Dan Star's Federal Court Judgements

EVIDENCE AND PLEADINGS

Claim of privilege against self-exposure to a penalty or self-incrimination – whether relieved from pleading a defence – extent to which the claim for privilege needs to be supported by evidence and submissions

In *QC Resource Investments Pty Ltd (In Liq) v Mulligan* [2016] FCA 813 (15 July 2016) the Court (Edelman J) considered the claim of the respondent (Mr Mulligan) to be relieved from pleading to extensive parts of a statement of claim by reason of his asserted claim for the privilege against self-exposure to a penalty and self-incrimination. The Court ordered Mr Mulligan to provide to the applicants an affidavit setting out in relation to each allegation for which he maintains a claim for privilege, the particular pleading rule or rules within the *Federal Court Rules 2011* (Cth) from which he seeks a dispensation, and the basis upon which he apprehends that compliance with the Rules will tend to incriminate him or expose him to a penalty.

The applicants, QC Resource Investments Pty Ltd (QCRI) and its liquidators, brought proceedings seeking declarations that Mr Mulligan had breached his duties as a director of QCRI (ss. 180(1) and 181(1) of the *Corporations Act 2001* (Cth)) and permitted QCRI to trade while insolvent (s588G(2) of the *Corporations Act*). The applicants did not seek any civil penalties. Mr Mulligan refused to plead to 92 paragraphs of a statement of claim on the basis that if he was required to plead, he *might* be exposed to a penalty in other, unspecified litigation which had not been threatened or commenced. He submitted that the six-year time limit for ASIC to bring penalty proceedings against him had not expired (s. 1317K of the *Corporations Act*), and that ASIC had not informed him that they would not bring penalty proceedings.

The Court at [19]-[25] considered the authorities for two different circumstances in which the privilege against exposure to a penalty arises. At [21] Edelman J observed that the decision of Deane J in *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat & Livestock Corporation* (1979) 42 FLR 204 was referred to with approval by the High Court in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 335-336 "for the distinction between (i) refusing discovery in a mere action for a penalty, and (ii) requiring objection to particular documents in an action which was not for a penalty (the result of which might be used to establish a party's liability to a penalty in other proceedings)". For the second circumstance, "something more" is required to justify the dispensation from pleading rules, depending on all the circumstances of the case and

upon the rules of pleading from which dispensation is sought. Edelman J stated at [24] "it is not enough simply to allege that there is a possibility of ASIC commencing penalty proceedings. It is necessary to descend to the detail of each claim for privilege".

Orders were made giving Mr Mulligan the opportunity to bring an application to relieve him from the rules of pleading supported by affidavit evidence and submissions explaining the reasonable grounds for each claim (at [41]).

PRACTICE AND PROCEDURE

Civil penalty and criminal proceedings on foot – primary judge refused to stay civil proceeding until conclusion of criminal proceeding – no error by the primary judge in his discretionary judgment warranting leave to appeal

In *Construction, Forestry, Mining and Energy Union v Australian Competition and Consumer Commission* [2016] FCAFC 97 (19 July 2016) the Full Court (Dowsett, Tracey and Bromberg JJ) dismissed an application for leave to appeal from the orders of the primary judge (Middleton J). Middleton J had refused an application to stay part of the ACCC's proceedings against the first applicant (the CFMEU) until certain criminal proceedings were concluded against two of its officers (Setka and Reardon): *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2016] FCA 504.

The respondent (the ACCC) commenced proceedings against the CFMEU, Setka and Reardon seeking declarations, injunctive relief, pecuniary penalties and other relief under the *Competition and Consumer Act 2010* (Cth) (the CCA) and Australian Consumer Law (the ACL). It was alleged that the CFMEU contravened s. 45E(2) of the CCA and s. 50 of the ACL at a meeting where they threatened Boral (a concrete supplier) to cut off its concrete supply to Grocon (a construction company), and Setka and Reardon were knowingly concerned in or party to the s. 50 contravention. The ACCC also alleged that the CFMEU contravened s. 45D(1) of the CCA by instructing shop stewards and organisers not to allow Boral to supply concrete to construction sites.

Subsequently, Setka and Reardon were charged with blackmail under s. 87 of the *Crimes Act 1958* (Vic). The relevant meeting in which the conduct occurred that gave rise to the blackmail alleged in the charge-sheet (the April meeting conduct) was the same meeting that the ACCC relied on for alleging the contraventions of s. 45E of the CCA and s. 50 of the ACL. By consent, Middleton J ordered a stay of the ACCC's proceedings for relief in respect of the April meeting conduct. That left as the remaining part of the ACCC's proceeding the alleged contravention of s. 45D of the CCA, being a claim which was brought only against the CFMEU. The trial of the s. 45D allegation is listed to commence in the Federal Court in late September 2016 while the committal hearing for the blackmail charges against Setka and Reardon are listed in the Magistrates' Court of Victoria in early November 2016.

In dismissing the application for leave to appeal, the Full Federal Court gave close consideration to the decisions of the High Court in *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5; (2015) 255 CLR 46 and the Victorian Court of Appeal in *Zhao v Commissioner of the Australian Federal Police* (2014) 43 VR 137. The Full Federal Court observed at [23]: "The reasoning of both the High Court and the Court of Appeal in *Zhao* recognised that a potential prejudice for an accused is that evidence given by that person in a civil proceeding would reveal or telegraph information to the prosecutor about the accused's defence in the criminal proceeding. The potential to advantage the prosecutor was regarded by the Court of Appeal as an infringement of the privilege against self-incrimination and the right to silence. The High Court relied upon a different but related foundation. As the Court noted at [18], by reference to the fundamental principle of the common law as explained in *Lee v The Queen* (2014) 253 CLR 455 at [32]–[33], the prosecution is to prove the guilt of an accused person and cannot compel a person charged with a crime to assist in the discharge of its onus of proof".

The applicants relied on the principle in *Zhao* to argue that the Crown must prove its case in the blackmail proceedings without the compelled assistance of an accused and, without the stay, the applicants were forced to make an "invidious choice" (at [28]-[31]). However, the Full Court found that *Zhao* was distinguishable and there was no basis for concluding that an invidious choice was actually faced by Setka and Reardon (at [36]). The primary judge (whose findings were not challenged) found that he had been given no indication as to whether Setka and Reardon would be giving evidence in the s. 45D proceeding; indeed, the primary judge was unsatisfied that the CFMEU would seek to compel their evidence (at [34]-[35]). The Full Court stated at [36]: ". . . the mere *possibility* that Setka and Reardon might desire to clear their names or assist the CFMEU does not establish that they are confronted by an invidious choice".

Further, the applicants were unable to show appealable error by the primary judge's conclusion that the conduct of the CFMEU in defence of the s. 45D proceedings would not be imputed to Setka and Reardon and, accordingly, there was no risk of prejudice in the criminal proceeding by better informing the prosecution (at [39]-[41]).

The Full Court also held that there was no basis for thinking that Setka and Reardon would be burdened by a need to participate in the s. 45D proceeding to the detriment of the conduct of their defences in the blackmail proceeding (at [42]).

The Full Court did hold reservations about the primary judge's reasoning on the issue of whether a jury in the blackmail proceeding may be contaminated by the findings and declarations that may be made in the s. 45D proceeding (at [45]). However, it did not follow that an error was established sufficient to overturn a discretionary judgment or sufficient to warrant the grant of leave to appeal (at [47]). The applicants were also unable to identify any specific error in the primary judge's approach or findings in respect of the potential prejudice to the CFMEU in the s. 45D proceeding (at [50]-[54]).

Despite agreeing with the applicants that the primacy of a criminal proceeding needs to be taken into account in the balancing process, the Full Court held that there was no risk to the fair and efficient conduct of the criminal proceeding by dismissing a stay in the s. 45D proceeding (at [59]-[61]).

Finally, there was no error in the approach of the primary judge that the applicable principles governing the exercise of his discretion to stay civil proceedings are not relevantly different in the case of a civil proceeding brought by a regulator (at [61]). The Full Court stated at [62]: "An interest ought not be given less weight merely because it is held or being pursued by a public body in the public interest, rather than in the protection or preservation of the rights of private plaintiffs".

Refugees – misunderstanding resulting in no opportunity to present evidence on an issue to the Tribunal – adequacy of the standard of interpreting before Federal Circuit Court also in issue – appeal from the Federal Circuit Court allowed

MIGRATION

In *MZAMP v Minister for Immigration & Border Protection* [2016] FCA 804 (15 July 2016) the Court (Rangiah J) allowed an appeal from the Federal Circuit Court dismissing an application for judicial review of a decision of the Refugee Review Tribunal, now the Administrative Appeals Tribunal (the Tribunal), quashed the decision of the Tribunal and ordered the Tribunal to decide the application according to law.

The first and second appellants, who are husband and wife, are citizens of Malaysia and applied for protection visas. Their claims for protection were based on their Tamil ethnicity and Hindu religion. Among other claims, the first appellant claimed to fear persecution by Malaysian police because he has a tattoo of a spider web on his neck which resembles a tattoo of a Malaysian criminal gang. He claimed that he would be persecuted by police as a person suspected of involvement with that gang. Their application for protection visas was rejected by the delegate of the Minister for Immigration and Border Protection (the Minister).

The appellants applied to the Tribunal for a review of the delegate's decision, which affirmed the decision of the Minister's delegate. Relevant to the claim that the first appellant will be persecuted by Malaysian police as a suspected member of criminal gang, the Tribunal found that his tattoo was not a gang tattoo and would not be perceived as a gang tattoo by Malaysian authorities.

As litigants in person, the appellants applied to the Federal Circuit Court for judicial review on various grounds. One of those grounds was that the Tribunal failed to provide an adequate opportunity to obtain evidence after the Tribunal's hearing concerning gang tattoos. The Federal Circuit Court found there was no jurisdictional error and dismissed the application.

The appellants then appealed to the Federal Court (again, as litigants in person). While some grounds were dismissed, the appellants succeeded on two grounds in the Federal Court.

First, the Minister conceded that the Federal Circuit Court erred by failing to consider the first appellant's evidence to that Court about his discussion with a Tribunal case officer about providing the Tribunal with information about Malaysian gang tattoos (at [4], [41]). That was evidence in the first appellant's affidavit to the effect that he contacted the Tribunal and told a case officer that he could not access websites in relation to criminal gangs and tattoos from immigration detention and the Tribunal's case

note did not reflect the full contents of the conversation by omitting this. Assuming that the appellants were denied procedural fairness, that denial could have made a difference to the outcome of the application before the Tribunal (at [45]). The Federal Court accepted the Minister's submission that the Federal Court was in as good a position as the Federal Circuit Court to decide for itself whether the Tribunal fell into jurisdictional error by not providing the appellants with an adequate opportunity to provide information about gang tattoos (at [46]-[47]).

Noting that the first appellant's evidence was not the subject of cross-examination by the Minister and was not inherently improbable (at [48]-[50]), Rangiah J held: "I accept that the first appellant made it known to the Tribunal's case officer that he wished to provide the Tribunal with information about criminal gangs and tattoos. I accept that the first appellant was led to think that the Tribunal would contact him if it required information about criminal gangs or tattoos and would give him an opportunity to provide that information. The Tribunal did require that information, but contrary to that representation, he was not contacted and was not given that opportunity. The Tribunal is taken to have had constructive knowledge of the representation made by its case officer: *Xiang Sheng Li v Refugee Review Tribunal* (1994) 36 ALD 273 at 285 (Moore J)" (at [51]).

Further, Rangiah J held at [62]: "In circumstances where the first appellant, through the misunderstanding of the Tribunal's case officer, was unfairly denied an opportunity to present further evidence, he was denied a real chance to be heard: cf *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 at [45]-[48] (Kiefel, Bell and Keane JJ). The Tribunal failed to comply with its statutory obligation. This was a jurisdictional error: see *WAJR v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCA 106 at [58] (French CJ).

Second, the Minister conceded that the Federal Circuit Court erred by failing to decide whether there was a denial of procedural fairness in the hearing before the Federal Circuit Court (not the Tribunal) because of the inadequacy of the standard of interpreting for the appellants (at [4], [79]). However, the Minister submitted that if the Federal Circuit Court had ruled on the argument it would have been rejected and the Federal Court should do so (at [80]). Rangiah J referred to the authorities on when poor or incorrect interpreting in a hearing before the Tribunal can amount to a denial or procedural fairness. There may also be a denial of procedural fairness in a proceeding before the Federal Circuit Court where the standard of interpreting has been inadequate (at [85]). In the circumstances before the Federal Court, Rangiah J would have remitted the matter back to the Federal Circuit Court to be heard again on the interpreting issue, however the Tribunal's decision was being set aside on other grounds (at [89]). Finally, without deciding, Rangiah J doubted the Minister's submission that any unfairness before the Federal Circuit Court had been "cured" by a hearing in the Federal Court (at [90]).

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