

COMMONWEALTH OF AUSTRALIA v HELICOPTER RESOURCES PTY LTD & ORS (S217/2019)

Court appealed from: Full Court of the Federal Court of Australia
[2019] FCAFC 25

Date of judgment: 15 February 2019

Special leave granted: 21 June 2019

In January 2016 Captain David Wood, a helicopter pilot, died while working in the Australian Antarctic Territory, as a result of falling into a crevasse that was hidden by ice. The fall occurred while Captain Wood was attempting to reboard a helicopter that he had landed. At the time of his death, Captain Wood was employed by Helicopter Resources Pty Ltd (“Helicopter”), which was supplying helicopter services to the Commonwealth.

In September 2017 a coronial inquest into Captain Wood’s death commenced in the Australian Capital Territory (“the ACT”). In December 2017, while the inquest was still underway, both Helicopter and the Commonwealth were charged, as co-accused, with summary offences under the *Work Health and Safety Act 2011* (Cth) (“the criminal charges”). The criminal charges were laid on behalf of Comcare, in the ACT Magistrates Court. One of the criminal charges alleges contraventions arising out of the circumstances of Captain Wood’s death.

After the criminal charges were laid (and prior to the entry of pleas), Helicopter applied for the coronial inquest to be adjourned pending completion of the criminal prosecution. At that stage of the inquest, the only witness remaining to be examined was Helicopter’s Chief Pilot, Captain David Lomas. The Commonwealth submitted that the inquest should proceed to finality. On 12 April 2018 the Chief Coroner of the ACT refused Helicopter’s application. The Chief Coroner considered that Helicopter’s defence to the criminal charges would not be compromised by Captain Lomas giving evidence in the inquest, nor would the coronial findings be binding on the Magistrate determining the criminal proceedings.

Helicopter applied to the Federal Court for judicial review of the Chief Coroner’s decision, contending essentially that an examination of Captain Lomas at the inquest prior to the determination of the criminal charges risked giving rise to an interference with the criminal proceedings in two ways: (1) the prosecution might become armed with evidence and admissions attributable to Helicopter; and (2) the Commonwealth would gain an advantage of assessing the evidence that Captain Lomas might give if he were called by the Commonwealth as a witness in its defence. On 29 June 2018 Justice Bromwich dismissed Helicopter’s application, finding that although Helicopter had pointed to forensic disadvantage and a generalised sense of unfairness, it had not demonstrated that an improper interference with the criminal proceedings would result from the calling of Captain Lomas to give evidence at the inquest. Justice Bromwich found it premature to decide whether any restriction on Captain Lomas’ appearance at the inquest was warranted, since there was no evidence as to

the position Captain Lomas would take, nor could it be said in advance that the Coroner would not appropriately exercise protective powers such as restricting the disclosure of evidence.

An appeal by Helicopter was unanimously allowed by the Full Court of the Federal Court (Rares, McKerracher and Robertson JJ), which stayed the operation of any subpoena to be issued to Captain Lomas for him to give evidence at the inquest. Their Honours observed that anything said by Captain Lomas in giving evidence before the Coroner could be tendered against Helicopter as an admission by it in the criminal proceedings, by force of s 87(1)(b) of the *Evidence Act 2011* (ACT). The Full Court held that that fundamentally altered the position of Helicopter as an accused because Helicopter's hand could be forced prematurely. Such an alteration amounted to an improper interference with the criminal proceedings because it departed from the fundamental principle that the prosecution bears the onus of proving its case. Their Honours considered that such an interference could not be overcome by the entitlement of Captain Lomas to invoke the privilege against self-incrimination at the inquest, since Captain Lomas would be unable to object to answering a question on the basis that his answer might tend to incriminate Helicopter. The Full Court held that relief should not be withheld on the basis of prematurity, since the necessary considerations would be speculative and could not gainsay the risk to the due administration of justice.

The grounds of appeal are:

- The Full Court erred as to the meaning and effect of s 87 of the *Evidence Act 2011* (ACT).
- The Full Court erred as to the scope and effect of the accusatorial principle by treating it as preventing an employee of a corporation from being compelled to provide evidence that is relevant to pending criminal charges against that corporation.
- The Full Court erred in overturning the primary judge's findings as to prematurity.