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CASENOTE: *CFMEU v Australian Competition & Consumer Commission* [2016] FCAFC 504 *(19 July 2016)*

In November 2014, the Australian Competition & Consumer Commission (also **'ACCC'** and '**Respondent**') brought an application against the Respondent union ('**CFMEU**' or '**Union**') and two officers for penalties and other relief pursuant to the *Competition and Consumer Act* 2010 ('**CC Act**'), and the Australian Consumer Law ('**ACL**').

The ACCC alleged that the Union and officers breached sections 45D(1) of the ACL (which deals with secondary boycotts) and section 45E(2) of the ACL (which prohibits arrangements which affect the supply or acquisition of goods and services). In respect of the section 45E breaches, it was alleged at a meeting in April 2013, CFMEU officers Setka and Reardon threatened Boral employees - and that this conduct contravened the section of the ACL ('**April meeting conduct**').

-Stay application-

In February 2016, a consent order was made by the Court effecting a stay upon the proceeding for the relief sought in respect of the April meeting conduct. In April 2016, each of the Union, Setka and Reardon sought a stay relating to section 45D(1) of the ACL, on the basis that:

(a) the Court should not make declarations of contravention in respect of issues that are to be determined in the criminal jurisdiction [. .], unless the failure to do so would result in irreparable injury, in accordance with the principles set out in ASIC v HLP Financial Planning (Aust) Pty Ltd (2007) 164 FCR 487; and
(b) the balancing of justice between the parties favours a stay of the civil proceedings, in accordance with the principles set out in McMahon v Gould (1982) 7 ACLR 202.

In May 2016, the primary judge Middleton J ordered that the application for stay on these grounds be dismissed, and published reasons at [2016] FCA 504. Also in May 2016, each of the Union, Setka and Reardon sought leave to appeal.

-Leave to appeal-

The leave application was heard before Dowsett, Tracey and Bromberg JJ.

A. Overview; claims and submissions

The refusal by the primary judge to stay the proceeding was interlocutory. Accordingly, leave to appeal is required by s 24(1A) of the *Federal Court of Australia Act 1976* (Cth). The questions to be considered when granting leave to appeal from an interlocutory judgment comprises two questions:

- whether the primary decision is attended by sufficient doubt to warrant its being reconsidered by the appeal Court; and
- if substantial injustice would result if leave were refused, supposing the decision to be wrong.

A further consideration means that appeals against a discretion are less often granted: Hogan v Australian Crime Commission [2010] 240 CLR 651. In Hogan, the High Court found:

Appellate intervention in matters of practice or procedure, where no questions of general principle are at stake, has been said to require the exercise of particular caution.

The full court adopted the reasons in Hogan; see [14]. The full court also noted that the errors *in exercising a discretion* which are those in considering the appellants' application for a stay in the primary application, are those of the kind referred to in House v King. It is not enough to overturn a discretionary judgment that the appeal judges would have weighted considerations differently to the primary judge: see Markarian v R (2005) 228 CLR 357.

The applicants CFMEU, Setka and Reardon alleged they would suffer extensive prejudice if no stay were granted; this included the CFMEU exposing its defence; the prejudice of overlapping proceedings; and the primacy (in legal terms) of the criminal proceedings over the civil penalty claims.

B. Consideration of the discretion to stay, in light of House v King

The full court considered the principles in cases like Commissioner of the Australian Federal Police v Zhao (2015) 255 CLR 46, as to the exercise of discretions to stay a civil proceeding where criminal proceedings are on foot. The full court found (at [22]):

- where both civil and criminal proceedings are pending, a stay of the civil proceeding will be ordered where "the interests of justice require such an order";
- a court will not stay a civil proceeding merely because related charges have been brought against an accused and criminal proceedings are pending;
- to warrant a stay of the civil proceeding, "it must be apparent" that the accused "is at risk of prejudice in the conduct of his or her defence in the criminal trial"; and
- the risk of prejudice must be real and that risk is to be weighed against the prejudice that a stay of the civil proceeding would occasion:

As with all discretionary decisions, the key to reviewing Middleton J's refusal to stay is a balance of considerations. In this case, the full court found there was no error in the primary judge's consideration, and dismissed the application for leave to appeal.

Rationale of the decision

This case highlights some of the difficulties attended by industrial relations proceedings – where a civil cause of action lies with a party but criminal proceedings are pending, foreshadowed or likely. In many cases, the risk of prejudice (set out in cases like Zhao in the High Court) will be real and a prosecutor in a criminal case will gain an advantage from the 'dry run' in a civil trial. Cases in which a prosecutorial authority will choose not to pursue such a viable criminal claim will be a relative rarity.

There is an undeniable tension between the protections offered (to individuals accused of civil penalty provisions, where criminal cases are on foot) in the context of seeking to stay civil proceedings -- and the more general protections which exist, for example in the privilege against self-incrimination. For this reason, it is quite likely that the CFMEU (as they have done in relation to other claims, in the past) will seek leave to appeal to the High Court, even if only for Setka and Reardon.

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21 July 2016