JEFF PHILLIPS ON THE CASE

In this analysis, Jeffrey Phillips SC scrutinises a recent Federal Court case in which it was held that the independent contractors jurisdiction bound and prohibited the court from making orders that have a prior or earlier effect. As such, the legislation prevented a proper assessment of appropriate compensation and does not provide the ordinary power to award costs, providing little by way of remedy for business.

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INFORMAX INTERNATIONAL V CLARIUS GROUP

In *Informax International Pty Ltd v Clarius Group Ltd (No 2)* [2011] FCA 934, Justice Nye Perram has delivered a decision dealing with the remedies available under the *Independent Contractors Act 2006* (Cth). Perram J declined orders for relief seeking damages.

In an earlier set of proceedings, Perram J had found that the contract between the first applicant (Informax) and the respondent (Candle) were unfair and inserted into the contracts two terms seeking to redress what was found to be unfair.

The amendment to the contract related to contracts dated May and June 2008. The added terms related to the prohibition of conduct occurring in September and October 2008. The date of the order making the amendment to the contract was March 2011. Candle argued that it could not be in breach of those inserted terms because, as at the date of the breach, the terms were not to be found in the contracts. The applicants, on the other hand, argued that the orders of 29 March 2011 should be interpreted as retrospective so that the terms inserted should be deemed to have been in the contract as at the relevant time in 2008 when the contravening conduct occurred.

Both parties needed to focus upon s 16(4) of the Act which provides:

(4) An order takes effect on the date of the order or a later date specified in the order.

Candle argued that that subsection did not permit an order having a retrospective operation because "such an order would be one neither taking effect on the date of its making nor at some later time" (at [3]). The applicants argued in the alternative for the operation of the slip rule as provided by the *Federal Court Rules* if the earlier order on its face did not have a retrospective effect. The issue of retrospectivity of an order was not raised at the first hearing, although what was an issue in the first hearing was whether an order could be made to vary a contract that had already been terminated. This was determined in favour of the applicants (see *Informax International Pty Ltd v Clarius Group Ltd* (2011) 192 FCR 210 at [150]).

His Honour recognised that in making the orders in March 2011 in relation to a contract that had ended in October 2008 would be of no utility. That is, if the orders were to make sure that Candle did not seek to persuade Woolworths to dispense with the applicants' services. He found that it would be implicit that in the reasons for judgment in the first decision that there was an assumption that the orders would be retrospective in operation (at [9]). However, the actual terms of the orders made varying the contract did not include an express statement that the variations would take effect from the date of the formation of the contracts (at [10]). His Honour found that there was jurisdiction to amend the orders to embody the reasons and to give effect to the intention of the judgment. However, he felt bound and prohibited by s 16(4) of the Act to bring about an order for relief which varies terms of a contract at a time prior to the making of the order (at [12]).

His Honour found that the difficulties the applicants shied away from in the order, which they had sought at the first hearing, was a debate about the very terms of s 16(4) which now bedevilled them (at [16]). The order the applicants sought at the first hearing, on its face, was not expressly retrospective. His Honour's decision required him to examine a number of previous authorities under the independent contractors jurisdiction as exercised by the Australian Industrial Relations

Commission under ss 127A and 127C of the *Industrial Relations Act 1988* (Cth). He considered the authorities of *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 and *Gerrard v Mayne Nickless Ltd* (1996) 135 ALR 494. He found that the orders in those cases were not made retrospectively, but were prospective in their operation. In this regard, he respectfully disagreed with the finding of Cameron FM in *Keldote Pty Ltd v Riteway Transport Pty Ltd* (2009) 185 IR 155 that such orders could be made retrospectively.

In considering these cases, Perram J eloquently observed "the attempt to operate on the past by speaking only to the future may, I think, be the source of some of the present obscurities" (at [38]). He returned to the words of s 16(4) which he found to be clear, being words of apparent limitation on their face that they did not permit the orders to have a prior or earlier effect (at [40]). He turned to earlier cases where the court had varied the contract by providing for an agreed damages clause. In neither case could it be said: "Did the court historically re-engineer the contract to permit a breach of contract suit to be brought" (at [41])? (See *Harding v EIG Ansvar Ltd* (2000) 95 IR 349; *Buchmueller v Allied Express Transport Pty Ltd* (1999) 88 IR 465.)

His Honour then dealt with one of the proposed orders sought in the amended notice of motion before him, that is, to provide for an order giving an agreed damages clause. It was apparent that proposed order was prospective in form and did not run into the difficulties with s 16(4) (at [45]). In resisting that part of the claim, Candle sought to bring in s 12(3) of the Act which provides:

> In reviewing a services contract, the court must only have regard to:
> (a) The terms of the contract when it was made; and
> (b) To the extent that this Part allows the Court to consider other matters – other matters as existing at the time when the contract was made.

By calling in aid that subsection, it was argued that the actions which took place subsequently when Candle contacted Woolworths, were not matters that were "existing at the time when the contract was made" (at [48]). Ultimately, his Honour found that even though an order was made to render the contact fair, it was limited in that the remediation was available "to cure the contract but not the historical conduct which the contract should have prevented" (at [50]). That is, the Act is concerned with the prospective remediation of unfair or harsh contracts (at [51]).

In summary, his Honour found that the combined operation of ss 12(3), 16(2) and 16(4):

> prevent an examination of the matters which would need to be examined in order to undertake an assessment of the appropriate compensation. Perhaps the easiest way to express this conclusion is to say that those sections disclose a scheme whose end is the reform of the unfair contracts and not the remediation of unfair behaviours which have not been contractually forbidden. (at [53])

His Honour found that the statute bound the court from only making prospective orders and that is the point of the particular subsections referred to above as being the kind of law under consideration (at [54]).

This judgment shows that the statute, if it is to have any real effect, needs to be amended forthwith. It needs to be brought into line with the long-established, but now lost, jurisprudence found within the New South Wales unfair contracts power. These provisions in the Act, in particular, have come about after the WorkChoices amendment, which wiped out the unfair contracts jurisdiction as it applied to corporations in New South Wales. Orders made by the Industrial Court of New South Wales when exercising its unfair contracts jurisdiction under s 106 of the *Industrial Relations Act 1996* (NSW) permitted the awarding of just compensation, which included damages, including restitution and beyond. Generally, applicants came to that court with a contract after it had been terminated and they sought effective redress by having terms of it amended and then seeking just compensation on account of the reformulation of the contract ab initio. The complications thrown up in this case reveal the *Independent Contractors Act* to be the paper tiger many suspected it to be. Small corporations providing services which have been subject to unfair contracts or being overborne in the negotiation of a contract, have very little by way of remedy under this Act. This power of this Act, which also does not have the courts' ordinary power to award costs, is an illusion. This particularly will have a deleterious effect upon the much oppressed owner drivers in the transport industry. Please take note, Senator Chris Evans and Tony Sheldon from the Transport Workers Union.

It is understood that this decision is under appeal.

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