HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

CONCUT PTY LTD APPELLANT

AND

IVOR WORRELL & ANOR RESPONDENTS

Concut Pty Ltd v Worrell [2000] HCA 64
14 December 2000
B85/1999

ORDER

1. *Appeal allowed with costs.*

2. *Set aside orders 1 and 2 made by the Court of Appeal of the Supreme Court of Queensland on 5 February 1999 and in place thereof, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of Queensland

Representation:

P A Keane QC with A K Herbert for the appellant (instructed by Hopgood Ganim)

J S Douglas QC with P D T Applegarth for the respondents (instructed by Mullins & Mullins)

CATCHWORDS

Concut Pty Ltd v Worrell & Anor

Contract – Employee under oral contract of employment executed written contract with employer – Employee guilty of serious misconduct before date of written contract justifying summary dismissal under oral contract – Employer summarily dismissed employee not knowing of misconduct – Whether written contract a new and discrete contract that entirely replaced oral contract or whether oral contract varied – Whether written contract removed employer's right under oral contract to dismiss employee summarily – Whether terms in written contract relating to dismissal had prospective operation only – Terms implied by law into contract of employment.

1 GLEESON CJ, GAUDRON AND GUMMOW JJ. This appeal raises issues respecting the application of general principles of the law of contract to the termination of an employment relationship.

2 At the relevant times, the appellant ("Concut") carried on in several States and the Australian Capital Territory the business of concrete sawing, concrete drilling, grooving of concrete and other surfaces, and the texturing of concrete and other surfaces. The respondents succeeded the Official Trustee in Bankruptcy in the administration of the bankruptcy of Geoffrey John Wells, a former employee of Concut. The affairs of Mr Wells had been administered by the Official Trustee from on or about 2 July 1997, after the commencement of the present litigation. The respondents were appointed joint and several trustees in place of the Official Trustee by resolution passed at a meeting of the creditors of Mr Wells' estate held on 28 April 1999.

3 In the period before 1980, Mr Wells was employed by a related corporation of Concut as a sales representative. He moved to Brisbane in November 1980 and became Queensland Branch Manager for Concut. At this stage, the terms of the employment relationship between the parties were not reduced to writing. However, on 1 December 1986, Concut and Mr Wells executed a document headed "SERVICE AGREEMENT" ("the Service Agreement"). Recital B thereof stated that Mr Wells "is an employee of and shareholder in [Concut]" and recital C stated that they "have entered into this Agreement to record the terms and conditions of the employees [sic] employment with [Concut]". At the same time, Mr Wells purchased part of the shareholding in Concut of another company. These further arrangements were recorded in a document styled "Shareholders Agreement" and dated 2 December 1986.

4 Clause 1.1 of the Service Agreement stipulated that Mr Wells was to serve as "Branch Manager Queensland" from 1 December 1986 until 30 November 1991 and, thereafter, for further consecutive periods of 12 months each. There was a proviso that either party might give at any time after 30 November 1991 at least three months' notice in writing of the intention to terminate "this Agreement" at the end of that period of three months. Clause 1.1 was designed to give Mr Wells some security of tenure, given his investment in the shares in Concut.

5 On 1 February 1988, Concut terminated the employment of Mr Wells as its Queensland Branch Manager. It did so without notice. The period stipulated in cl 1.1 then still had a substantial time to run.

6 In 1991, Mr Wells brought an action in the Supreme Court of Queensland for damages for wrongful termination of his employment. The action appears to

have been transferred to the District Court, where it was heard by Trafford-Walker DCJ. His Honour dismissed Mr Wells' claim.

7 Concut resisted the claim on the footing that Mr Wells had breached his conditions of employment in a manner which gave Concut the right to dismiss him without notice and without the payment of any penalties. What the trial judge described as the most substantial ground put forward to justify Mr Wells' dismissal was his alleged misconduct by the use of Concut's employees and property in the construction of his house at Beaudesert. The trial judge found that, in a period which most probably occurred prior to 1 December 1986, Mr Wells had used Concut's staff and materials for his private purposes without Concut's permission, knowing that he was not entitled to do so, and that this constituted significant misconduct on his part. His Honour also found that Concut had not been aware of Mr Wells' misconduct when it terminated his employment, and that it only became aware of this later. There was a counterclaim by Concut for the cost of the improper use of its staff and property. The trial judge entered judgment for Concut on the counterclaim in the sum of $2,816.

8 The Court of Appeal confirmed the order made by the District Court on the counterclaim. However, by majority (McMurdo P and Thomas JA; Shepherdson J dissenting), it allowed an appeal by the Official Trustee and entered judgment against Concut in the sum of $383,333. The Court of Appeal held that the Service Agreement was "a new and discrete contract of employment, terminating and replacing the oral agreement"; that *Bell v Lever Brothers, Limited*[1] was "strong authority for the proposition that there is no duty on an employee to disclose his or her own past faults"; that, while the oral contract had contained a term implied by law that the employee refrain from conduct destructive of the necessary confidence between the parties, this contract "had been concluded" at the time of the employee's dismissal; that there had been no obligation under the Service Agreement for the employee to disclose his prior misconduct; and that there had been no breach of any term of the Service Agreement.

9 In this Court, Concut seeks an order setting aside the entry of judgment against it and the restoration of the order made by the trial judge dismissing the action against it for wrongful termination.

10 The relevant findings of fact in the District Court have not been challenged. The area of debate between the parties concerns the identification of

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1 [1932] AC 161.

the legal consequences of those findings, the construction of the Service Agreement and its place in the employment relationship between the parties. In particular, in this Court, as was done successfully in the Court of Appeal, the respondents place great weight upon the circumstance that the misuse by Mr Wells of his position occurred before the date of the Service Agreement and upon what they say is the prospective and exclusive operation of a provision in the Service Agreement for the dismissal of Mr Wells.

11 For its part, Concut stresses the anterior existence of the employment relationship whereunder, since 1980, Mr Wells had been its Queensland Branch Manager. It is common ground that Mr Wells remained Queensland Branch Manager before and after the date of the Service Agreement. Concut submits that the legal effect of what happened was that there was a contractual variation brought about by the execution of the Service Agreement so that thereafter the terms of the employment relationship were found partly, but not exclusively, in the written instrument.

12 The respondents complain that these submissions involve some departure from the legal characterisation previously attached by Concut to the state of affairs surrounding Mr Wells' employment as Queensland Branch Manager. It is by no means clear that this fairly describes the earlier conduct by Concut of the litigation. In any event, this is a case in the class identified by Mason J in *O'Brien v Komesaroff*[2] where it is expedient in the interests of justice that a question of law turning upon the construction of a document or upon facts either admitted or found beyond controversy should be argued and decided in this Court. It was not suggested by the respondents that the legal issues advanced in this Court were such that evidence could have been given at the trial which could have prevented the success of the appellant on those issues.

13 Clause 6 of the Service Agreement stated:

"DISMISSAL FOR MISCONDUCT

If at any time during his employment by [Concut] the Employee

(a) Shall be guilty of any serious misconduct which shall include failure by the Employee to devote his whole time and attention to the business of [Concut] during normal business hours, absenting himself without leave (except in the case of illness or accident)

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2 (1982) 150 CLR 310 at 319. See also *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

disobedience or neglect to fulfil any of the orders or directions of the Board of Directors of [Concut].

(b) Shall commit either in the course of his employment or otherwise any act which causes the Employee to be publicly disgraced or held in public contempt.

(c) Commits any material breach of any provision of this Agreement which is incapable of being remedied or fails after notice in writing given by [Concut] to remedy any other breach by the Employee of any provision of this Agreement within 7 days of such notice.

(d) Shall draw endorse, accept or otherwise render the company liable under any Bill of Exchange, Promissory Note or Guarantee other than as authorised from time to time by the Board.

(e) Shall render [Concut] liable for any borrowings without the prior written consent of [Concut].

(f) Shall dispose of or purport to dispose of any of [Concut's] property other than in the ordinary course of the business of [Concut] without the written consent of [Concut]

and in any such event [Concut] may terminate the Employee's employment forthwith without any notice or payment in lieu of notice or liability for damages or otherwise."

14 In his dissenting judgment, Shepherdson J concluded that (a) the Service Agreement "was not a new and discrete contract between the parties with its operation, including its 'DISMISSAL FOR MISCONDUCT' provisions … being limited to [Mr Wells'] misconduct only on and from 1 December 1986" and (b) Concut had been entitled to rely upon that provision in cl 6 in respect of conduct before 1 December 1986.

15 The contrary result reached by the majority depended upon their Honours' conclusion that the Service Agreement was a new and discrete agreement and, it would seem, that it was a new contract of employment which terminated and replaced the pre-existing oral agreement between Concut and Mr Wells.

16 The issues which arise in this Court include the following:

(i) whether Mr Wells' misconduct in the period before 1 December 1986 was in serious breach of his duties forming part of his employment relationship as Queensland Branch Manager under his then unwritten contract with Concut;

(ii) whether, at any time before it dismissed Mr Wells, Concut had released or compromised its rights against Mr Wells arising from that serious breach, so that at no time thereafter was Concut at liberty to justify his dismissal by reliance upon those rights;

(iii) the relationship between the Service Agreement and the antecedent employment relationship; and

(iv) the significance for this case of certain remarks by Lord Atkin in *Bell v Lever Brothers, Limited*[3].

In the end, it will not be necessary to consider certain further questions which emerged in the course of argument in this Court. One is the scope of the principle that there may be conduct "quite outside the discharge of duties in the immediate service" which justifies immediate dismissal[4]. Another is the proposition that present unfitness to discharge the duties of the employee may be demonstrated, at least in an evidentiary sense, by previous misconduct[5].

17 The issues which must be determined are to be understood in the context of the law respecting employment relationships. It would be unusual for this to be purely contractual. Statute may impose obligations to observe industrial awards and agreements[6], and in some instances the relevant terms of the employment relationship may be found in the industrial award which binds the parties at the relevant time[7]. Further, as Mason J pointed out in *Hospital Products Ltd v United States Surgical Corporation*[8], the relationship between employee and employer is one of the accepted fiduciary relationships; their

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3 [1932] AC 161 at 227-228.

4 *Griffin v London Bank of Australia Ltd* (1919) 19 SR (NSW) 154 at 161 per Cullen CJ.

5 See the extract from the judgment of the Full Court of the Supreme Court of Victoria in the report of *Gordon & Gotch (Australasia) Ltd v Cox* (1923) 31 CLR 370 at 377, and the observations by Isaacs J at 380-381.

6 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410.

7 See, for example, *Stratton v Illawarra County Council* [1979] 2 NSWLR 701 at 705-706.

8 (1984) 156 CLR 41 at 96-97.

critical feature is that the fiduciary undertakes or agrees to act for or on behalf of, or in the interests of, another person in the exercise of a power or discretion that will affect the interests of that other person in a legal or practical sense. An illustration respecting employer and employee is provided by the decision of Kearney J in *Timber Engineering Co Pty Ltd v Anderson*[9]. In that case, the defendant employees, in breach of their fiduciary duties, diverted the business and profits of their employer to themselves and to their companies; the equitable remedies awarded included an account of profits and a constructive trust as to the business of the employees' companies.

18 In the present case, the dispute centres not upon these other aspects of the employment relationship, but upon the identification of the contractual source of the relationship over a fairly lengthy period. In our view, the majority of the Court of Appeal erred in treating the Service Agreement as a new and discrete contract of employment which had the effect of terminating and replacing the anterior oral agreement between Concut and Mr Wells, and this error dictated an incorrect outcome to the appeal.

19 The relevant principles are well settled. In *Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd*[10], Gleeson CJ, Gaudron, McHugh and Hayne JJ said:

> "When the parties to an existing contract enter into a further contract by which they vary the original contract, then, by hypothesis, they have made two contracts. For one reason or another, it may be material to determine whether the effect of the second contract is to bring an end to the first contract and replace it with the second, or whether the effect is to leave the first contract standing, subject to the alteration. For example, something may turn upon the place, or the time, or the form, of the contract, and it may therefore be necessary to decide whether the original contract subsists."

Their Honours went on[11] to refer to the judgment of Taylor J in *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd*[12]. Taylor J had rejected

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9 [1980] 2 NSWLR 488.

10 (2000) 74 ALJR 1094 at 1098 [22]; 172 ALR 346 at 350-351.

11 (2000) 74 ALJR 1094 at 1098 [23]; 172 ALR 346 at 351. See also (2000) 74 ALJR 1094 at 1105 [81], 1106 [95], 1107 [100] per Callinan J; 172 ALR 346 at 360, 362, 363.

12 (1957) 98 CLR 93 at 143-144.

submissions that (a) "it is impossible by a subsequent agreement, merely, to vary or modify an existing contract" and (b) "[an] agreement which purports to vary an existing contract operates … first of all to abrogate entirely the existing contractual relationship and, then, to reinstate the terms of the old contract as varied or modified by the new agreement"[13]. His Honour, to the contrary, accepted the propositions that (a) the earlier contract might be rescinded altogether, the determining factor being the intention of the parties disclosed by the later agreement; (b) partial rescission is a variation, not the destruction, of the contractual relationship between the parties; and (c) the earlier contract may be varied by way of (i) partial rescission with or without the substitution of new terms for those rescinded and (ii) the addition of new terms with or without any partial rescission at all[14]. In *Tallerman*, Kitto J[15] spoke in terms which involved acceptance of propositions (a) and (b) as identified above, adding that whilst "in strict logic" a variation may be a new contract, "the discharge of an old contract is a matter of intention".

20 The decision of the majority in the Court of Appeal in the present case appears to involve the holding that there was a discharge of the prior contractual relationship between Concut and Mr Wells, that the Service Agreement became the exclusive charter of the contractual rights and duties of the parties, and that subsisting rights and liabilities under the prior contract, including those arising by reason of breach thereof, were compromised or released. However, the text of the Service Agreement itself, as well as the surrounding circumstances, indicate that such a conclusion would not be in accord with the manifest intention of the parties.

21 The Service Agreement recited that Mr Wells was an employee of Concut and manifested no intention to displace rights and liabilities which had accrued between the parties since Mr Wells had become the Queensland Branch Manager in 1980 by releasing or compromising those rights and liabilities. Rather the employment relationship continued but was supplemented by the terms of the Service Agreement. Clause 1 thereof specified a term of employment to continue until 30 November 1991 and for periods thereafter as provided in the clause; cl 2 fixed Mr Wells' remuneration and provided for regular salary reviews; cl 8 contained various provisions protective of the interest of Concut in what was defined as "confidential information". Clause 11 stipulated an entitlement to four

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13 cf *Meek v Port of London Authority* [1918] 2 Ch 96.

14 (1957) 98 CLR 93 at 144.

15 (1957) 98 CLR 93 at 135. See also at 122-123 per Williams J.

weeks' annual leave on full salary, but this had to be read with cl 13. This was headed "PRIOR SERVICE" and stated:

> "Nothing contained in this agreement shall in anyway [sic] limit or restrict the accrued rights of [Mr Wells] in respect of prior service with [Concut] to long service leave, superannuation, holiday pay and other like emoluments."

22 The conclusion that the employment relationship continued but was supplemented by the terms of the Service Agreement has several relevant consequences. One concerns the argument that the express provision made in cl 6(a) of the Service Agreement for dismissal without notice if at any time Mr Wells was guilty of serious misconduct had a prospective and exclusive operation. The corollary is said to be that Concut was precluded from dismissing Mr Wells during the currency of the Service Agreement for misconduct anterior to the date of the Service Agreement. However, cl 6(a) operated concurrently with terms implied by law and did not displace the consequences of anterior breach of such terms.

23 In *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd*[16], Hope JA identified contracts between master and servant as a typical class of contract in which terms will be implied by law. Such terms apply in the absence of an expression of contrary intention by the parties[17]. In discerning that intention, regard should be had to "the familiar principle of construction that clear words are needed to rebut the presumption that a contracting party does not intend to abandon any remedies for breach of the contract arising by operation of law"[18]. Thus, an express provision for termination for breach in certain circumstances may be regarded as designed to augment rather than to restrict or remove the rights at common law which a party otherwise would have had on breach[19].

24 Paragraph (a) of cl 6 of the Service Agreement is a provision of this character. It specifies that certain acts or omissions are to be treated as included

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16 (1987) 10 NSWLR 468 at 487.

17 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 449-450.

18 *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 WLR 574 at 585; [1998] 1 All ER 883 at 893; *Modern Engineering (Bristol) Ltd v Gilbert-Ash (Northern) Ltd* [1974] AC 689 at 717.

19 *Holland v Wiltshire* (1954) 90 CLR 409 at 415-416; *Taylor v Raglan Developments Pty Ltd* [1981] 2 NSWLR 117 at 135.

in the notion of "serious misconduct" for which Mr Wells might be dismissed without notice. The activities so identified are a failure to devote the whole of Mr Wells' time and attention to the business of Concut during normal business hours, absence without leave (except in the case of illness or accident), disobedience, and neglect to fulfil any of the orders or directions of the Board of Concut. Paragraph (a) was expressed prospectively and augmented rather than restricted or removed rights which Concut otherwise would have in respect of a breach of any term implied by law; nor did it release or compromise such rights as Concut may have had at the time of the execution of the Service Agreement by reason of past misconduct of Mr Wells.

25 In *Pearce v Foster*[20], Lord Esher MR stated it to be a "rule of law" that "where a person has entered into the position of servant, if he does anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him". In *Blyth Chemicals Ltd v Bushnell*[21], in the course of considering the position of the respondent, who was the manager of the appellant's business, Starke and Evatt JJ said[22]:

> "As manager for the appellant, the respondent was in a confidential position. And it is clear that he might be dismissed without notice or compensation if he acted in a manner incompatible with the due and faithful performance of his duty, or inconsistent with the confidential relation between himself and the appellant."

In the same case, Dixon and McTiernan JJ said[23]:

> "Conduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal."

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20 (1886) 17 QBD 536 at 539. See also the discussion by Viscount Simonds in *Sterling Engineering Co Ltd v Patchett* [1955] AC 534 at 543-544 and in *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 575-576; cf *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 at 306-307; *Mahmud v Bank of Credit and Commerce International SA* [1998] AC 20 at 34-35, 45-46.

21 (1933) 49 CLR 66.

22 (1933) 49 CLR 66 at 72-73.

23 (1933) 49 CLR 66 at 81.

26 Contractual obligations and fiduciary duties have different conceptual origins, "the former", in the words of McLelland J[24], "representing express or implied common intentions manifested by the mutual assents of contracting parties, and the latter being descriptive of circumstances in which equity will regard conduct of a particular kind as unconscionable and consequently attracting equitable remedies". Formulations of the obligations of an employee in terms such as those in *Pearce* and *Blyth Chemicals* may be understood, Professor Finn has pointed out, as the re-expression of equitable obligations in terms of implied contracts[25]. If so, the importation is well established and beneficial, and nothing turns upon it for present purposes.

27 The trial judge had held that Mr Wells' activities in relation to the building operations at Beaudesert had amounted to significant misconduct which was sufficient to terminate his employment. His Honour also held, with reference to *Shepherd v Felt and Textiles of Australia Ltd*[26] that it did not matter that at the time of the dismissal Concut had not been aware of that misconduct. That misconduct nevertheless was available to Concut to resist the action for damages for wrongful dismissal instituted by Mr Wells.

28 The majority in the Court of Appeal did not controvert those grounds upon which the case had been decided at trial. Plainly, the trial judge was correct in deciding the case in this way. However, the Court of Appeal directed its attention to the submissions for the appellant, which sought to outflank the decision of the trial judge by maintaining that Concut had not been entitled to terminate the employment of Mr Wells because breach of the earlier oral contract did not entitle Concut to terminate without compensation what was said to be the later fixed term contract.

29 In this Court, no attempt was made, and none would have succeeded, to deny the proposition of law expressed in *Shepherd*. The proposition that the dismissal of an employee may be justified upon grounds on which the employer did not act and of which the employer was unaware when the employee was

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24 *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 at 799; affd (1984) 156 CLR 41.

25 Finn, *Fiduciary Obligations*, (1977) at 267. See also Gurry, *Breach of Confidence* (1984) at 177-179; Dean, *The Law of Trade Secrets* (1990) at 181-183.

26 (1931) 45 CLR 359 at 373, 377-378.

discharged is but an application of what, in *Shepherd*, Dixon J identified as a rule of general application with respect to the discharge of contract by breach[27].

30 The submissions, accepted by the majority in the Court of Appeal, depended upon acceptance of a view of the contractual relationship between Mr Wells and Concut before and during the currency of the Service Agreement which, as indicated above, should not be accepted. There may conceivably have been a question whether, by reason of any release or compromise of Concut's rights arising at general law by reason of the serious breach by Mr Wells of the term implied by law into his contractual relationship, Concut had been disabled from later justifying its dismissal of Mr Wells by reliance upon the breach. However, no such release or compromise was stipulated in the Service Agreement and no other source for it has been suggested.

31 The majority in the Court of Appeal fixed their attention upon the state of affairs at the time of execution of the Service Agreement and emphasised that there was nothing to show that Mr Wells had deliberately withheld his prior misconduct in order to induce Concut to enter into "the new written contract of employment". The majority further stressed that the speech of Lord Atkin in *Bell v Lever Brothers, Limited*[28] was "strong authority for the proposition that there is no duty on an employee to disclose his or her own past faults".

32 Neither proposition is determinative of the present appeal once there is an appreciation of the duration and content of the employment relationship between the parties. In any event, *Bell v Lever Brothers, Limited* was concerned not with an answer to a claim for damages for breach of contract, but with a situation where payments had been made under contracts stated to be entered into "in full satisfaction and discharge of all claims and demands" between the parties[29] and the party which had then made the payments sought to recover them as moneys paid under total failure of consideration[30]. The jury had held that the contracts had not been induced by fraud[31].

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27 (1931) 45 CLR 359 at 377.

28 [1932] AC 161 at 227-228.

29 The text of the agreements is set out in the speech of Lord Blanesburgh [1932] AC 161 at 178-179.

30 See the judgment of Wright J, *Lever Brothers, Limited v Bell* [1931] 1 KB 557 at 567-569.

31 [1931] 1 KB 557 at 560-561.

33 In the present matter, the majority of the Court of Appeal, as did counsel for the respondent in this Court, placed particular reliance upon the statement by Lord Atkin in *Bell v Lever Brothers, Limited*[32]:

> "If a man agrees to raise his butler's wages, must the butler disclose that two years ago he received a secret commission from the wine merchant; and if the master discovers it, *can he*, without dismissal or after the servant has left, *avoid the agreement* for the increase in salary *and recover back the extra wages paid?* If he gives his cook a month's wages in lieu of notice can he, on discovering that the cook has been pilfering the tea and sugar, *claim the return of the month's wages?* I think not. He takes the risk; if he wishes to protect himself he can question his servant, and will then be protected by the truth or otherwise of the answers." (emphasis added)

However, as these remarks show, Lord Atkin was concerned with avoidance of agreements for failure to disclose past misconduct and the recovery of moneys paid thereunder.

34 In his speech, Lord Atkin (who, with Lord Blanesburgh and Lord Thankerton, comprised the majority) had isolated "[t]wo points … for decision"[33]. The first was whether the agreement with Bell negotiated by Mr Cooper was void by reason of a "mutual mistake" of Bell and Cooper, as to the "quality of the thing contracted for"[34], so that, if the agreement be executed (as was the case), one party "can recover back money paid on the ground of failure of the consideration"[35]. His Lordship decided that "the party paying for release [had gotten] exactly what [it had] bargain[ed] for", and it was not to the point that, had it known the true facts, it would not have entered into the bargain[36]. So, on this ground, Bell was able successfully to resist the claim for repayment.

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32 [1932] AC 161 at 228.

33 [1932] AC 161 at 217. At trial, the defendants had admitted liability to account for their profits on certain private dealings in breach of duty and their payments into court on that account were accepted: [1931] 1 KB 557 at 560, 574.

34 [1932] AC 161 at 218.

35 [1932] AC 161 at 222.

36 [1932] AC 161 at 223-224.

35 With this branch of Lord Atkin's speech, which for 70 years has attracted varied academic analysis, the Court of Appeal was not concerned. The passage set out above comes from that part of Lord Atkin's speech answering favourably to Bell the second point for decision. This was whether Bell had "owed a duty to Levers to disclose his misconduct, and that in default of disclosure the contract was voidable"[37].

36 In *Bank of Credit and Commerce International SA v Ali*[38], Lightman J dealt with this section of Lord Atkin's speech and said that *Bell v Lever Brothers, Limited* was authority for the following propositions:

> "The current law as generally understood may be stated as follows: that (1) (subject to one exception) neither party to a contract is obliged to disclose facts material to the decision of the other party whether to enter into that contract; (2) the exception is limited to contracts which are uberrimae fidei; (3) neither contracts of employment nor contracts of compromise (unless by way of family arrangement) fall within this exceptional category; and (4) neither the employer nor the employee, once in contractual relations, are under a duty as such to disclose to each other their own breaches of contract."

37 Proposition (4) may require qualification to allow for obligations of disclosure which attend a fiduciary duty, if informed consent is to be obtained to what otherwise would be a breach of that duty[39]. Further, particular problems arise respecting the contracts of compromise identified in proposition (3) by his Lordship where there is a question respecting the actual or apparent authority of counsel to enter into such a compromise. In *Harvey v Phillips*[40], Dixon CJ, McTiernan, Williams, Webb and Fullagar JJ said that a court did not appear to possess a discretion to rescind or set aside such a compromise and continued[41]:

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37 [1932] AC 161 at 227.

38 [1999] 2 All ER 1005 at 1015.

39 cf McCarry, "The Employee's Right to Silence", (1983) 57 *Australian Law Journal* 607; Collins, "Implied Duty to Give Information During Performance of Contracts", (1992) 55 *Modern Law Review* 556 at 559.

40 (1956) 95 CLR 235 at 243.

41 (1956) 95 CLR 235 at 243-244. See also *Taylor v Johnson* (1983) 151 CLR 422 at 432.

> "The question whether the compromise is to be set aside depends upon the existence of a ground which would suffice to render a simple contract void or voidable or to entitle the party to equitable relief against it, grounds for example such as illegality, misrepresentation, non-disclosure of a material fact where disclosure is required, duress, mistake, undue influence, abuse of confidence or the like."

Questions respecting non-disclosure of a material fact where disclosure is required may also arise where the complaint is one of contravention of s 52 of the *Trade Practices Act* 1974 (Cth)[42]. None of these questions arises here.

38 The fundamental point is that the present appeal is not concerned with any claim by Concut to avoid Mr Wells' contract for alleged failure by Mr Wells to disclose alleged misconduct during a period anterior to his appointment in 1980 as Queensland Branch Manager. Rather, the outcome of the case turns upon the breach of an obligation implied by law in the employment contract and the right of the employer to rely upon that breach, when subsequently discovered, in answer to a claim for damages for wrongful dismissal, although the dismissal was not based on that ground. The applicable principles are well settled and their application to the undisputed facts produces a result favourable to the employer.

39 The appeal should be allowed with costs. Orders 1 and 2 of the orders of the Court of Appeal should be set aside. In place thereof, it should be ordered that the appeal to that Court be dismissed with costs.

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42 *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31.

40 McHUGH J. I agree that this appeal should be allowed.

41 The judgments of other Justices establish that there was only one contract of employment between the employer and employee. It follows that the Queensland Court of Appeal erred when it held otherwise. Because that is so, the case is one for the straightforward application of well accepted principles.

42 The learned trial judge found that the employee's use of his employer's resources to build a private dwelling was "significant misconduct"[43]. That misconduct entitled the employer to terminate the employment contract[44], the terms of which at that time were only partly recorded in the Service Agreement executed on 1 December 1986. The fact that the employer was not aware of, and was not acting upon, the employee's serious misconduct when it purported to terminate the employment contract on 1 February 1988 is irrelevant[45]. Accordingly, the termination of the employee's employment was not "wrongful", and the employee's claim for damages for breach of the employment contract must fail.

43 In light of this conclusion, it is unnecessary to consider the employer's submission that the employee was in breach of the express obligation of faithful service under the Service Agreement executed on 1 December 1986 for as long as he failed to make good "his past breaches of fiduciary duty by accounting for the benefits wrongly appropriated by him". This submission accepted, but was made to overcome, the erroneous holding by the majority of the Court of Appeal that there were two distinct contracts between the employer and employee. The majority held that the first contract was made prior to, but had been discharged on, 1 December 1986 and that the second contract was contained in the Service Agreement executed on that date.

44 Once it is accepted that there was only one employment contract, it is also unnecessary to determine for what proposition, if any, *Bell v Lever Brothers, Limited*[46] is authority and whether it had any application to the facts of this case.

45 The appeal must be allowed with costs.

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43 This finding is not challenged in this appeal.

44 *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 72-73, 81-82. See also *Adami v Maison de Luxe Ltd* (1924) 35 CLR 143 at 155-156.

45 *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 370-371, 373, 377-378, 391.

46 [1932] AC 161.

46 KIRBY J. In *Shepherd v Felt and Textiles of Australia Ltd*[47] Starke J observed that an employee is "bound to render faithful and loyal service to the [employer], and not to do anything inconsistent with the continuance of confidence between them"[48]. This appeal requires this Court to reconsider that dictum in contemporary circumstances and in the particular facts of this case. Those facts are sufficiently stated in the reasons of Gleeson CJ, Gaudron and Gummow JJ[49].

A surprising outcome needing clear legal authority

47 The outcome of the decision of the Court of Appeal of Queensland[50] immediately strikes one as surprising. Mr Wells ("the employee") was formerly employed in a responsible and senior management position by Concut Pty Ltd ("the employer"). He was dismissed summarily following alleged "significant misconduct" in the use, for his own private purposes, of the employer's property and the services of its employees. Yet the Court of Appeal held, by majority[51] that, although such misconduct was established, the employer was not, in law, justified in summarily terminating the employee's services as it did.

48 By inference, then, the employer was obliged to retain and tolerate the dishonest employee[52]. It was required to maintain its daily dealings with him; to engage with him in the many transactions common to the employment relationship; and to trust him with a position giving him access to its funds and the direction of its employees. If it wished to get rid of him at once, it was inherent in the Court of Appeal's conclusion that this could only be done lawfully by mutual agreement or by paying him his "entitlements" under the Service Agreement which it had executed with him. That Agreement was executed after the employee acted dishonestly, whilst he was still employed by the employer, but before those acts were known to the employer.

49 In the event, the employer, in fact, dismissed the employee summarily. The primary judge concluded, upon finding the relevant misconduct on the

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47 (1931) 45 CLR 359.

48 (1931) 45 CLR 359 at 372.

49 Reasons of Gleeson CJ, Gaudron and Gummow JJ at [1]-[8].

50 *Official Trustee in Bankruptcy v Concut Pty Ltd* [1999] QCA 3.

51 McMurdo P and Thomas JA; Shepherdson J dissenting.

52 cf *Griffin v London Bank of Australia Ltd* (1919) 19 SR (NSW) 154 at 161; *Employment Secretary v Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 QB 455 at 491.

employee's part, that not only was the employer entitled to dismiss him in the peremptory way that it had, but that the employee was liable, on a counter-claim by the employer, to refund to the employer the costs involved in the employee's private use of its property and the services of its employees.

50 Given the nature of an ordinary employment relationship, at least as here in the case of a senior employee serving as the Queensland Branch Manager of a private company with national operations, the result reached by the primary judge seems unsurprising and appropriate. The notion that an employer, in such a case, does not enjoy a right summarily to terminate the relationship with such a senior employee, would appear to be an odd one: one out of step with common sense. To suggest that the common law would effectively insist that such parties continue in the personal, and often quite close and trusting, relationship of employment, as if nothing had happened, would seem remarkable[53]. The effect of this would be to demand the employer put out of mind (as it were) the discovery of the misconduct, and continue to pay the employee under the supervening Service Agreement as if nothing had occurred. This is a conclusion to which a court would need to be driven by clear legal authority or by singular factual circumstances of the case, so far undisclosed in this matter.

Five applicable legal propositions

51 Five basic starting points may be stated for the elucidation of the applicable law. I did not take them to be disputed by the parties:

1. No statutory provision, regulation or industrial award governed the case, obliging an outcome different from that derived from the application of the principles of the common law of employment[54]. In Australia it will sometimes be the case that a federal or State statute or award will control what may be done in a case of employment termination[55]. This was not the case here.

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53 *Vine v National Dock Labour Board* [1957] AC 488 at 500; *Hill v C A Parsons Ltd* [1972] Ch 305 at 314.

54 See eg *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 453-456 concerning the effect of National Security (Man Power) Regulations (Cth) on the termination of employment; see *Hill v C A Parsons Ltd* [1972] Ch 305 at 315 concerning the effect of the *Industrial Relations Act* 1971 (UK).

55 cf *Qantas Airways Ltd v Christie* (1998) 193 CLR 280 at 287, 297 and 328-330 where relevant provisions of federal legislation controlling termination of an employee's employment are set out.

2. Nor was this a case governed by any special body of common law, such as, for example, the prerogatives of the Crown and its successors in the engagement and dismissal of employees in some positions in the public domain[56]. In such cases the employee may serve at the will of the Crown or its successor. Subject to statute or special agreement, the Crown may then terminate such service at will. Again, the present was not such a case.

3. The ordinary relationship of employer and employee at common law is one importing implied duties of loyalty, honesty, confidentiality and mutual trust. At common law[57]:

> "[c]onduct which in respect of important matters is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal[58]. ... [T]he conduct of the employee must itself involve the incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to its future conduct arises."

In the present case, the findings at trial went beyond mere uneasiness as to the future. They necessitated, or at least warranted, a conclusion that the "confidence" essential to the relationship of employer and employee had been destroyed[59]. Instead of pursuing the interests of the company and its shareholders, the employee had pursued his own private interests. Not only was the employee in breach of his duty of fidelity and trust owed to the employer, he had remained in breach of that duty to the date of the trial. Until that time he had not accounted for the benefits wrongly appropriated by him. Indeed, he had denied any wrongful appropriation.

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56 cf *Ryder v Foley* (1906) 4 CLR 422 at 435-436, 443, 449; *Fletcher v Nott* (1938) 60 CLR 55 at 64, 70-71, 73-74, 77; *Kaye v Attorney-General for Tasmania* (1956) 94 CLR 193 at 199, 203; *Reedman v Hoare* (1959) 102 CLR 177 at 181, 185; *Coutts v The Commonwealth* (1985) 157 CLR 91 at 98-99, 105, 119.

57 *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 81-82.

58 *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 at 357-358, 362-364; *English and Australian Copper Co Ltd v Johnson* (1911) 13 CLR 490; *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359.

59 cf *Independent Management Resources Pty Ltd v Brown* [1987] VR 605 at 612.

The issue so tendered at the trial was determined against the employee[60]. He was then subject to the employer's counter-claim for an order to make a refund. Such order was duly made at trial[61]. It was not contested on appeal. Given his senior status in the company's service and the nature and extent of the misconduct disclosed in the evidence and accepted by the primary judge, it was open to him to find that the employee had undermined the confidence essential to the ongoing relationship of employment. Prima facie, this had afforded a legal justification for the employee's summary dismissal.

4. It is, however, only in exceptional circumstances that an ordinary employer is entitled at common law to dismiss an employee summarily[62]. Whatever the position may be in relation to isolated acts of negligence, incompetence or unsuitability[63], it cannot be disputed (statute or express contractual provision aside) that acts of dishonesty or similar conduct destructive of the mutual trust between the employer and employee, once discovered, ordinarily fall within the class of conduct which, without more, authorises summary dismissal. Exceptions to this general position may exist for trivial breaches of the express or implied terms of the contract of employment[64]. Other exceptions may arise where the breaches are ancient in time and where they may have been waived in the past, although known to the employer[65]. Some breaches may be judged irrelevant to the duties of the particular employee and an ongoing relationship with the employer[66]. But these exceptional cases apart, the

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60 *Wells v Concut Pty Ltd* unreported, District Court of Queensland, 10 April 1997 at 7, 8, 14 per Trafford-Walker DCJ.

61 cf *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 392; *Timber Engineering Co Pty Ltd v Anderson* [1980] 2 NSWLR 488; Greig and Davis, *The Law of Contract* (1987), at 1365; Glover, *Commercial Equity: Fiduciary Relationships* (1995), at 110-111, par [4.11].

62 *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 72-73.

63 *Printing Industry Employees Union of Australia v Jackson & O'Sullivan Pty Ltd* (1957) 1 FLR 175.

64 *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 82.

65 See *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 at 364.

66 Such as a single act in no way affecting an employer's business, eg an isolated instance of intoxication in festive circumstances as distinct from conduct interfering in the ability to render due service: *Clouston & Co Ltd v Corry* [1906]

(Footnote continues on next page)

establishment of important, relevant instances of misconduct, such as dishonesty on the part of an employee like Mr Wells, will normally afford legal justification for summary dismissal. Such a case will be classified as amounting to a relevant repudiation or renunciation by the employee of the employment contract, thus warranting summary dismissal[67].

5. The particular misconduct of the employee, upon which the employer relied in this case, was not known to the employer at the time of the employee's dismissal. It was discovered later and relied on at the trial. However, as a matter of law, it was certainly open to the employer to rely on it. The question was not whether the employer was *aware* of grounds to justify the course which the employer adopted. It was whether such grounds and justification *existed*[68].

The supervening contract did not extinguish the earlier agreement

52 Because the employer had in fact purported to terminate the employment relationship, the only relevant legal issues at trial were whether the employer was entitled in law to so act and, if it was not, what was the measure of the employee's damages[69]. The employee's argument against the employer's exercise of its asserted right to dismiss him summarily was based, essentially, upon three related propositions: (1) that the relevant term of his employment was governed by the Service Agreement and was for a fixed period; (2) that the right to terminate that employment short of that term was the subject of a specific provision in the Service Agreement which therefore governed the case; and (3) that the conduct in question occurred during a different, earlier, oral contract and thus did not attract the express provisions for termination afforded by the Service Agreement. It will be observed that these arguments rest upon the hypothesis that the employment contract between the employer and the employee was

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AC 122 at 129 (PC). See also *Griffin v London Bank of Australia Ltd* (1919) 19 SR (NSW) 154 at 160-161; *Gordon & Gotch (Australasia) Ltd v Cox* (1923) 31 CLR 370.

67 *In re Rubel Bronze and Metal Co Ltd and Vos* [1918] 1 KB 315 at 320-321; *Adami v Maison De Luxe Ltd* (1924) 35 CLR 143 at 151, 155; *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 370, 372-373; *Orr v The University of Tasmania* (1957) 100 CLR 526 at 531.

68 *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359 at 373, 377; *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 80.

69 See *Lucy v The Commonwealth* (1923) 33 CLR 229 at 237, 248, 253; *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 451, 465, 476.

relevantly defined, and exhaustively defined, by the Service Agreement. I would reject this hypothesis.

53 It is true that the Service Agreement between the employer and the employee contained detailed provisions for dismissal for misconduct. It is also true that some of the provisions of the Agreement would, on the face of things, appear to attract a prospective construction directed at the ongoing employment relationship. Clause 6 of the Agreement states that the appellant may summarily dismiss the respondent without notice "[i]f at any time during his employment ... the Employee ... (a) [s]hall be guilty of any serious misconduct ... [or] (f) [s]hall dispose of ... any of [the appellant's] property other than in the ordinary course of the business of [the appellant] without the written consent of [the appellant]". This would limit the application of the Service Agreement to the time of the employment pursuant to the Agreement itself and not before.

54 However, viewing the matter in a practical and businesslike way as befits such a Service Agreement with such an employee[70], it seems scarcely likely that the written provision for dismissal for misconduct (cl 6) was adopted by the parties with a purpose of depriving the employer of any accrued rights under the term implied into the employment relationship between the parties constituted by the former oral agreement between them. It is impossible to accept that the execution of the Service Agreement was intended, during the operation of the Agreement, to deprive the employer of remedies otherwise available to it for breach of such an implied term, subsequently discovered. There is no express provision to such effect in the terms of the Service Agreement itself. There is no recital that the Service Agreement had been negotiated and concluded between the parties in discharge of rights and obligations accrued before it came into effect. The essential character of the relationship between the parties before and after the Service Agreement commenced remained the same, namely that of employment. Indeed, the employment description, by which the employee was maintained in the employer's service, remained precisely the same: namely Queensland Branch Manager.

55 The foregoing facts are given emphasis by provisions in the Service Agreement which contemplated, and acted upon, the continuation of the previous oral agreement between the parties, at least for some purposes[71]. In such circumstances, it would be yet another illustration of impermissible *expressio*

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70 cf *Pan Foods Co Importers & Distributors Pty Ltd v ANZ Banking Group Ltd* (2000) 74 ALJR 791 at 793 [14]; 170 ALR 579 at 582-583.

71 Notably cll 2, 8, 11, 13 as described in the reasons of Gleeson CJ, Gaudron and Gummow JJ at [21].

unius reasoning[72] to conclude that the express provisions of the Service Agreement, such as cl 6, were intended to replace whatever legal consequences flowed from the previous oral agreement between the parties, including for any breach of such agreement. The better, more practical and commercially realistic view is that the Service Agreement was intended to vary and supplement the oral employment agreement between the parties, not to rescind it.

The governing consideration of the parties' intention

56 Problems of the present kind are usually resolved by the law of contract by reference to the imputed intention of the parties to the contractual relations, as expected here in the successive oral and written agreements. Of course, that "intention" is to be ascertained objectively. In a case such as the present, ordinary practical and commercial considerations militate strongly against a conclusion that the Service Agreement wholly discharged the former oral agreement and excused every later discovered instance of misconduct that had occurred during the currency of the employment, however serious. The Service Agreement simply did not deal with the problem which later arose. It would take much more explicit provisions in the Service Agreement to persuade me that it was intended, objectively, to deprive the employer of the remedies normal to the discovery by it of such a breach by a senior employee of one of the most basic terms ordinarily implied in an employment contract. This is particularly so given the essential character of an employment relationship recognised by the common law, which continued from the commencement of the oral contract until the employee's dismissal, regardless of the intervening execution of the Service Agreement.

57 Once this conclusion is reached, most of the other points argued in this appeal fall away. The case is revealed for what it is: nothing more than the invocation of an ordinary remedy belonging to an employer who discovers a serious breach by, in this case, a senior employee of a fundamental term implied into an employment contract by force of law. This is the term that such an employee will exhibit fidelity and good faith in dealing with the employer and its assets and property, avoiding conduct incompatible with the continuing trust between them. The special terms of the Service Agreement were not inconsistent with the continuing operation of that implied term. Nor were they incompatible with its availability to the employer who discovered a breach of such term during the currency of the Service Agreement.

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72 cf *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 at 94: it is "a valuable servant, but a dangerous master"; *Colquhoun v Brooks* (1888) 21 QBD 52 at 65.

58 No question therefore arises, in this case, as to the obligation of an employee to disclose past misconduct to the employer when the latter contemplates a fresh contract with him[73]. Such questions may be presented by way of defence to an attempt by an employee to enforce a contract with a new employer made in ignorance of supervening misconduct. But here, the employer was not new and the employee was summarily dismissed. The only question was whether the employer was entitled in law to act as it did. If it was so entitled, no further question is presented as to the employee's entitlements whether by reference to the Service Agreement or otherwise.

Conclusion

59 The employer in this case did not have to rely on the Service Agreement for the dismissal. It relied, as it was entitled to do, on its rights at common law. Those rights were not incompatible with the Service Agreement. The primary judge was correct to so hold. The majority in the Court of Appeal erred in disturbing the judgment which followed that conclusion at trial. Such judgment should be restored.

Orders

60 I agree in the orders proposed by Gleeson CJ, Gaudron and Gummow JJ[74].

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73 *Gill v Colonial Mutual Life Assurance Society Ltd* [1912] VLR 146; *Bell v Lever Brothers Ltd* [1932] AC 161 at 227-228; *Sybron Corp v Rochem Ltd* [1984] Ch 112 at 121, 123, 128, 130; McCarry, "The Employee's Right to Silence", (1983) 57 *Australian Law Journal* 607 at 612; cf Collins, "Implied Duty to Give Information During Performance of Contracts", (1992) 55 *Modern Law Review* 556.

74 Reasons of Gleeson CJ, Gaudron and Gummow JJ at [39].