

40/81

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES  
COURT OF APPEAL IN PROCEEDINGS NO. 350 OF 1980

B E T W E E N:

WILSON PARKING (N.S.W.) PTY. LIMITED Appellant

- and -

THE FEDERATED MISCELLANEOUS WORKERS' UNION  
OF AUSTRALIA, NEW SOUTH WALES First Respondent

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- and -

TORRE JOHN LENNART SUNESON  
HAROLD SIMPSON  
JOHN McCORMACK  
WILLIAM SMITH  
LIONEL DOUGLAS WHITTINGHAM  
NORMAN RICHARDSON  
ALLAN O'NEIL  
GEORGE WILLIAM WILKS  
INDUSTRIAL COMMISSION OF NEW SOUTH WALES  
Other Respondents

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CASE FOR THE FIRST RESPONDENT

Record

1. In this appeal the Appellant seeks prohibition directed to the Industrial Commission of New South Wales and to the first respondent (the Union) restraining them from proceeding further on orders made by the Commission on 24 June, 1980 pursuant to Sec. 88F of the Industrial Arbitration Act (the Act).

pp.1-3

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2. The Board has already had occasion to consider Sec. 88F in the case of Caltex Oil (Australia) Pty. Limited -v- Feenan (5/3/81).

3. The Union's submissions are that the appeal should be dismissed because:-

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- (a) the appellant is estopped from making a second application for prohibition by the judgment of the Court of Appeal in Wilson Parking (N.S.W.) Pty. Ltd. -v- Industrial Commission of New South Wales and Another (1979) 1 N.S.W.L.R. 396 in earlier proceedings to which the Union was a party; and because
- (b) On the true construction of the Act the Union was entitled to commence proceedings under Sec. 88F and obtain orders under both sub-sections (1) and (2).

Record

SECOND APPLICATION FOR PROHIBITION SHOULD BE REFUSED

- pp.66-87 4. Following the decision of the Industrial Commission in Court Session on 25 August, 1978 that the Commission had jurisdiction to entertain the Union's application under
- pp.40-42 Sec. 88F, the appellant issued a summons in the Court of Appeal seeking to prohibit further proceedings on the application.
- pp.88-106 5. The majority of the Court of Appeal (Street C.J. and Hope  
pp.119 J.A.) held that the Commission had jurisdiction to entertain  
p.121 the Union's application and dismissed the summons.
- pp.107-118 6. The third member of the Court (Rutley J.A.) held that the Commission had jurisdiction to entertain the application under 10  
Sec. 88F(1) and further held that the summons for prohibition was premature, both generally and specifically in relation to the order sought by the Union under Sec. 88F(2).
7. The appellant did not prosecute any appeal from this decision.
- pp.33-4 8. The Union's application to the Commission was then heard and determined on its merits. Final orders adverse to the appellant were made on 24 June, 1980.
- pp.1-3 9. Thereafter the appellant made a second application for prohibition to the Court of Appeal, and having submitted to 20  
pp.35-38 such proceedings being dismissed without argument brings this appeal.
10. The Union submits that the appeal from the refusal of the second application fails both on ordinary principles relating to res judicata and issue estoppel and on the authority of the Queen -v- Mayor of Bodmin (1892) 2 Q.B. 21.

INDUSTRIAL COMMISSION DID NOT EXCEED IT'S JURISDICTION

11. The appellant invokes the decision in Gouriet -v- Union of Post Office Workers (1978) A.C. 435 in support of its contention that the Union had no right to apply to the Commission under Sec. 88F in relation to this contract to which it was not a party. 30
12. With respect, the appellant's reliance on Gouriet's case is misplaced. The question in issue is whether the section, on its true construction, and in its setting in the Act as a whole, conferred on the Union the right to bring these proceedings in the Commission. If the answer is no the proceedings fail for that reason, and reliance on Gouriet is unnecessary. If the answer is yes, the proceedings are within jurisdiction and reliance by the appellant on Gouriet is unavailing. 40
13. A statute which authorises an application to a Court for the exercise of a discretionary power confers a substantive right on a qualified applicant. See The King -v- Commonwealth Court of Conciliation and Arbitration ex parte Barrett (1945) 70 CLR 141 where at 155 Latham C.J. said:-

"A right is created by the provision that a Court may make an order, and such a provision also gives jurisdiction to the Court to make the Order."

See also Dixon J. at 165-168.

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14. The Union submits that it was entitled to bring proceedings under the section because inter alia:-
- (a) The history of the section establishes that it has this right,
  - (b) The section, by enabling the Commission to make an award, shows that an industrial union is a competent applicant,
  - (c) The section is an anti-avoidance provision and it would be surprising if it could not be invoked by a union entitled to police and enforce the Act and awards made under it; and
  - (d) The section in terms is concerned with interests other than those of the parties to the contract in question and these include interests which under the Act an industrial union of employees is entitled to secure and protect.
15. The Courts below have upheld the jurisdiction of the Commission substantially for the reasons summarised above.
16. The section as enacted in 1959 authorised applications either to the Commission or to a conciliation committee, the latter being a subordinate industrial tribunal subject to control by the Commission through the exercise of its appellate and supervisory authority.
17. It is clear that between 1959 and 1966 an industrial union of employees (such as the Union) was entitled to apply under sec. 88F to an appropriate conciliation committee. See Section 74.
18. The Courts below have held, correctly in our submission, that during this period the original jurisdiction of the Commission under the section was no less extensive.
19. The section was amended in 1966 to take away the jurisdiction of conciliation committees, and by the insertion of subsections (2) and (3) to widen the Commission's powers by authorising it to make orders for the payment of money and costs.
20. The Courts below have also held, correctly in our submission, that Parliament did not intend by the 1966 amendments to take away any jurisdiction that the Commission already had. Its only intention was to widen the Commission's jurisdiction.
21. In these circumstances both Courts have held that the Commission retained under the amended section the jurisdiction to entertain applications by unions which it clearly had possessed under the original section.
22. In our submission it was permissible for the Courts below to have regard to the history of the section as a guide to its interpretation, and we rely upon the statement of Gibbs J. to this effect in Mathieson -v- Burton (1971) 124 CLR 1 at 26 where he said:-

Record

"... the weight of authority favours the view that it is permissible to have regard to a repealed portion of an Act for the purpose of construing what remains."

pp.66-87  
pp.88-119

23. The Union also relies upon the other reasons given by the Courts below for their conclusion that the Commission did not exceed its jurisdiction in this case.

24. The appellant's general reliance upon its contractual rights is, in our submission, misplaced. The section is clearly intended to authorise the Commission, in a proper case, to set aside what would otherwise be valid and enforceable common law rights. Moreover it is found in the statute which, in the public interest, has established a system of compulsory arbitration so that minimum standards for employees in industry will be fixed by industrial awards and not by private bargain.

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25. The whole purpose of the Act and the system which it established is to restrict freedom of contract in industry. The Act contains a number of anti-avoidance provisions including, we submit, sec. 88F itself. Given the special position which industrial unions occupy in the system of industrial arbitration established by the Act it would, in fact, be surprising if a union could not invoke sec. 88F.

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VALIDITY OF ORDER FOR PAYMENT OF MONEY

pp.33-34

26. Finally the Union submits that the order for the payment of money made by Dey J. was authorised by subsection (2). In the light of the decision in Agius -v- Arrow Freightways (1965) A.R. 77, one of the purposes of the 1966 amendments was to avoid the necessity for further proceedings consequent upon the avoidance of a contract under this section.

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p.28  
lines 11-16  
p.17

27. The avoidance of the subject contract by order of the Commission left exposed a situation where persons had performed work for the appellant for which rates of pay were fixed by an industrial award.

28. In the absence of any valid express contract between the parties it was, to say the least, likely that in separate proceedings to enforce the award the persons concerned would be held to be employees of the appellant.

29. In a prosecution under section 93 for nonpayment of award wages, orders could be obtained at the suit of the Union's Secretary which in substance and effect would be the same as that made by Dey J. in this case.

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30. In these circumstances, and in the light of the generality of the power conferred by the subsection, we submit that the order made by Dey J. was within power.

31. The Union therefore submits that this appeal should be dismissed for the following (amongst other)

R E A S O N S

1. Because it was not competent for the appellant to bring a second application for prohibition in the same Case.

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2. Because the Commission did have jurisdiction to entertain the Union's application under sec. 88F.
3. Because the Commission did have power to make the order for the payment of money by the appellant to the Union to be held in trust for Suneson which was in fact made by Dey J.
4. Because the decisions of the Industrial Commission in Court session and of the Court of Appeal were correct.

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COUNSEL FOR THE FIRST  
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First Respondent

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Other Respondent

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CASE FOR THE FIRST RESPONDENT

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