

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH AND GUMMOW JJ

WHISPRUN PTY LIMITED (Formerly
Northwest Exports Pty Limited)

APPELLANT

AND

SONYA LEA DIXON

RESPONDENT

Whisprun Pty Limited v Dixon [No 2]
[2004] HCA 2
5 February 2004
S216/2002

ORDER

Amend the orders made by this Court on 3 September 2003 by deleting the previous orders and substituting the following paragraphs:

- 1. Appeal allowed.*
- 2. Set aside the orders of the Court of Appeal of New South Wales made on 28 September 2001.*
- 3. Remit the matter to the Court of Appeal to determine whether "the further evidence" should be admitted and to take such further steps as are necessary to dispose of the appeal to that Court including the costs of the trial.*
- 4. Respondent to pay the costs of the appeal to this Court and the proceedings in the Court of Appeal to date.*
- 5. Each party to pay its or her costs of the notice of motion.*

On appeal from the Supreme Court of New South Wales

Representation:

B W Walker SC with S E Pritchard for the appellant (instructed by Hicksons Lawyers)

D F Jackson QC with K J Ryan and N G Ford for the respondent (instructed by Walker Kissane & Plummer)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

1 GLEESON CJ, McHUGH AND GUMMOW JJ. The issue in this Notice of Motion is whether the Court should vary the orders it made in an appeal decided last year and remit the matter to the Court of Appeal of New South Wales to determine whether it should admit further evidence and then re-hear the appeal. The issue arises because, in giving judgment, the majority Justices did not deal with a contention of the unsuccessful respondent to the appeal.

2 On 3 September 2003, the Court made orders in an appeal brought by Whisprun Pty Limited ("Whisprun") against an order of the Court of Appeal for a new trial of an action for damages. The orders of this Court were:

1. Appeal allowed with costs.
2. Set aside the orders of the Court of Appeal of New South Wales made on 28 September 2001 and, in lieu thereof, order that the appeal to that Court be dismissed with costs.

3 The effect of these orders was that the verdict entered in favour of Whisprun, the defendant in the trial, was reinstated. At the trial, the respondent to the appeal in this Court, Ms Sonya Lea Dixon, had claimed that she suffered from chronic fatigue syndrome as the result of being infected with Q fever. The trial judge accepted that Ms Dixon had contracted Q fever but, because of the view that he took of her credibility, he was not satisfied that she suffered from chronic fatigue syndrome as the result of contracting Q fever.

4 The Court of Appeal set aside the verdict and judgment of the trial judge because it appeared to that Court that his Honour had not satisfactorily considered Ms Dixon's case. On appeal to this Court, a majority of the Court disagreed with this finding. The majority held that the case that the Court of Appeal found had not been properly considered was not the case that Ms Dixon had run at the trial.

5 By a Notice of Motion, Ms Dixon now moves the Court for an order that the orders pronounced on 3 September 2003 be varied by deleting Order 2 and replacing it with the following orders:

2. Set aside the orders of the Court of Appeal of New South Wales made 28 September 2001.
3. Matter remitted to the Court of Appeal for the determination of the issues the subject of the respondent's Notice of Contention dated 19 August 2002.

6 That Notice of Contention stated:

2.

"The Respondent wishes to contend that the decision of the Court below should be affirmed but on grounds other than those relied on by the Court below.

GROUNDS

1. The Court of Appeal should have received the further evidence referred to on pages 46 and 47 of the Court of Appeal's reasons for judgment."

7 Whisprun opposes the making of the orders sought in the Notice of Motion.

8 Ms Dixon had contended in the Court of Appeal that the "further evidence" supported her claim that she suffered from chronic fatigue syndrome and that it showed that she was still suffering from Q fever. However, because that Court found that the verdict in favour of Whisprun should be set aside in any event, it did not rule on the admissibility of the further evidence.

9 Whisprun correctly points out that the issue raised in the Notice of Contention did not entitle this Court to affirm the order of the Court of Appeal. Even if the Court of Appeal had erred in not admitting the evidence, that error would not entitle Ms Dixon to retain her order for a new trial. At best, it would only entitle her to have her appeal to the Court of Appeal determined on the basis of "the further evidence" *and* the evidence given at the trial.

10 On its face, the Notice of Contention did not seek – nor could it have sought – an order that the matter should be remitted to the Court of Appeal if the appeal by Whisprun was upheld. The effect of a Notice of Contention is to support the order under appeal by an argument or arguments not accepted or applied by the court whose order is under appeal.

11 However, despite the filing of and the terms of the Notice of Contention, on the hearing of the appeal Ms Dixon's counsel said that he did not seek to use the issue of the admissibility of the further evidence as a ground for affirming the Court of Appeal's order. After counsel for Whisprun had completed his argument in reply, Ms Dixon's counsel said¹:

"[W]hether the notice of contention be the right form or not, all that we seek in relation to it is that the matter be remitted to the Court of Appeal to

1 Transcript of proceedings, 7 November 2002 at 85.

3.

deal with the unresolved issue of the admission of further evidence if the appeal is otherwise successful."

12 The question then is whether this Court should determine the issue of admissibility or make the orders sought by Ms Dixon. If the Court of Appeal should not have received the further evidence, the orders made on 3 September 2003 would stand. However, there are a number of difficulties with this Court determining the issue, the chief of which is that the Court has not had the benefit of a full argument from the parties on the issue. Moreover, if the Court decided the evidence was admissible, the case would have to be remitted to the Court of Appeal.

13 Given the circumstances set out in the previous paragraph, the best course is for the matter to be remitted to the Court of Appeal. That Court can then determine the issue of the admissibility of the further evidence and take whatever additional steps are required to dispose of the appeal to that Court.

Orders

14 The orders made by this Court on 3 September 2003 should be amended by deleting the previous orders and substituting the following paragraphs:

1. Appeal allowed.
2. Set aside the orders of the Court of Appeal of New South Wales made on 28 September 2001.
3. Remit the matter to the Court of Appeal to determine whether "the further evidence" should be admitted and to take such further steps as are necessary to dispose of the appeal to that Court including the costs of the trial.
4. The respondent should pay the costs of the appeal to this Court and the proceedings in the Court of Appeal to date.
5. Each party to pay its or her costs of the notice of motion.