Broadspectrum (Australia) Pty Ltd v United Voice & Ors [2019] HCATrans 57 (22 March 2019)

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[2019] HCATrans 057

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Perth No P49 of 2018

B e t w e e n -

BROADSPECTRUM (AUSTRALIA) PTY LTD

Applicant

and

UNITED VOICE

First Respondent

FAIR WORK COMMISSION

Second Respondent

TRANSPORT WORKERS' UNION OF AUSTRALIA

Third Respondent

Application for special leave to appeal

KEANE J
GORDON J

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON FRIDAY, 22 MARCH 2019, AT 10.38 AM

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MR S.J. WOOD, QC: If it pleases the Court, I appear with my learned friend, **MR D. TERNOVSKI**, for the applicant. (instructed by KHQ Lawyers)

MR M. GIBIAN, SC: May it please, I appear with **MR A.P. GUY** for the first and third respondents. (instructed by Solicitor, United Voice)

KEANE J: Mr Wood.

MR WOOD: Thank you, your Honours. Your Honours, the error in the court's decision below was that it found that the Commission had applied the right test, the broader test, for coverage, a test that was first propounded, or propounded by this Court in *ALDI* even though the Commission was attempting to apply the narrower old Federal Court test for coverage; that is the error, it is found at paragraphs 39 and 40 of the reasons for decision.

KEANE J: Of the?

MR WOOD: Of the Full Court.

GORDON J: This is on application book

MR WOOD: Application book 44 to 45, your Honours.

GORDON J: Is it right that those paragraphs are in effect not critical or essential to the reasoning of the Full Court?

MR WOOD: No.

GORDON J: They seem to be

KEANE J: They look like an afterthought.

MR WOOD: No, your Honour, that is not right. No, your Honours.

GORDON J: It says "Furthermore and in any event".

MR WOOD: The basis upon which the case was run below was on two bases: one, that there was an irrelevant consideration taken into account by the Commission and, in any event, two, that the Commission applied the wrong test, which it clearly did because this Court had not yet propounded the broader coverage test in *ALDI*. At the time the Commission came to make its decision the only test that it could apply, acting in an orthodox manner, was the narrower Federal Court test also propounded by the Federal Court in the *ALDI Case*. That argument was before the court. It was encompassed by the grounds before the court. It was in the written submissions.

GORDON J: Was it? I thought the point taken against you was it was not raised until oral submissions in reply

MR WOOD: No, that is right, your Honours.

GORDON J: and as a result the court did not have the benefit of submissions on the issue.

MR WOOD: No, that is not correct. What happened was that the point was raised in the written submissions, admittedly at that point in the written submissions as a point going to discretion, but the point was clearly raised that the Commission had applied the wrong test.

KEANE J: To say that it was raised as a point going to discretion is to acknowledge that it was not dispositive.

MR WOOD: Well, that is true at that point, at the point of the written submissions.

KEANE J: Quite. So is there not an element here of an argument about a tail wagging a dog?

MR WOOD: Well, that was certainly the view that the Full Federal Court took, your Honour, but in terms of the way in which the matter progressed our learned friends were on notice that this point was being raised. It was a legal point; it did not require any additional facts. By the time we got to oral submissions the point was put as a separate jurisdictional error before

GORDON J: For the first time.

MR WOOD: For the first time orally.

GORDON J: Yes.

MR WOOD: Yes. At that point in those submissions that we advanced orally it was put my learned friend who appeared Mr Gibian who appears today and appeared there, listened to it. When we sat down the presiding judge, Justice Bromberg, put to my learned friend they were putting the case on two bases: on the point of a jurisdictional error because of taking into account irrelevant considerations and also because the Commission applied the wrong test.

Now, the reason that it was being put on that basis was, of course, because by that stage this Court had propounded the broader test in *ALDI*, the broader coverage test, which it did not do until December of 2017. My learned friend then answered the proposition that was being put and his answer is reflected in paragraphs 39 and 40 of the reasons for decision. He did not ask for an adjournment. He did not say he was disadvantaged, nor could he, having notice of the point. No application for leave to amend was made.

GORDON J: By you.

MR WOOD: My learned friend did not say he could not answer the point, your Honour. He did answer the point. If we had have been told – if my learned friend had have got up and said we require our learned friends to seek leave to amend, we would say, what, you do not need leave to amend our grounds, our grounds cover the point. What? Leave to amend our written submissions by putting it as a substantive point rather than a discretionary point? Then we would have got up and said, we asked for that leave and it should be granted because there is no detriment to our learned friends and what could be said?

The similar point was raised, remember, in the High Court, in this Court, in the *ALDI Case* – not identical but a similar point – that because there was a concession as to coverage in the Federal Court in *ALDI* that that concession as to coverage prevented the argument as to coverage being run in the High Court, in this Court. This Court said, because it is a matter of public importance, even if that concession had been made, the interests of justice require that the point be articulated

GORDON J: So why here, given that the Court has pronounced so recently in December 2017 on the issue, should we take this matter?

MR WOOD: Because the way in which the Federal Court has added a rider to this Court's pronouncement, this Court's decision, in effect sets this Court's decision at nought, because if you apply the principal purpose test – as the Federal Court says, the Commission was right to do – then you in effect go back to the narrow Federal Court test.

KEANE J: The principal purpose test was applied in the Commission almost as – to the extent that it was an error, it was an error in your client's favour. The Commissioner was prepared to look at the question through the prism of the principal purpose test, having concluded already that the agreement should be set aside.

MR WOOD: That is not quite right, your Honour. What happened was the Commission below – and this is set out at paragraphs [28] and [29] of the application book at pages 17 and 18 – you will see at paragraph [28] the Commission, the Deputy President, sets out the old narrow Federal Court test for coverage, then at [29] on the next page, application book 18:

Drawing on the decision in *ALDI* and the analysis at paragraph [27] –

i.e., the findings that he had made, he says:

raise doubts as to whether the employees were "covered by" the Agreement at the time at which it was made.

He then in conformity with the test that applied at the time, the narrow Federal Court test for coverage, he applied at paragraph [35], application book 23 to 24, the principal purpose test. Now, that test is a test that is used to determine whether there is present coverage, present application of an industrial instrument. It says nothing about the future. That test was applied because the

KEANE J: Quite right, it says nothing about the future. The question is – to the extent that the question is will they be covered in the future applying the principal purpose test is actually an error in your client's favour.

MR WOOD: Yes, it is. Sorry, your Honour, I did not quite understand the import of your Honour's question; of course. That is the problem with the Federal Court's decision because the Federal Court's decision – you mean favouring this application, your Honour?

KEANE J: No, no.

MR WOOD: Sorry, that is

KEANE J: I mean favouring your client in the disposition of the application before the Federal Court.

MR WOOD: Before the Federal – before the Commission or the Federal Court?

KEANE J: The appeal before the Federal Court.

MR WOOD: No, your Honour. No, that is not right. I thought you meant in this application in order to show that there was public importance.

KEANE J: No, because the principal purpose test is an "in any event" test, having concluded – having reached the conclusion that the agreement had not been genuinely agreed by employees covered by the award. The Commission then went on to say, well, even if I look at the principal purpose of the agreement there might be a more favourable result for your client.

MR WOOD: I think a fair construction of the reasons – and that is a possible construction – I think a fair construction of the reasons when you look at what the Commission did it does not matter either way for us in terms of this application – a fair construction is that the Commission below applied the narrow Federal Court test for coverage, as it was obliged to do because that was the law at the time.

GORDON J: That is what you complained about?

MR WOOD: That is what we complained about. In assisting the Commission to do that the Commission applied the principal purpose test, which is, of course, on allfours with the narrow Federal Court test for coverage. It is the same test because it is aimed at the same object trying to determine whether at present there is coverage or application.

KEANE J: The principal purpose has nothing to do with whether there is coverage at the moment. It is an attempt to predict the future and it is a poor predictor. In fact, it is an insufficient predictor.

MR WOOD: I am not sure I would agree with that proposition, your Honour, because

GORDON J: It is the way in which the Full Court saw it because if you go to paragraph 40 on page 44 of the application book they in effect describe the way in which they interpreted the President's reasons:

did so by reference to the likelihood that at a later time

MR WOOD: Yes, that is what he did, but in the wrong way according to the test that this Court says should be applied. If you look at what the Commission did at paragraph [35], it applied *Carpenter* and said:

"In our view –

This is the quote from *Carpenter* at the top of application book 24:

in determining whether or not a particular award applies –

i.e., applies at the moment:

to identified employment –

that is the test and these are the factors you take into account. The Commission then went on in the full paragraph on application book 24 to make two points. The first seven lines are taken up with analysis of the work that the employees were doing at the time, the preparatory work. The second seven lines are concerned with what they would be doing in the future, and rather than those factors identified in the second seven lines assisting the question of coverage they were used properly because the test then was a narrow test to say that the employees were not covered.

GORDON J: I know that, Mr Wood, but my problem is that when you go to 44 and 45 and deal with the way in which the Federal Court dealt with the matter when one gets to paragraph 40 you have this use of the principal purpose test looking to the future, so describing the reasons. Then on the top of 45 the court recognises that applying that test the President would have said they were covered and then they say:

The reasoning in *ALDI* does not support a conclusion that the reasoning of the Deputy President involved a misconstruction of s 186(2)(a).

In other words, when we apply the proper test we get to the same conclusion.

MR WOOD: That is not quite correct because it is missing a step

GORDON J: It may be missing a step but they did not need to go through the steps; that is my point.

MR WOOD: They did, your Honour, for this reason

GORDON J: Why?

MR WOOD: If you apply the principal purpose test as a rider to what this Court has said the proper test is – the court says in paragraph 39, the way the Commission went about it was "not inconsistent with" the broader High Court test. That is the conclusion in 39 and paragraph 40 of the reasons. In paragraph 40, the court says, if you apply the principal purpose test then that is consistent with this Court's coverage test. Now, that is not true and it must not be true

because it leaves out the very thing that was determined by this Court to be essential when it came to posit the broader test for coverage, that is, an examination of the future.

KEANE J: Mr Wood, to the extent that there is this level of controversy about just what it was that was decided and whether or not what you are complaining about was actually crucial to the decision that does tend to suggest that it is not a great vehicle for the agitation of the issue and that if there is really a question as to whether the Full Court of the Federal Court is actually misunderstanding what this Court said in *ALDI* we might well wait for a case that raises it more squarely than a case where we are involved in this level of parsing and analysis of what the court actually said.

MR WOOD: Well, that may well be the position this Court takes, but we would say leaving – taking the case at its highest for our learned friends, looking at the reasons of the Commission in the most favourable light for our learned friends, it is plain that the wrong test was applied; that is selfevident because of the – just the time at which the decision was made.

That decision, that narrow test for coverage, was overturned by this Court and replaced with a broader one. The broader one does not quite overturn it because the narrow one is a subset of the broader one. Now, somehow by applying the narrow one the Federal Court said that what the Commission did was consistent with the broader one, and you ask yourself, well, how did they bridge that, how did that gap get bridged because they are not the same test, and the bridge is the use of the principal purpose test, that is what happened in the reasons in paragraph 40.

Now, when you think through that logic, that the use of the principal purpose test can be consistent with the broader test propounded by this Court, that cannot stand, that cannot be right, because the broader test which encompasses the narrow test is not coextensive with the principal purpose test. The principal purpose test is a narrower test, and it must be because of the reasons of the Commission, even taken as favourably as they could be in our learned friend's interest.

Now, if that test was applied at paragraph 40 in the *ALDI Case* itself, if the principal purpose test was applied, then the result in *ALDI* would have been different. It must have been because the principal purpose for their employment was working at the other stores.

GORDON J: Are there any other decisions of the Federal Court or the Commission which have adopted a different construction of the *ALDI* test, adopted what you call this characterisation of the *ALDI* test since the decision?

MR WOOD: Sorry, just give me the question again, your Honour. At which level?

GORDON J: Certainly. December 2017, *ALDI* was handed down

MR WOOD: Yes, your Honour.

GORDON J: Have there been any other decisions of the Commission or the Federal Court that have misunderstood the way in which *ALDI* should be applied? Is the problem endemic?

MR WOOD: I could not say it is endemic because the

GORDON J: No. Can you refer the Court to any authority which has done the same thing since?

MR WOOD: Well, the decision of the Federal Court was delivered in August of last year and we are not permitted by the normal rules of bringing this sort of proceeding to wait till the problem becomes endemic

KEANE J: No.

GORDON J: No, no, we are looking to see whether it is a real problem. Is this just – one of the questions the presiding judge talked to you about was appropriate vehicle.

KEANE J: Is there a real problem with this? What you are presenting to us is some remarks that look like an alternative basis for reaching a conclusion, or supporting a conclusion that has already been reached as to the want of genuine agreement.

MR WOOD: Well, I do not think that is a fair characterisation of the reasons, but I understand we have had that debate, your Honour. The best way I could answer Justice Gordon's question about whether it is a real problem is that it is now March, the Federal Court's decision was handed down in August, it has been six months. I can say I will predict it will be a problem but that is not an answer to your question because that is merely a prediction, but at the moment I am aware of the *Broadspectrum Case* being used in argument at the level of the Commission but it has not percolated up to the level of the Federal Court yet, it has only been six months.

KEANE J: Well, that may be so but the problem remains that if we are to take the matter up as an occasion to address the problem with the application of this Court's decision then ordinary prudence would suggest we wait for a case that shows that it is a problem, rather than a case where, to the extent the problem is identified at all, it is identified by way of an argument made in the heel of the hunt.

MR WOOD: Well, I understand the point your Honour is making, and I notice the light is on, but this argument was before the Court, it gave it my learned friend put his position very simply and the reasons are what they are but the reasons reveal that if the principal purpose test is applied as a bridge between the old Federal Court test, the narrow one, and the broader High Court test, then it will have the effect of wiping out the broader High Court test and that is what the Federal Court have done in support of the reasons of the Commission.

KEANE J: Thanks, Mr Wood. We need not trouble you, Mr Gibian.

The appeal foreshadowed by this application for special leave to appeal would not be a suitable vehicle for agitation or determination of the issues proposed by the applicant. The application for special leave should be refused.

MR GIBIAN: I think the applicant accepted that costs would follow, your Honours.

KEANE J: With costs?

MR GIBIAN: Yes, your Honours.

KEANE J: The application for special leave is refused with costs.

AT 11.00 AM THE MATTER WAS CONCLUDED

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