

Supreme Court Notes

Work Health Dux Litus

Edwards v Air Power Pty Ltd. *No 213 of 1995*

Judgement of Mildren J. 8 Nov. 1995.

The Worker appealed a decision of the Work Health Court that the worker be *dux litus* in proceedings challenging the Employer's decision to reduce weekly benefits.

The worker had claimed Work Health compensation following an injury on or about 30 October 1990. The claim was accepted and payments made to the Worker until on or about 25 March 1994 when the Employer reduced weekly benefits pursuant to s 69 of the *Work Health Act*.

The Form 5 notice alleged the worker was partially recovered from the injury and was fit to resume alternative duties.

In addition to disputing the decision to reduce benefits the worker sought orders that the Employer take reasonable steps to provide employment and retraining. The Worker also sought orders for arrears of compensation for medical treatment and for retraining expenses and alleged ongoing incapacity. The learned Magistrate determined that the Worker would be *dux litus* in the Work Health proceedings.

Counsel for the Worker on the Appeal submitted that in Work Health proceedings challenging a decision to reduce or cancel payments the employer bears the onus of proving the change in circumstances and therefore becomes *dux litus* in the proceedings: *AAT Kings Tours Pty Ltd v Hughes* (1994) 99 NTR 33 and *J H Constructions Pty Ltd v Davies* (unreported, NT Supreme Court 3 November 1989 per Ash CJ). Counsel for the Employer submitted that the proceedings in the Work Health Court raised issues other than the decision to reduce payments. It was argued that it is only where the burden of proof on all issues lies with the respondent that the respondent should begin.

Mildren J held that the decision as to which party was *dux litus* involved questions of general convenience and depended upon the issues raised in the

pleadings. Amongst other factors is the question of whether a party is called upon to prove a negative. The learned Magistrate's decision was a discretionary ruling in a matter of practice and procedure: *Prolean (Holdings) Ltd. v American Home Assurance Co* (1985) VR 187 at 191 per Marks J.

Mildren J was not satisfied that the discretion had miscarried and dismissed the Appeal with costs.

Hinds & Hinds v Uellendahl, Amphora Pty Ltd. & Syrimi & Syrimi.

Judgement of Thomas J. 22 September 1995

This matter involves a dispute over a block of land situated on the corner of Stuart Highway, Lagoon Road and Agostini Road.

On 17 May 1984 the property was owned by Australian National Railways Commission who leased the land to Horst Uellendahl for a period of ten years.

On the 20 July 1988 the Australian National Railways Commission entered into an agreement for sale of the land to the first defendants.

On or about 20 July 1988 the plaintiffs and the first defendants entered into an oral contract for sale of the land. The plaintiffs and the first defendants then entered into a written contract for sale of the land on 8 August 1988.

On 20 July 1988, in part performance of the contract, the plaintiffs paid a deposit of \$5,000. to the Australian National Railways Commission. The Plaintiffs then arranged to mortgage their own property to obtain the balance of \$95,000. Mr Hinds also organised property insurance on this property for the loan.

The Plaintiffs arranged for an agreement to be drawn between themselves and the first defendants together with an acknowledgement that the first defendants held the property in trust for the plaintiffs until such time as the property was transferred to the plaintiffs.

On 8 August 1988 the plaintiffs were contacted by the first defendants and informed that their money to purchase a property would not be needed.

On 9 September 1988 the land was

transferred from the Australian National Railways Commission to the first defendants.

The first defendants then transferred their estate in the land to the second defendant, a registered company.

The second defendants transferred land to the third defendants on 9 September 1988.

Held.

The plaintiff and the first defendants entered into a binding and valid contract dated 8 August 1988 and that such a contract was not obtained by duress, threats or intimidating behaviour on the part of the plaintiffs.

The plaintiffs were at all relevant times willing and able to complete the contract between themselves and the first defendants.

The first defendant's refusal to comply with the agreement for the sale of the land constituted repudiation of the contract with the plaintiffs by the first defendants.

The actions of the plaintiffs were not such as to indicate an election on their behalf to terminate the contract between themselves and the first defendants. The contract between the plaintiffs and the first defendant was specifically enforceable. The land was held by the first defendants by way of constructive trust for the plaintiffs.

The second defendant first came into existence on 1 September 1988. The third defendants were clearly acting for their own benefit and not for the benefit of the second defendant. The second defendant was a vehicle for their scheme. The third defendants offered an inducement to the first defendants to retain interest in the land and breach their contract with the plaintiffs for the transfer of the land from the first defendants to the plaintiffs. The third defendants induced the first defendants to breach the contract between the plaintiff and the first defendants.

The plaintiffs are entitled to a claim for damage against the third defendant and the benefit received by the third defendant by reason of their breach of trust. Plaintiffs have judgements against the first defendants for breach of contract and breach of trust with damages to be assessed.

Reporters: Graham Jefferson and
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