Mitchforce v Industrial Relations Commission

Commercial contracts and sec 106 of the Industrial Relations Act

By Ingmar Taylor

What is the Industrial Relations Commission going to do? Will it fall into line with the views of the Chief Justice and President of the Court of Appeal as to the commission's jurisdiction to deal with commercial matters under sec 106 of the *Industrial Relations Act 1996* (NSW) (and in so doing effectively overturn themselves).

Or will it decline to follow the decision of the Court of Appeal? After all, Spigelman CJ found that 'Parliament intended the Industrial Commission to be the sole judge of its jurisdiction', and Mason P held that (for the same reason) his disagreement with the commission's view of its jurisdiction was 'irrelevant in the circumstances'?

These questions arise following the Court of Appeal decision *Mitchforce v Industrial Relations Commission & Ors*[1] *('Mitchforce')*. A full bench of the commission (Wright J, President, Walton J, Vice-President and Boland J) is currently reserved on the question of whether, in light of *Mitchforce*, its earlier decision[2] to uphold the existence of jurisdiction was wrong.

The proceedings began before Hungerford J who held[3] that a commercial lease to operate a tavern was a contract 'whereby a person performs work in an industry' and so was within the jurisdiction of the commission under sec 106. Hungerford J made orders to compensate the operators of the tavern arising from unfairness in the lease.

On appeal, the full bench of the commission confirmed that the lease was within jurisdiction, stating that the law in that respect was 'well settled'[4] and finding that as the first instance decision was consistent with established law and principle leave to appeal should be refused (something the Bench may now regret - if the bench had instead granted leave and dismissed the appeal it would not now be in the position of having to reconsider the case).

The landlord sought prerogative relief in the Court of Appeal, pursuant to that court's supervisory jurisdiction[5]. Spigelman CJ and Mason P found (Handley JA dissenting) that the commission did not have jurisdiction under sec 106 to consider a commercial lease of the type in question. However, the Court of Appeal did not quash the decision because of the court's view as to its powers to review decisions of the commission. The Court of Appeal instead invited the commission to reconsider its *interlocutory* decision to refuse leave to appeal.

On 22 August 2003 the same full bench that refused leave to appeal on the ground that the law was 'well settled' heard argument as to why it should now, in light of the decision in *Mitchforce*, grant leave to appeal and set aside the decision of Hungerford J. The full bench has reserved its decision.

Pre-Mitchforce - Commercial contracts and sec 106

As far back as 1988 the former Industrial Commission identified that the jurisdiction conferred by sec 88F had become:

> A major commercial jurisdiction exercised in circumstances frequently having little to do with the industrial arbitration and similar litigation normally encountered by industrial tribunals[6].

Since that time the relevant legislation has been re-enacted twice[7] and amended[8] without any attempt to remove the 'commercial jurisdiction', something not referred to in *Mitchforce*.

Types of matters where jurisdiction has previously been found to exist include:

- agreements for the purchase of equipment with associated right to work (eg truck with work)[9];
- partnership agreements[10];
- agency agreements[11];
- a license to use and operate a service station[12];
- a franchise agreement to operate a service station[13];
- dealership agreements[14];
- lease contracts, at least where they contain terms requiring work to be done (eg to keep a retail shop in a shopping centre open during certain hours)[15] (these decisions however must now be read subject to the decision in *Mitchforce*[16]); and
- even finance agreements, provided they form part of an overall arrangement under which work is performed in an industry[17].

However the decision of the Court of Appeal in *Mitchforce* suggests the previous readiness to find jurisdiction in respect of 'commercial contracts', in particular leases, may have been misplaced.

Mitchforce v Industrial Relations Commission

The contract in question in *Mitchforce* was a lease of property. Mitchforce had constructed a 'purpose-built' facility and obtained a liquor license, so that a tavern could be operated on the site. The Starkeys, who had experience operating hotels, entered into a 10 year lease to operate the tavern. Both parties actively contemplated that the Starkeys would operate a tavern from the facility. Pursuant to the lease, the rent increased above CPI, and when business did not grow as expected the rent became uneconomic. There was no express term in the lease that required the Starkeys to operate the premises as a tavern, although the Starkeys did have an obligation to do work maintaining the premises.

Spigelman CJ noted that Sheldon J in *Davies case*[18] (a seminal case on the jurisdiction) found that the basic purpose of the provision was industrial, and that in order to have the 'requisite industrial colour and flavour' the contract must itself 'directly envisage' the work and have a 'recognisable impact on the conditions of employment'.

At [49] Spigelman CJ noted that both parties to the lease contemplated that work would be done by the Starkeys as a consequence of the lease, but it could not be said that was a *purpose* of the lease. Spigelman CJ found that the purpose was merely to provide one part of the means to run a business, akin to an agreement to purchase equipment which will be used to run a business.

Spigelman CJ concluded at [58] as follows:

> There is not, in my opinion, anything which provides an 'industrial flavour or colour' to the arrangement presently under consideration. Nor is there anything which has a 'recognisable impact on the conditions of ... work', to use the formulation of Jacobs JA in *VG Haulage*. Nor is the 'purpose' of the transaction that work be performed, to use the formulation of Mahoney JA in *Production Spray Painting*. The sole purpose of the agreement is the occupation of premises. It does not lead directly to the performance of work in an industry.

Mason P concurred with the reasoning of Spigelman CJ. Mason P said [at 140]:

> this seems to be one of those situations not unknown to the law in which it is difficult to draw a precise descriptive line, but not so difficult to know whether it has been crossed in the particular case.

Mason P also made some robust comments about the commission doing work more properly done by the Supreme Court[19]. At [147] he said he was 'profoundly troubled by the march of the commission's jurisdiction into the heartland of commercial contracts . . . This is a significant inroad into the effective and efficient exercise of the Supreme Court's jurisdiction in commercial causes'. Mason P went on to say at [147] that 'the matter is also troubling because it must frankly be stated that the members of the commission do not generally have the experience of the judges of the Equity Division in such matters and because, on the same hypothesis, the commission lacks the ongoing assistance of appellate and other supervision by the Court of Appeal or the High Court in such matters'.

Ultimately, however, the views of Spigelman CJ and Mason P as to whether the lease in question was within jurisdiction were, as Mason P said, 'irrelevant in the circumstances'. This is because their Honours found that, unless it was constitutionally invalid, sec 179 of the *Industrial Relations Act 1996* protected the decision from review by the Court of Appeal. Section 179 is a privative clause drafted in extremely wide terms, which amongst other matters, protects a 'purported decision' from being 'reviewed, quashed or called into question'. Spigelman CJ and Mason P decided not to determine whether sec 179 was constitutionally valid. They instead noted that, as the full bench had refused leave, the decision of the full bench was only interlocutory and the full bench could review its own decision (in light of the findings of the Court of Appeal). The Court of Appeal accordingly stood the matter over for further argument, pending further determination by the commission (if any).

If sec 179 is constitutionally valid, the Court of Appeal could not overturn the full bench decision. Yet the Court of Appeal may achieve the same result in this case by making extensive *obiter* comment, and suggesting the commission revisit the matter and determine it again. (Presumably the Court of Appeal did not consider that its decision called into question the decision of the commission, contrary to sec 179.) Of course, if the commission full bench does not overturn itself, and dismisses the appeal from the decision of Hungerford J, then the Court of Appeal will be forced to determine the constitutional validity of sec 179. If sec 179 were found to be valid, then subject to the High Court taking a different view, the commission's view as to its jurisdiction will prevail, at least in respect of matters heard by the commission.

There is a recent trend for respondents to a sec 106 Summons to commence proceedings in another jurisdiction and then apply to cross-vest all the proceedings, including the sec 106 proceedings, to the Supreme Court[20]. That gives rise to the potential for conflicting approaches to the jurisdiction depending on where the matter is determined[21]. This is particularly so given that Supreme Court Judges are for the first time applying a power that has traditionally been seen to be at odds with established common law principles, being closer to arbitration than judicial determination. Sheldon J in Davies Case famously described it as a 'radical law' which 'plays havoc with classic principles of contract law', permitting a judge to remake contracts, including by adding new terms: 'destruction, dilution, renovation and patching are all weapons in the section's arsenal'[22].

Can commercial contracts still be litigated under sec 106?

While the Chief Justice spoke critically about the commission travelling 'a long way from an "industrial" context' and the President spoke critically about the commission involving itself in commercial matters, there is no doubt that sec 106 is not limited to employment contracts and contracts for service. The majority in *Mitchforce* did not call into question the Privy Council decision in *Caltex Oil (Australia) Pty Ltd v Feenan*[23] or the Court of Appeal decision in *Majik Markets Pty Ltd v Brake and Service Centre Drummoyne Pty Ltd*[24], both decisions in respect of agreements that would be considered, at least to some degree, 'commercial' agreements.

As Barwick CJ said in *Stevenson v Barham*[25]:

> Notwithstanding the wide language of sec 88F, I have found difficulty in becoming convinced that it was within the contemplation of the legislature that agreements for business ventures, of which the present may be a specimen, freely

> entered into by parties in equal bargaining positions, should be so far placed within the discretion of the Industrial Commission as to be liable to be declared void. However, I have come to the conclusion that the language of sec 88F of the Act is intractable and must be given effect according to its width and generality.

And so notwithstanding the decision in *Mitchforce* it cannot be doubted that 'commercial' agreements *will* fall within the jurisdiction conferred by sec 106 where by their terms they lead directly to the performance of work in an industry[26] (or to use the words of Mason P in *Mitchforce*; where their 'direct effect' is 'to require the performance of work in an industry'[27]).

The ability to attack contracts that might be described as 'arms-length commercial contracts' has always been seen to be an important part of the role of sec 106, given its purpose to pierce through stratagems designed to avoid fair industrial conditions.

Possible legislative change

Whether 'commercial' cases continue to be heard in the commission, and whether sec 179 is constitutionally valid are questions that may be rendered moot by legislative amendment. It has been reported that the Attorney General is considering changes including 'allowing appeals to be made to the [Court of Appeal]' and 'clarifying the extent to which the commission should handle commercial law cases that otherwise would go to the NSW Supreme Court'[28].

It is unclear whether the mooted amendments are to limit the jurisdiction of sec 106, or simply remove some sec 106 cases to the Supreme Court. It would not be easy to amend sec 106 to exclude 'commercial' cases whilst maintaining the original purpose of the section of protecting the arbitration system. Many of the early cases were about contracts to purchase a truck with a promise of work[29]. On one view such contracts were 'commercial' agreements to purchase a small business. Another example is provided by the long-running litigation involving Wilson Parking and the Federated Miscellaneous Workers Union[30], which involved car parking attendants being encouraged to form partnerships and successfully tender for the right to supply 'management services' in what was described as a commercial arrangement. Under that arrangement each attendant received a profit distribution that equated to an hourly rate below that set by an award for employees doing the same work, something the commission ultimately found to be unfair. Anyone drafting amendments to sec 106 to exclude 'commercial cases' would hopefully want to ensure cases such as those could still be taken.

Certainly it is hard to envisage how a tribunal can be given full power to cut through legal artifice without permitting scrutiny of some agreements capable of being characterised as 'commercial agreements'.

1 [2003] NSWCA 151, 16 December 2003, Spigelman CJ, Mason P and Handley JA
2 *Mitchforce Pty Ltd v Starkey* (2002) 117 IR 122
3 *Starkey v Mitchforce Pty Ltd* (2000) 101 IR 177
4 *Mitchforce Pty Ltd v Starkey* (2002) 117 IR 122 at 135
5 *Supreme Court Act* 1970 (NSW), sec 48(1)(ii)
6 *Rolles v Donald Scott Surgicals Pty Ltd* (unreported, Fisher P, Cahill VP and Bauer J, 19 February 1988) a passage quoted in *Symes v Bennett* (1990) 35 IR 171 at 176 and *TNT v Thomas* (1990) 34 IR 378 at 392, this being a matter identified by Holmes QC in his 1995 article, '*An historical analysis of the jurisdiction conferred on the Industrial Court by sec 275 of the Industrial Relations Act 1991 (NSW)* (1995) 69 ALJ 49 at 49-50'
7 Re-enacted in 1991 as sec 275 of the *Industrial Relations Act 1991* and then again in 1996 as sec 106
8 It has been amended twice, in 1998 and 2002
9 *Agius v Arrow Freightways Pty Ltd* [1965] AR 77 (which was the first case ever determined under sec 88F); *Ex parte VG Haulage Services Pty Ltd; Re Industrial Commission* [1972] 2 NSWLR 81
10 *Stevenson v Barham* (1977) 136 CLR 190; *Wilson Parking v Federated Miscellaneous Workers' Union* [1981] 2 NSWLR 824
11 *Re Becker and Harry M Miller Attractions Pty Ltd* (1972) AR (NSW) 298
12 *Caltex Oil (Australia) Pty Ltd v Feenan* [1981] 1 NSWLR 169
13 *Majik Markets Pty Ltd v Brake and Service Centre Drummoyne Pty Ltd* (1992) 28 NSWLR 443
14 *Chrysler Jeep Automotive Distributors Australia Pty Ltd v Canberra Star Motors Pty Ltd* (1997) 79 IR 452 at 459; *Gough & Gilmour Holdings Pty Ltd v Caterpillar of Australia Ltd (No.11)* [2002] NSWIRComm 354
15 *Mitchforce v Starkey and Anor* [2002] NSWIRComm 85; *Jennings v Auto Plaza Ltd* (1993) 46 IR 413; *Booth v Kritikos Developments Pty Limited* (1995) 59 IR 298; *Kostakis v New World Oil & Developments Limited* (unreported, Schmidt J , CT 1157 of 1996, 25 July 1997) and *Australian Institute of Music Limited v L M Investment Management Pty Ltd* [2000] NSWIRComm 201
16 [2003] NSWCA 151, in particular Spigelman CJ at [53]-[55]
17 *Mitchell v Darby* (1983) 4 IR 72; *State Bank v Grover* (1996) 64 IR 451
18 [1967] AR (NSW) 371
19 Industrial practitioners might call it a demarcation dispute
20 See for example *Resarata Pty Ltd v Finemore* [2002] NSWCA 250, 24 July 2002
21 And the potential conflict is not limited what types of contracts can be contracts 'whereby a person performs work'. In *Mitchforce* at [93] Spigelman CJ specifically left open the question of whether a contract can be found to be unfair because of conduct that is in *breach* of contract, a question about which different views were expressed in the commission, before it was authoritatively determined by a five member Bench in *Reich v Client Server Professionals of Australia Pty Ltd* (2000) 49 NSWLR 551
22 *Davies v General Transport Development Pty Ltd* [1967] AR 371 at 372-373
23 [1981] 1 NSWLR 169
24 (1992) 28 NSWLR 443
25 (1977) 136 CLR 190 at 192
26 *Stevenson v Barham* (1977) 136 CLR 190 at 200
27 At [151]
28 *Sydney Morning Herald*, 18 November 2003
29 *Davies' Case* is an example
30 *Federated Miscellaneous Workers Union of Australia (NSW Branch) v Wilson Parking (NSW) Pty Ltd* [1978] 1 NSWLR 563; *Wilson Parking (NSW) Pty Ltd v Industrial Relations Commission of New South Wales* [1979]1 NSWLR 396; *Federated Miscellaneous Workers Union of Australia (NSW Branch) v Wilson Parking (NSW) Pty Ltd* [1980] AR (NSW) 365; and *Wilson Parking (NSW) Pty Ltd v Federated Miscellaneous Workers Union of Australia (NSW Branch)* [1981] 2 NSWLR 817