Case note - High Court

by Mark Hunter

State Rail Authority of New South Wales -v- Earthline Constructions Pty Ltd (in liquidation) & Ors

High Court No. S34/1998

Judgment of Gaudron, Gummow, Kirby, Hayne and Callinan JJ - Delivered 9 February 1999

CIVIL LAW - APPEALS - CREDIBILITY FINDINGS

In this appeal the High Court revisited the question of when it is appropriate for an appellate court to set aside findings of fact made by a trial judge on the basis of the credibility of a witness.

The appellant claimed $2.75 million from the respondent companies with which it contracted for the hire of plant and equipment to be used in railway line maintenance. The appellant alleged a fraudulent scheme whereby the respondents were paid on the basis of false work dockets prepared by them and certified for accuracy by employees of the appellant who knew the dockets to be false.

At trial, O'Keefe CJ Comm D received evidence of more than four thousand allegedly false dockets created over a three year period. This represented about one quarter of the total number of dockets submitted to the appellant for payment. Oral testimony was given by three secretaries employed by the respondents over the relevant period as to the way the fraud was committed.

It was the first of these witnesses (Mrs Page) whose testimony was central to the appellant's case. She had been indemnified by the appellant from civil suit. Her cross examination at trial filled some two hundred pages of transcript while the generally corroborative evidence of the other two secretaries was largely unchallenged by the respondents. The only witness called by the respondent informed the trial judge that the subject transactions were being investigated by ICAC and for this reason none of the respondents would give evidence before him.

The trial judge declined to draw a Jones -v- Dunkel inference against the respondents and rejected most of Mrs Page's evidence which he found to be "internally inconsistent". His Honour stated that he found her to be an argumentative and evasive witness. O'Keefe CJ rejected the fraud allegations but awarded the appellant damages and interest totalling around $150,000 on the basis of some duplicated claims submitted by the respondents.

The New South Wales Court of Appeal (Mahoney P, Meagher and Handley JJA) was bound to deal with the appeal by way of rehearing and considered the decision of the High Court in Abalos -v- Australian Postal Commission (1990 171 CLR 167). The Court of Appeal unanimously dismissed the appeal, being unable to find that the trial judge had "palpably misused his position of advantage" in assessing the credibility of Mrs Page.

In the High Court the appellant raised no point of legal controversy but was granted special leave to appeal, the sole ground being the Court of Appeal's failure to overrule the trial judge's rejection of the appellant's witnesses.

Held

1. The appeal should be allowed with costs and a new trial ordered.
2. The trial judge and the Court of Appeal failed to determine the appellant's case upon a consideration of the real strength of the body of evidence presented.

Per Kirby J - the words of restraint used in the "Abalos trilogy" (*) were never intended to deflect appellate courts from their duty to review factual conclusions in appropriate cases. The oft cited intervention threshold of whether the trial judge has "palpably misused his advantage" in assessing the credibility of a witness is flawed because it infers a test of judicial misconduct.

An appellate court must precisely identify the advantages enjoyed by the trial judge in determining specific facts in the context of the complete trial record.

Judicial evaluation of credibility from appearance and demeanour is fallible and trial judges should strive, so far as they can, to decide cases without undue reliance upon it.

Appearances

Appellant Counsel Jackson QC & Martin Solicitors Clayton Utz Respondent Counsel Toner SC & Stubbs Solicitors Crichton-Browne Crossley

Commentary

(*) In Abalos -v- Australian Postal Commission (1990 171 CLR 167), Devries -v- Australian National Railways Commission (1993 177 CLR 472) and Jones -v- Hyde (1989 63 ALJR 349) the High Court unanimously allowed the appeals and restored the trial judge's findings of fact.

Claytons Democracy? - Ted Mack

Former independent Federal parliamentarian Ted Mack will visit Darwin to explain how he makes it work, according to senior law lecturer at the Northern Territory University Peter McNab.

As a spokesman for Territorians for a Democratic Statehood, Mr McNab is urging lawyers interested in the future of Australia's political system to come and hear Mr Mack speak on April 8.

His topic will be "The Australian Political System: A Claytons Democracy?" and he is sure to touch on the republic debate and the case for a popularly elected president. "He is an inspirational leader who hasn't got the recognition he deserves for improving the face of politics at all three levels of government," Mr McNab said.

Mr Mack has served as the popularly elected Mayor of North Sydney Council, served three terms as a NSW parliamentarian and two in the Federal Parliament.

He has championed political accountability and open government.

He is noted for his stand against over generous payments to politicians for their public service and has refused parliamentary perks including pensions and overseas junkets.

Mr McNab called on Territorians, and lawyers in particular, to attend Mr Mack's dinner address at the ballroom at the Carlton Hotel. "All lawyers have studied consitutional law and many lawyers find their way into politics but democracy should be of concern to all," he said.

Tickets are $50 and available from Carrie on 89813827 during work hours, Jane on 89851949 after hours and Gordon on 89482414, also after hours.