WYNTON STONE AUSTRALIA PTY LTD (in liquidation) v MWH AUSTRALIA PTY LTD (M158/2010 & M159/2010)

Court appealed from: Court of Appeal of the Supreme Court of Victoria
[2010] VSCA 245

Date of referral to Full Court: 11 March 2010

In early 1997 the applicant ("WSA") was engaged by the respondent ("MWH") to perform structural design work in relation to two sewerage treatment plants. On 6 May 1997 WSA sold its business to Taylor Thompson Whitting Pty Ltd ("TTW") and MWH entered into a deed of novation by which TTW was substituted for WSA. Clause 2 of the deed provided; *"[MWH] releases and discharges WSA from all claims and demands whatsoever in respect of the contract and accepts the liability of TTW under the contract in lieu of the liability of WSA and agrees to be bound by the terms of the contract in every way as if TTW was named in the contract as a party thereto to [sic] place of WSA*". Clause 4 of the deed contained an acknowledgement by WSA that the services performed by WSA to that date had been performed in accordance with the original contract between WSA and MWH.

In late 1997 cracking started to appear in the aerator tanks at the sewerage plants. Proceedings were commenced in the Supreme Court of Victoria to determine responsibility for, and the financial consequences of, the failure of the tanks. Byrne J rejected MWH's claim against WSA for breach of contract and negligent preparation of the structural design. He found that clause 2 of the deed operated as a complete release from all claims in respect of the contract, including negligence claims. However, his Honour found that clause 4 operated as a contractual warranty in respect of the work completed under the contract. He ordered WSA to pay MWH $4,138,696 together with damages by way of interest of $2,946,601.08, for breach of warranty.

Both parties appealed to the Court of Appeal (Warren CJ, Buchanan and Nettle JJA). The issues in the appeals were: (i) whether clause 2 of the deed of novation released WSA from all liability for breach of the contract or only from liability for breach of contract occurring on or after commencement of the deed; (ii) whether clause 2 of the deed released WSA from liability in tort; and (iii) whether clause 4 of the deed amounted to a contractual warranty and, whether or not it did, was it misleading or deceptive within the meaning of s 52 of the *Trade Practices Act* 1974 (Cth) (the 'TPA').

Buchanan and Nettle JJA disagreed with the trial judge's finding on the first issue, because his construction of the deed overlooked or undervalued the operation of clause 3 of the deed, which stated: "*The effective date for the substitution of TTW for WSA and the acceptance of such substitution and transfer by the client is the date of this deed*". Their Honours considered the effect of clause 3 was that TTW took the contractual position of WSA only 'as and from' the date of the deed and, correspondingly, that WSA ceased to be responsible under the contract for any defective work undertaken only 'as and from' that date. With respect to the second issue, their Honours agreed with the trial judge's conclusion that, if clause 2 was effective to release the liability of WSA for defective design work undertaken prior to the effective date, there

was no rational basis for limiting this to exclude liability for negligence. On the third issue they also agreed with Byrne J's finding that clause 4 amounted to a contractual warranty, but disagreed with his conclusion that it was not misleading and deceptive within the meaning of s 52 of the TPA.

Warren CJ dissented on the third issue, for three reasons: first, she was not satisfied that the making of the warranty had a substantial enough causal connection to MWH's decision to execute the deed on the evidence before the Court; secondly, the failure of MWH to establish, in light of the Court's finding as to clause 2, that it suffered any loss by entering into the deed; and thirdly the procedural unfairness occasioned to WSA if MWH was allowed to raise such a claim before an appellate court in a fashion inconsistent with its conduct of its case before the trial judge.

The questions of law said to justify the grant of special leave include:

- If a court tells parties at the start of a trial, without objection, that it will treat as abandoned any pleaded claim not pressed in final submissions, can the court decide the case against the defendant on an issue not mentioned in the plaintiff's final submissions?
- When may what a court says is the "more likely" meaning of a commercial contract from "a business common sense point of view" allow it to depart from the natural and unambiguous meaning of words used in a contract?

On 11 March 2011 Heydon and Crennan JJ ordered that the applications for special leave be referred to a Full Court for argument as on appeal.