

# Supreme Court Notes

Reporters for this month's Supreme Court notes include Anita Kneebone, Alistair Shields, and Roger Bednall. High Court Notes reporter for this month is David Lisson.

## ILLEGAL AND VOID CONTRACTS - CONTRACT TO DRILL WATER BORES CONTRARY TO THE WATER ACT

*Colin Fitzgerald v  
FJ Leonhardt Pty Ltd*

No AP15 of 1994

Court of Appeal

Judgment of Martin CJ Angel and Thomas JJ delivered 26 April 1995.

The appellant contracted with the respondent to drill three bores on the appellant's land at Hingston Beach. The respondent proceeded to drill several bores on the land, however neither party had obtained an authority from the Controller of Water Resources in accordance with section 57 of the *Water Act* to carry out the drilling.

The respondent commenced action to recover the sum of \$20,595 and costs for the work completed. In the Local Court, it was held that the claim made by the respondent for the contract price could not succeed because the drilling was illegal. On appeal to the Supreme Court, the Court held that having regard to all the proper indications, the respondent was able to enforce the contract against the appellant because the contract was not rendered void or unenforceable, either expressly or impliedly, by the *Water Act*. The appellant appealed to the Court of Appeal.

Held by Martin CJ, Thomas J, (Angel J dissenting) that the appeal be dismissed, the illegality did not go to the core or essence of the method of performance of the contract. It would be unjust if the appellant could accept the benefit of respondent's work without paying for it.

The effect of the provisions of the *Water Act* is that the plaintiff and the defendant are subject to a penalty, however it does not render the contract between them unenforceable.

S Gearing instructed by Close and Carter for the appellant.

D Norman and Associates for the respondent.

AS

## WORK HEALTH APPEAL *Wormald International (Aust) Pty Ltd v Barry Leslie Aherne*

Supreme Court

Judgment of Mildren J delivered 23 June 1995.

The appellant appealed against a decision of the Work Health Court awarding interest and punitive damages to the respondent in respect of compensation payments due. The orders of the Work Health Court were set aside.

His Honour addressed the issue of whether (1) new orders should be made, (2) the matter be remitted to the Work Health Court, or (3) no further order be made.

Having considered section 116 of the *Work Health Act* His Honour concluded that he had no power to remit the matter to the Work Health Court.

His Honour further concluded, after considering Section 116(2) of the *Work Health Act* that "... the power [of the appellate court] must include, in a proper case, a power to make such findings on the evidence which ought to have been made and a power to exercise such discretions as ought to have been exercised in order to properly decide the appeal."

His Honour proceeded to make orders in substitution for the previous orders of the Work Health Court awarding the respondent interest and punitive damages. There follows an explanation of previous orders for costs, and a general discussion as the Court's powers to award costs.

Mr Cassells for the appellant.

Mr Clift for the respondent.

RB

## NEGLIGENCE – PUBLIC AUTHORITY – OCCUPIERS LIABILITY

*Shoemith v NT of Australia and  
Katherine Town Council*

No SC 492 of 1990

Judgment of Martin CJ delivered 10 August 1995.

The plaintiff claimed damages for negligence against the defendants as occupiers of an area known as the Katherine Hot Springs. The plaintiff fell from a fallen tree projecting over the waterhole, struck his head on a submerged rock ledge and suffered a dislocation of his spine resulting in quadriplegia. The quantum of loss had been agreed. The issue

before the court was liability, if any, of the defendants to the plaintiff and as between the defendants themselves.

The land in which the waterhole was located was unalienated Crown land which lay within the boundaries of the municipality of Katherine. The Territory owned the land and the Katherine Town Council carried out work to the relevant land with the consent of the Territory. The Council had no legal rights to occupy the area except as derived from the Territory. The Council's activities in relation to the area included improvements at the waterhole, maintenance and cleaning services.

On the question of liability, held that:

1) in addition to its legal status as owner of the land, the Territory was aware of the developments in and around the waterhole by the Katherine Town Council through information conveyed to it by the Council and inspections by its officers. Both defendants knew or ought to have known about the fallen tree and the rock ledge;

2) the plaintiff had established all the elements of negligence;

3) there was no contributory negligence on the part of the plaintiff, the onus being on the defendants to prove that the plaintiff did not take reasonable care for his safety;

4) the defendants failed to discharge their onus that the plaintiff had voluntarily accepted the risks in standing or moving on the fallen tree.

As to apportionment, the Chief Justice found both defendants liable for the plaintiff's loss. The Territory owned the land and knew of the waterhole and the recreational facilities offered by it to the public. It knew, or ought to have known, of the fallen tree and the ledge. It cannot absolve itself of liability by saying that it was the Council which carried out the improvements and maintenance to the area. The Council did the work with the consent of the Territory. There was no evidence to show that the Council had any greater control or responsibility because of its activities than did the Territory as owner. Held that damages be borne equally as between the defendants.

Mr P Coombe QC, instructed by Ms M Day, Elston & Gilchrist, for the plaintiff.

Mr R Wild QC, instructed by Ms R Webb, Attorney-General's Department, for the first defendant.

Mr T Worthington, instructed by Mr J Stewart, Ward Keller, for the second defendant.

AK