MICHAEL WILSON & PARTNERS LIMITED v NICHOLLS & ORS (S67/2011)

Court appealed from: New South Wales Court of Appeal [2010] NSWCA 222

Date of judgment: 15 September 2010

Date of grant of special leave: 11 February 2011

The First and Second Respondents were employees of the Appellant, a law firm operating in Kazakhstan. On 9 October 2006 the Appellant commenced proceedings in the Supreme Court of New South Wales against the First and Second Respondents alleging breach of fiduciary duty. Shortly beforehand it also commenced arbitration proceedings in London relating to another partner of the law firm, Mr Emmott. Again the Appellant alleged breach of fiduciary duty. (Mr Emmott however was not named as a party in the New South Wales proceedings.) On 11 December 2009 Justice Einstein found in favour of the Appellant.

On 15 September 2010 the Court of Appeal (Basten & Young JJA, Lindgren AJA) allowed the Respondents' appeal. (Much of the Court of Appeal's decision however concerned choice of law issues which are no longer in dispute.) Justice Basten (with whom Justices Young and Lindgren broadly agreed) upheld the Respondents' complaint of apprehended bias on a number of bases including:

(a) the number of ex parte applications made to the primary judge in 2007;
(b) the unusual nature of those applications;
(c) the absence of an opportunity for the Respondents to challenge the orders made ex parte;
(d) the absence of consideration in the judgments of the existence of the power, and the appropriateness of its use, to make orders in aid of criminal complaints in foreign jurisdictions;
(e) the absence of consideration of the power of the Court, on an ex parte hearing, to vary orders made by consent, pursuant to an agreement between the parties, thus unilaterally and without hearing from the affected party varying the orders which resulted from the agreement;
(f) the circumstances in which, and the period over which, confidentiality was maintained in respect of the orders permitting use of the disclosure affidavits in support of the criminal complaints;
(g) the fact that the primary judge appeared to have formed at least a tentative view that the individual Respondents had conducted themselves in a manner giving rise to a reasonable suspicion that they were involved in criminal activities, without permitting them an opportunity to present material to the contrary;
(h) forming the view last referred to on the basis of evidence of Mr Wilson in circumstances where Mr Wilson's credit was likely to be a significant issue at the trial;

(i) the absence of persuasive reasons in the judgment on the recusal application, tending to remove the basis of the apprehension of bias, and

(j) the remarks at the hearing on 28 May 2008 in respect of secreting documents in chambers.

The Respondents further contended that the Appellant's proceedings should be dismissed as an abuse of process. (After judgment was given at first instance, the Arbitrators published an interim award on liability in which they dismissed most of the claims against Mr Emmott.) Justice Basten found that to the extent that the Appellant was unsuccessful in the arbitration, it should not be able to pursue claims against the Respondents based on Mr Emmott's liability. His Honour found that such a course would constitute a collateral challenge to the Arbitrators' findings and would be an abuse of process. Justice Lindgren agreed.

The grounds of appeal include:

- The Court of Appeal erred in holding that it was an abuse of process for the Appellant to maintain and seek to enforce part of judgments of the Supreme Court of New South Wales dated 6 October 2009 and 11 December 2009, and part of orders and declarations made by the Supreme Court of New South Wales on 11 December 2009, in the face of an arbitral award made by London arbitrators on 22 February 2010.

On 4 March 2011 the Respondents filed a notice of contention, the grounds of which include:

- Upon an assumption that (if the appeal is successful) the whole of proceedings will be remitted to the Court of Appeal for further consideration (in accordance with paragraph 5.1 of the notice of appeal filed in the High Court on 25 February 2011), and subject to any direction from the High Court to the contrary, the Respondents proceed on the basis that it is not necessary, or appropriate, for them to advance in the High Court any contention that the order made by the Court of Appeal on 15 September 2010 for a re-trial should be affirmed on a ground other than an apprehension of bias in the primary judge.