HIGH COURT OF AUSTRALIA

GUMMOW, HEYDON AND BELL JJ

WESTERN EXPORT SERVICES INC & ORS APPLICANTS

AND

JIREH INTERNATIONAL PTY LTD RESPONDENT

Western Export Services Inc v Jireh International Pty Ltd [2011] HCA 45
28 October 2011
S227/2011

ORDER

Special leave to appeal refused with costs.

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with G K J Rich for the applicants (instructed by Koffels Pty Limited)

R Merkel QC with T Maltz for the respondent (instructed by Meerkin & Apel Lawyers)

CATCHWORDS

Western Export Services Inc v Jireh International Pty Ltd

Precedents – High Court – Statements of principle binding upon intermediate appellate courts and trial courts until reconsidered by High Court.

Contract law – Contractual construction – Whether essential to identify ambiguity in language of contract before court may have regard to surrounding circumstances and object of transaction.

Words and phrases – "ambiguity", "binding", "High Court", "precedents".

1 GUMMOW, HEYDON AND BELL JJ. This is an application for special leave to appeal from a decision of the New South Wales Court of Appeal[1], in which Macfarlan JA gave the leading judgment. The dispute concerned the construction of cl 3 of a "Letter of Agreement" concerning the franchising in Australia of Gloria Jean's Gourmet Coffee Stores. In the passage[2] in which he found error in principle in the reasons of the primary judge, his Honour said:

> "A court is not justified in disregarding unambiguous language simply because the contract would have a more commercial and businesslike operation if an interpretation different to that dictated by the language were adopted."

His Honour added[3] that the primary judge appeared:

> "to have acted on the basis that the provision would make more sense from a commercial point of view"

if it were construed as the primary judge did construe that provision. These statements by Macfarlan JA since have been applied by the New South Wales Court of Appeal in *Miwa Pty Ltd v Siantan Properties Pte Ltd*[4].

2 The primary judge had referred to what he described as "the summary of principles" in *Franklins Pty Ltd v Metcash Trading Ltd*[5]. The applicant in this Court refers to that decision and to *MBF Investments Pty Ltd v Nolan*[6] as authority rejecting the requirement that it is essential to identify ambiguity in the language of the contract before the court may have regard to the surrounding circumstances and object of the transaction. The applicant also refers to statements in England said to be to the same effect, including that by Lord Steyn in *R (Westminster City Council) v National Asylum Support Service*[7].

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1 *Jireh International Pty Ltd v Western Export Services Inc* [2011] NSWCA 137.

2 [2011] NSWCA 137 at [55].

3 [2011] NSWCA 137 at [56].

4 [2011] NSWCA 297 at [18].

5 (2009) 76 NSWLR 603 at 618 [19] and following.

6 [2011] VSCA 114 at [195]-[204].

7 [2002] 1 WLR 2956 at 2958-2959 [4]-[5]; [2002] 4 All ER 654 at 656-657.

3 Acceptance of the applicant's submission, clearly would require reconsideration by this Court of what was said in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[8] by Mason J, with the concurrence of Stephen J and Wilson J, to be the "true rule" as to the admission of evidence of surrounding circumstances. Until this Court embarks upon that exercise and disapproves or revises what was said in *Codelfa*, intermediate appellate courts are bound to follow that precedent. The same is true of primary judges, notwithstanding what may appear to have been said by intermediate appellate courts.

4 The position of *Codelfa*, as a binding authority, was made clear in the joint reasons of five Justices in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*[9] and it should not have been necessary to reiterate the point here.

5 We do not read anything said in this Court in *Pacific Carriers Ltd v BNP Paribas*[10]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*[11]; *Wilkie v Gordian Runoff Ltd*[12] and *International Air Transport Association v Ansett Australia Holdings Ltd*[13] as operating inconsistently with what was said by Mason J in the passage in *Codelfa* to which we have referred.

6 However, the result reached by the Court of Appeal in this case was correct. Further, even if, as the applicant contends, cl 3 in the Letter of Agreement should be construed as understood by a reasonable person in the position of the parties, with knowledge of the surrounding circumstances and the object of the transaction, the result would have been no different. Accordingly, special leave is refused with costs.

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8 (1982) 149 CLR 337 at 352; [1982] HCA 24.

9 (2002) 240 CLR 45 at 62-63 [39]; [2002] HCA 5.

10 (2004) 218 CLR 451 at 461-462 [22]; [2004] HCA 35.

11 (2004) 219 CLR 165 at 179 [40]; [2004] HCA 52.

12 (2005) 221 CLR 522 at 528-529 [15]; [2005] HCA 17.

13 (2008) 234 CLR 151 at 160 [8], 174 [53]; [2008] HCA 3.