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TRANSCRIPT OF PROCEEDINGS

O/N 91545

FEDERAL COURT OF AUSTRALIA

QUEENSLAND REGISTRY

SPENDER J

No. QUD 427 of 2007

STEVEN LOVEWELL

and

BRADLEY O'CARROLL and OTHERS

BRISBANE

10.39 AM, WEDNESDAY, 8 OCTOBER 2008

Continued from 7.10.08

DAY TWO

MR M. BRADY appears for the applicant
MR D. KENT appears for the respondent

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HIS HONOUR: Call the matter, please.

MR BRADY: Your Honour, the parties have agreed a resolution to the matter and as part of the resolution the parties have agreed, by consent, that the applicant can discontinue the proceedings on certain terms as to costs. I will hand up a copy of the notice of discontinuance that I would ask your Honour's leave to file. I don't need leave to discontinue in accordance with order 22, rule 2, but I do need to file a notice of discontinuance.

HIS HONOUR: Yes. Yes. What leave do I need to give you?

MR BRADY: Simply leave to file the notice of discontinuance.

HIS HONOUR: Leave to file it. Yes, very well. You can file a notice of discontinuance at any time with the consequence that are picked up by the rules. Is that right?

MR BRADY: Yes, yes.

HIS HONOUR: The consequence that the parties have agreed is in variation of that automatic consequence.

MR BRADY: Yes. Order 22, rule 3, subrule (ii), provides that a party who discontinues under subparagraph 2(i)(c), which is the subparagraph about where the parties consent:

> *...is liable to pay the costs of the other party or parties occasioned by the whole or the relevant part of the proceeding unless the terms of the consent provide otherwise.*

In this case, the terms of the consent provide specifically in respect of how the costs are to be dealt with.

HIS HONOUR: Yes, yes, very well. That's right. I give you leave to file this notice of discontinuance, which I will initial, date and place with the papers. Can I say, however, that this is a course which is clearly appropriate in the light of the evidence which the court heard yesterday. This case concerns an authorised officer of the Australian Building and Construction Commission seeking civil penalties against a union official, a federally registered union and a state registered counterpart for a contravention of section 43 of the Act which prohibits a form of industrial thuggery. The case, as brought and as evidenced by the evidence yesterday, was misconceived, was completely without merit and should not have been brought.

There is room for the view that if the commission was even-handed in discharging its task of ensuring industrial harmony and lawfulness in the building or construction industry proceedings, not necessarily in this court and not necessarily confined to civil industrial law, should have been brought against a company, Underground, and

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its managing director and possibly another director. The set-up by Underground of its workers as independent subcontractors is and was a matter requiring thorough investigation. The arrangement is very similar to that which prompted the employment advocate, Nigel Clive Hadgkiss, to bring proceedings against the Construction, Forestry, Mining and Energy Union and Ors, QUD 165 of 2004 which, after two days of hearing on 12 and 13 September 2005, led to the filing of a notice of discontinuance by the employment advocate on 23 September 2005.

That application was an application under section 298T of the Workplace Relations Act 1996, Commonwealth, and involved a similar corporate arrangement where workers of a tiling company on a project in Cairns were styled independent subcontractors, notwithstanding that they were, in truth, employees. The present arrangement in the present proceedings, on the material presently available to me, strongly suggests that the arrangement of the workers as "independent subcontractors" was a sham, a bogus arrangement. It was an example of dishonest or fraudulent financial engineering by Underground, whose intended purpose was to avoid the payments made under the certified agreement which bound Underground at the time.

In addition, the arrangement which Underground pursued was, in my view, a dishonest attempt to evade payment by the employer to the ATO of the income tax which the employer was obliged under the law of the Commonwealth to pay to the office in respect of the income tax obligations of its employees. It was also an attempt to evade the obligation on the employer to pay into the superannuation funds of the employees the 9 per cent that is mandated by Commonwealth legislation.

The whole arrangement is redolent of many separate acts that, in truth, have the potential to constitute frauds on the revenue. In addition, the acts of conducting the financial arrangements of the employment situation as Underground did constitute acts which evade the compliance with the terms of a certified agreement. A certified agreement is not simply an agreement between an employer and the employer's employees. It is certified by the commission and constitutes, in a sense, a piece of legislation of the Commonwealth.

The evidence in this case also establishes that the managing director of Underground is a foul-mouthed industrial cowboy. If the evidence admitted by the solicitors for the applicant that was engaged in by the managing director of Underground had been uttered in an industrial context by a union official, it would be extraordinary if that were not the subject of serious investigation and likely prosecution. The promotion of industrial harmony and the ensuring of lawfulness of conduct of those engaged in the industry of building construction is extremely important, but as one which requires an even-handed investigation and an even-handed view as to resort to civil or criminal proceedings, and that seems very much to be missing in this case.

The commercial arrangements that Underground entered into with its workers is a species of a black economy, which, unfortunately, seems to exist in the building industry, and equally, that it is to be stamped out if at all possible in the payment to

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workers in such a way as to avoid the obligations of the income tax legislation and the superannuation legislation. It is not to be ignored or a blind eye cast when it is engaged in by employers. As I say, the offence constituted by section 43 is a species of industrial thuggery, and is properly to be the subject of condign punishment if it is established. In this particular case, as I have said at the outset, the pursuing of a civil penalty against each of the three respondents was misconceived.

The case was completely without merit and should not have been brought. I note that Mr Lovewell has today discontinued those proceedings on terms, and in my view, that is very much the appropriate way in which this matter should have been concluded. I will say nothing further. Is there anything further that any party wishes to say?

MR BRADY: No, your Honour.

MR KENT: No, thank you, your Honour.

MATTER ADJOURNED at 10.51 am INDEFINITELY

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