

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION v. BORAL RESOURCES (VIC) PTY LTD & ORS (M18/2015)

Court appealed from: Court of Appeal, Supreme Court of Victoria
[2014] VSCA 261

Date of judgment: 24 October 2014

Date special leave granted: 13 February 2015

On 5 April 2013 Hollingworth J, in the Supreme Court of Victoria made orders restraining the appellant ('the Union') from, inter alia, preventing, hindering or interfering with, or attempting to prevent, hinder or interfere with, the supply or possible supply of goods or services by the first respondent ('Boral') at any building or construction site in Victoria. On 22 August 2013, Boral filed a summons seeking that the Union be punished for contempt of court for allegedly establishing and maintaining, through the actions of its official Joseph Myles, a blockade of a construction site in Footscray on 16 May 2013, thereby preventing the supply of concrete to that site by Boral.

In order to succeed on the charges, Boral needed to establish either that the Union authorised Myles to engage in the alleged conduct, or that it failed to take appropriate steps to prevent it. Boral therefore sought discovery of documents that went to the issue of Myles' authority to act as he did on 16 May 2013. Daly AsJ dismissed Boral's application on the grounds that proceedings for punishment for contempt are criminal in nature and discovery is not available or appropriate in criminal proceedings. Boral successfully appealed and on 25 March 2014 Digby J ordered specific discovery as sought. His Honour held that although Daly AsJ was correct in characterising the proceeding as a 'criminal contempt', her Honour was not correct in her characterisation of it as a 'criminal proceeding', to which the rules of civil procedure did not apply.

In its appeal to the Court of Appeal (Ashley, Redlich & Weinberg JJA), the Union relied upon both *X7 v Australian Crime Commission* (2013) 248 CLR 92 and *Lee v The Queen* (2014) 308 ALR 252 as having established definitively what had always thought to be the law, namely that an alleged contemnor was not obliged to give discovery in proceedings brought against him or her. The Union further submitted that, although neither *X7* nor *Lee* involved any question of discovery, the broad-ranging statements of principle by this Court regarding the nature of the accusatorial system meant that this proceeding, which was undoubtedly criminal in nature, should not be conducted as though it were nothing more than an ordinary piece of civil litigation.

The Court of Appeal noted that the law regarding civil contempt is in an unsettled and uncertain state and that, although each side was able to call in aid a significant body of authority in support of its contention, none of those authorities was directly in point. The Court found that the problem with the Union's submissions was that a contempt proceeding cannot simply be characterised, for all purposes, as a criminal proceeding. A description of that kind may be apt for some purposes, but that is not inevitably the case. While it is clear contempt proceedings are brought within the civil jurisdiction of the Court, they have a certain chameleon-like quality, taking their character from the surrounding circumstances and the context within which the analysis proceeds. The Court saw no error in Digby J's conclusion that Daly AsJ was wrong to refuse specific discovery simply on the basis that this was a criminal proceeding and therefore the Supreme Court Rules had no application. This matter should not have been so characterised: its actual status was more complex than that.

The grounds of appeal include:

- The Court of Appeal erred in deciding that discovery may be ordered under Order 29 of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)* in contempt proceedings (which are criminal in nature) brought against a corporation under Order 75 of those Rules.