SUPREME COURT OF QUEENSLAND

CITATION:	*Australia Meat Holdings P/L v Kazi* [2004] QCA 147
PARTIES:	**AUSTRALIA MEAT HOLDINGS PTY LIMITED** ACN 011 062 338 (applicant/appellant) v **MAINUDDIN AHMED KAZI** (respondent/respondent)
FILE NO/S:	Appeal No 7365 of 2003 SC No 3521 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	7 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2004
JUDGES:	Davies and Williams JJA and McMurdo J Separate reasons for judgment of each member of the Court, Davies and Williams JJA concurring as to the orders made, McMurdo J dissenting
ORDER:	**1. Appeal allowed** **2. Order of the learned primary judge of 24 July 2003 set aside** **3. In lieu, declare that the respondent was not, on 25 August 2000, a worker within the meaning of s 12(1) of the *WorkCover Queensland Act* 1996** **4. That the respondent pay the appellant's costs of the proceedings before the learned primary judge and in this Court** **5. Grant the respondent an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973**
CATCHWORDS:	STATUTES - ACTS OF PARLIAMENT - INTERPRETATION - PARTICULAR WORDS AND PHRASES - SPECIFIC INTERPRETATIONS - where respondent worked for the appellant and suffered an injury for which he sought to claim compensation from the appellant - where the respondent did not at the relevant time hold a valid visa to reside in Australia and was therefore within the definition of an "unlawful non-citizen" in s 235 of the *Migration Act* 1958 (Cth) - whether the construction of

s 235(3) of the *Migration Act* 1958 (Cth) precluded the respondent from coming within the definition of a "worker" under s 12(1) of the *WorkCover Queensland Act* 1996 (Qld) and claiming compensation - whether the learned primary judge erred in finding that s 235(3) of the *Migration Act* 1958 (Cth) did not prohibit the making of a contract of employment

WorkCover Queensland Act 1996 (Qld), s 12(1)
Migration Act 1958 (Cth), s 4, s 235

Anderson Ltd v Daniel [1924] 1 KB 138, cited
Archbolds (Freightage) Ltd v S Spanglett Ltd [1961] 1 QB 374, cited
Cope v Rowlands (1836) 2 M & W 149; 150 ER 707, cited
Cornelius v Phillips [1918] AC 199, cited
Farrow Mortgage Services Pty Ltd (in liq) v Edgar (1993) 114 ALR 1, cited
Fitzgerald v F J Leonhardt Pty Ltd (1997) 189 CLR 215, distinguished
In re An Arbitration Between Mahmoud & Ispahani [1921] 2 KB 716, cited
J C Scott Constructions v Mermaid Waters Tavern Pty Ltd [1984] 2 QdR 413, cited
Nelson v Nelson (1995) 184 CLR 538, cited
Nonferral (NSW) Pty Ltd v Taufia (1998) 43 NSWLR 312, distinguished
Riteway Express Pty Ltd v Clayton (1987) 10 NSWLR 238, cited
Seager v Copydex Ltd [1967] 1 WLR 923, cited
St John Shipping Corporation v Joseph Rank Ltd [1957] 1 QB 267, cited
Taylor v The Crowland Gas & Coke Company (1854) 10 Exch 293; 156 ER 455, cited
Vita Food Products Incorporated v Unus Shipping Company Limited (in liquidation) [1939] AC 277, cited
WorkCover Corporation (San Remo Macaroni Co Pty Ltd) v Liang Da Ping (1994) 175 LSJS 469, cited
Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410, applied

COUNSEL: J A Griffin QC, with G J Cross, for the appellant
D C Rangiah for the respondent

SOLICITORS: Abbott Tout Solicitors for the appellant
Maurice Blackburn Cashman for the respondent

DAVIES JA:

1. The questions in issue

[1] The central question in this appeal is whether the respondent was on 25 August 2000 a "worker" within the meaning of s 12(1) of the *WorkCover Queensland Act* 1996 notwithstanding that he was an unlawful non-citizen within the meaning of

s 235 of the *Migration Act* 1958 (Cth) ("the Act"). This depends on the construction of s 235(3) and was also the central question before the learned primary judge who answered it in the affirmative. Her Honour did so by concluding that s 235(3) did not prohibit the making by an employee who was an unlawful non-citizen of a contract of employment between him and his employer.

[2] Having so concluded, her Honour went on to conclude also that, as a matter of public policy, the court should not decline to enforce the contract "because of its association with the illegal activity"[1] of the respondent in working contrary to s 235(3). It will not be necessary to consider this question if her Honour erred in her construction of s 235(3). It is necessary first to set out the factual context and the relevant statutory provisions in respect of which these questions arose.

2. The factual context

[3] The respondent commenced work with the appellant at its meat works on 26 February 1998. He claimed to suffer an injury at work on 25 August 2000 and sought to claim compensation from the appellant in respect of it. Between December 2000 and June 2002 the respondent was provided with medical treatment and rehabilitation for the injury. He left the appellant's employment on 18 June 2002.

[4] At no relevant time did the respondent hold a valid visa to reside in Australia. He was therefore, at all relevant times, an unlawful non-citizen within the meaning of s 14 of the Act. He was therefore committing a continuing offence under s 235(3) of the Act.

3. The relevant provisions

[5] Section 235 of the Act is in the following terms:

> "(1) If:
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> (a) the temporary visa held by a non-citizen is subject to a prescribed condition restricting the work that the non-citizen may do in Australia; and
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> (b) the non-citizen contravenes that condition;
>
> the non-citizen commits an offence against this section.
>
> (2) For the purposes of subsection (1), a condition restricts the work that a non-citizen may do if, but not only if, it prohibits the non-citizen doing:
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> (a) any work; or
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> (b) work other than specified work; or
>
> (c) specified work.
>
> (3) An unlawful non-citizen who performs work in Australia whether for reward or otherwise commits an offence against this subsection.
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> …
>
> (5) The penalty for an offence against subsection (1), (3) or (4) is a fine not exceeding $10,000.
>
> … "

[6] That section must be construed in its context which includes s 4 which provides:

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1 *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 227.

> "(1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.
> (2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.
> (3) To advance its object, this Act requires persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non-citizens so entering.
> (4) To advance its object, this Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act."

[7] It can be seen from s 235(5) that an unlawful non-citizen who performs work such as this is liable to a fine not exceeding $10,000. An unlawful non-citizen may also be liable to detention under s 189 and to be deported under s 198, but the operation of neither of those provisions is stated to be affected by whether or not the unlawful non-citizen has performed work contrary to s 235(3). The Act does not provide expressly that, in addition, any contract for the performance of work by an unlawful non-citizen is invalid. The question is whether it does so impliedly.

[8] The term "worker" is relevantly defined in s 12 of the *WorkCover Queensland Act* as "an individual who works under a contract of service". It was common ground that this section requires the person to work under a valid contract of service.

4. The learned primary judge's reasons

[9] In concluding that s 235(3) did not impliedly invalidate the contract of employment between the parties, the learned primary judge relied principally on a decision of the New South Wales Court of Appeal in *Nonferral (NSW) Pty Ltd v Taufia*,[2] a decision upon the predecessor of s 235, s 83 which relevantly provided in sub-section (2):

> "Where a person who is an illegal entrant performs any work in Australia without the permission, in writing, of the Secretary, the person commits an offence against this sub-section."

[10] The New South Wales Court of Appeal held, by a majority, that a contract of service entered into by an illegal entrant in breach of the statutory prohibition in the *Migration Act*, s 83(2) did not render the contract illegal and unenforceable so as to disentitle a worker from claiming workers' compensation under the New South Wales *Workers' Compensation Act* 1987. In reaching that conclusion the court refused to follow a decision of the Full Court of South Australia in *WorkCover Corporation (San Remo Macaroni Co Pty Ltd) v Liang Da Ping*[3] which had been to the opposite effect.

[11] In reaching the conclusion which she did the learned primary judge was conscious of the difference between s 83(2), as it was construed in *Nonferral* and *San Remo*, and s 235(3); namely that the former provision contained the additional relevant words "without the permission in writing of the Secretary". Nevertheless her

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2 (1998) 43 NSWLR 312.
3 (1994) 175 LSJS 469.

Honour followed what she described as the same approach to the construction of the Act as that which was adopted by the majority of the court in *Nonferral*.

5. The construction of s 235(3)

[12] In *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd*,[4] Mason J said that, in construing a statute in order to determine whether it prohibits a contract, it is necessary to have regard not only to the language of the provision "but also to the scope and purpose of the statute from which inferences may be drawn as to the legislative intention regarding the extent and effect of the prohibition which the statute contains".[5] Here, the purpose of the Act is specifically stated in s 4(1); to regulate, in the national interest, the coming into and presence in, Australia of non-citizens.

[13] In the light of that purpose, s 235 may be seen as a provision regulating, in the national interest, the presence in Australia of non-citizens; in particular, whether, and if so in what circumstances non-citizens may work while present in Australia. And s 235(3) prohibits such a non-citizen from working at all if he or she is an unlawful non-citizen.

[14] In *St John Shipping Corporation v Joseph Rank Ltd*[6] Devlin J said:

> "If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication."

[15] In *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd*[7] Gibbs ACJ and Mason J made a somewhat similar point in distinguishing the statutes considered in *Cope v Rowlands*[8] and *Cornelius v Phillips*[9] from s 8 of the *Banking Act* 1959 (Cth) which was the subject of that case. In *Cornelius*, for example a registered money-lender entered into a money-lending contract at a hotel some distance from his registered address. This was held to be in contravention of a provision of the *Money Lenders Act* which prohibited a money-lender from carrying on his money-lending business other than at his registered address. It was also held that this provision prohibited the contract and made it void because the prohibition amounted to a prohibition against a registered money-lender lending money except at his registered address. In such case, it was held, "the very mischief against which the statute … was directed was brought about."[10]

[16] In *Yango*, by contrast, s 8 of the *Banking Act* 1959 (Cth) prohibited a body corporate from carrying on any banking business without authority and the question was whether specific mortgages and guarantees given to a body corporate which was carrying on an unauthorized business were void. The court held that they were not.

[17] Gibbs ACJ distinguished *Cornelius*[11] on the basis that:

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4 (1978) 139 CLR 410.
5 At 423.
6 [1957] 1 QB 267 at 288.
7 (1978) 139 CLR 410 at 416 - 417.
8 (1836) 2 M & W 149; 150 ER 707.
9 [1918] AC 199.
10 At 214.
11 At 416 - 417.

> "The object and scope of the statute there considered differed from those of the *Banking Act*. The former statute, in forbidding the business of money-lending to be carried on except under specified conditions, was intended to forbid a money-lender to effect a money-lending transaction except under those conditions."

[18] His Honour had earlier explained[12] why s 8 of the *Banking Act* differed in this respect. After stating that the first of the main ways in which enforceability of a contract may be affected by a statutory provision which renders particular conduct unlawful as "The contract may be to do something which the statute forbids", his Honour went on:

> "In the present case we are not concerned with the first of these possible situations. Clearly s. 8 does not render it unlawful to borrow or lend money or to give and take a mortgage, supported by guarantees, to secure its repayment. The contract sued upon was therefore not to do anything which s. 8 forbids."

[19] Mason J[13] thought that the conclusion reached in *Cornelius* was inescapable because of the closeness of the relationship between the carrying on of the money-lending business and the making of a loan of money. But he thought that it did not provide guidance in the case before the court in *Yango* where contracts entered into in the course of banking business were so varied and were not necessarily distinctive of the business. He went on to say:

> "It is one thing to imply a prohibition against particular contracts which are distinctive of a business from a prohibition against the carrying on of that business. It is quite another thing to imply a prohibition against contracts of various kinds none of which are distinctive of the business which is the subject of the statutory prohibition."

[20] Of course the fact that s 235(3) prohibits the very act which is the subject of the contract is not determinative of the contract's invalidity. But it is a strong indication of invalidity. The fact that s 235(5) provides a penalty for breach of s 235(3) may be some indication to the contrary.

[21] In *Yango*[14] Gibbs ACJ said:

> "Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed."

[22] In the same case Mason J said:[15]

> "Where, as here, a statute imposes a penalty for contravention of an express prohibition against carrying on a business without a licence or an authority and the business is carried on by entry into contracts, the question is whether the statute intends merely to penalize the

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12 At 413.
13 At 424 - 426.
14 At 413.
15 At 426.

> person who contravenes the prohibition or whether it intends to go further and prohibit contracts the making of which constitute the carrying on of the business. In deciding this question the court will take into account the scope and purpose of the statute and the consequences of the suggested implication with a view to ascertaining whether it would conduce to, or frustrate, the object of the statute."

[23] If it is in the national interest to prohibit unlawful non-citizens from performing work it must also be in that interest, it seems to me, to prohibit any such person obtaining rights under a contract to perform work. To do so would conduce to the object of the statute. I do not think therefore that the Act intended that a penalty should be the only consequence of a breach of s 235(3).

[24] For the reasons which I have given, that a contract to perform work has as its whole object the doing of the very act which the statute prohibits, and that invalidity of a contract by a non-citizen to perform work is within the object stated in s 4(1), I think that the contract here was invalid.

[25] Mr Rangiah sought to show that there may be consequences of the application in specific cases of the conclusion which I have reached which would cause one to doubt that conclusion. I do not think that the ingenious examples which he gave, even if correct, are sufficient to displace this conclusion. And I would add that a prospective employer may guard against any loss in consequence of that conclusion by ensuring that any person, who is not plainly a citizen of Australia can either establish his or her citizenship or possesses a temporary visa which permits him or her to do the work proposed.

[26] As I have already mentioned, the learned primary judge followed the decision of the New South Wales Court of Appeal in *Nonferral* notwithstanding that the provision being considered in that case, s 83(2), did not make it an offence for an illegal entrant to perform work in Australia but only to perform such work without the permission in writing of the Secretary. But according to the majority of the Court of Appeal in that case, that qualification was of considerable importance in their conclusion that a contract entered into with an illegal entrant, without the permission in writing of the Secretary, was not an illegal contract. Cole JA said:[16]

> "Here the statute did not prohibit an illegal entrant from performing work. Accordingly it did not prohibit that person from receiving compensation for injuries at work. What was prohibited was performing work without the permission in writing of the secretary of the Department of Immigration."

[27] His Honour went on to say that the prohibition in that section was indistinguishable from that referred to in *Fitzgerald v F J Leonhardt Pty Ltd*[17] in which Dawson and Toohey JJ, considering the question of illegality of a drilling contract where a permit to drill was required and after referring to the four main ways, as stated by Gibbs ACJ in *Yango*, in which enforceability of a contract may be affected by a statutory provision, said:[18]

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16 At 315.
17 (1997) 189 CLR 215.
18 At 219.

> "Secondly, the drilling contract was not one which the statute expressly or impliedly prohibited. A permit was required if the drilling was not to constitute an offence on the part of the owner, but a contract for the drilling of bores was plainly envisaged by the Act."[19]

[28] Similarly, Cole JA in *Nonferral* said, the performance of work by an illegal entrant was contemplated by s 83 and thus a contract to perform that work was also contemplated. However, he said, in order that the performance of that work would not constitute an offence, a written permission was required.[20]

[29] Stein JA made a similar distinction. His Honour said:[21]

> "When examining the offence in s 83(2) it may be seen that an integral part of the offence is the performance of any work in Australia *without the permission in writing of the secretary*. An 'illegal entrant' may perform work in Australia if he or she has the secretary's written permission. The object of s 83(2) is to prohibit an 'illegal entrant' from working in Australia only in the absence of the secretary's written permission. The object is not to prohibit illegal entrants from working in Australia per se."

It would follow from his Honour's remarks that if the object of s 83(2) was to prohibit an illegal entrant from working in Australia only in the absence of written permission, the object of s 235(3) is to prohibit an unlawful non-citizen from working in Australia.

[30] It is unnecessary for this Court to choose between the decision of the South Australian Full Court in *San Remo* and that of the New South Wales Court of Appeal in *Nonferral*. Even accepting the correctness of the latter, it cannot be said in this case that, to adapt the above passage from the judgment of Dawson and Toohey JJ in *Fitzgerald*, a contract for performance of work by an unlawful non-citizen was plainly envisaged by the Act.

[31] Mr Rangiah, for the respondent, submitted that this case is within the principle in *Fitzgerald* because it was possible for the appellant, after the making of the contract and before performance of the work, to change his status from an unlawful non-citizen to a non-citizen possessing a visa entitling him to work. There are, it seems to me, two answers to that submission.

[32] The first is the one that I have already mentioned; that s 235(3) cannot sensibly be construed as a provision which envisages the making of a contract for the performance of work by an unlawful non-citizen, subject to his obtaining a relevant visa from the Minister. On the contrary it is cast in terms of an absolute prohibition and, for reasons which I have given, it should be construed as one which forbids the making of a contract for the performance of work by an unlawful non-citizen.

[33] Secondly, it is difficult to imagine how, realistically, in the time between the making of a contract for the performance of work and its performance, an unlawful non-citizen could change his or her status to that of a non-citizen holding a visa to perform work. This is especially so when, in most cases, such contracts would be

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19 See also per McHugh and Gummow JJ at 226.

20 At 315.

21 At 320.

likely to be made only on their performance. The impracticality of the operation of the construction contended for by Mr Rangiah makes it an unlikely one.

6. Conclusion

[34] It follows from what I have said that s 235(3) impliedly prohibited the making of this contract and thereby rendered it void. The appeal must be allowed and the order made by the learned primary judge set aside. Mr Griffin QC for the appellant sought only the first declaration in the notice of appeal which in my opinion is appropriate.

[35] In the event of his failure in this appeal, the respondent sought an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973. The appeal succeeded on a question of law. Although, as appears from these reasons, I have concluded that the learned primary judge was in error I do not think it was a case in which any conduct of the respondent should deprive him of the granting of a certificate.

Orders

1. Appeal allowed.
2. Order of the learned primary judge of 24 July 2003 set aside.
3. In lieu, declare that the respondent was not, on 25 August 2000, a worker within the meaning of s 12(1) of the *WorkCover Queensland Act* 1996.
4. That the respondent pay the appellant's costs of the proceedings before the learned primary judge and in this Court.
5. Grant the respondent an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973.

[36] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Davies JA and I agree with them. The relevant facts are fully set out therein.

[37] The learned judge at first instance appears to have been influenced by observations made by Stein JA in *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312 as to "unjust, unreasonable, inconvenient or absurd result[s]" which might flow from a finding that a contract of service was void. Stein JA at 321 referred, for example, to the fact that the employer would be unable to enforce the employees' duties under the contract such as the duty of confidentiality, and also that an unscrupulous employer could deliberately recruit illegal immigrants in order to pay them less than award wages.

[38] As to the latter I agree with the response of Sheppard A-JA in *Nonferral* at 331; if the employer did not act innocently in entering into the contract "questions of criminal responsibility pursuant to s 5 or s 86 of the *Crimes Act* 1914 (Cth) might arise." As to the former, a duty of confidentiality may arise out of the relationship of two persons regardless of contract. Even if the contract of employment was held to be void, in an appropriate case the employer could enforce the duty of confidentiality, for example, by way of injunctive relief based on the relationship: *Seager v Copydex Ltd* [1967] 1 WLR 923.

[39] But with respect it would seem that Stein JA stated the position too broadly when he said at 319: "Another theme in cases on statutory illegality is to consider the consequences." As is made clear in authorities such as *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 (especially at 413 per Gibbs ACJ and at 423 per Mason J) and *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 the critical determinant of illegality in a case such as this is the construction of

the statute in question. Gibbs ACJ in *Yango* at 413 and McHugh J in *Nelson v Nelson* (1995) 184 CLR 538 at 611 recognised there were four different ways in which illegality may attach to a contract consequent upon a statutory provision. Gibbs ACJ categorised those ways as follows:

> "(1) The contract may be to do something which the statute forbids; (2) The contract may be one which the statute expressly or impliedly prohibits; (3) The contract, although lawful on its face, may be made in order to effect a purpose which the statute renders unlawful; or (4) The contract, although lawful according to its own terms, may be performed in a manner which the statute prohibits."

The formulation by McHugh J was in the following terms:

> "First, the statute may directly prohibit the contract or trust. Second, while the statute may not prohibit making the contract or trust, it may prohibit the doing of some particular act that is essential for carrying it out. Third, the statute may not expressly prohibit the contract or trust but the contract or trust may be associated with or made in furtherance of a purpose of frustrating the operation of the statute. Fourth, the statute may make unlawful the manner in which an otherwise lawful contract or trust is carried out. It would be surprising if sound legal policy required each of these forms of illegality to be treated in the same way."

[40] The clearest situation, of course, is where the statute directly prohibits (makes illegal) the contract. Because of that there are relatively few reported decisions dealing with that situation; *Re Mahmoud & Ispahani* [1921] 2 KB 716 does provide a good example. Not surprisingly most of the reported decisions are concerned with situations where a contract legally made was performed illegally, or where it was asserted that a contract collateral to the act made illegal by the statute was tainted with illegality and therefore unenforceable. This case does not fall within those categories; it is properly categorised as one to do that which is forbidden; the statute in question prohibited the respondent from "doing . . . any work." The present position is clearly covered by the statement of Devlin J in *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267 at 288: "If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication." (See also, *Yango* at 416).

[41] Gibbs ACJ in *Yango* at 413 said that the question "whether a statute, on its proper construction, intends to vitiate a contract made in breach of its provisions, is one which must be determined in accordance with the ordinary principles that govern the construction of statutes." He cited in support Devlin J in *St John Shipping* at 286. He went on to say that one test is whether the statute was passed "for the protection of the public" but recognised that that was "not the only test".

[42] In *Yango* Mason J said at 423:

> "Primarily, then, it is a matter of construing the statute and in construing the statute the court will have regard not only to its language, which may or may not touch upon the question, but also to the scope and purpose of the statute from which inferences may be drawn as to the legislative intention regarding the extent and the effect of the prohibition which the statute contains."

And at 426 in considering a statute which imposed a penalty for contravention of an express prohibition against carrying on a business without a licence, he said:

> "In deciding this question the court will take into account the scope and purpose of the statute and the consequences of the suggested implication with a view to ascertaining whether it would conduce to, or frustrate, the object of the statute."

[43] The Privy Council in *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 was concerned with a bill of lading which did not contain a clause complying with a statutory provision. One of the questions was whether or not the failure to include such a clause rendered the contract illegal. In delivering the judgment of the Judicial Committee Lord Wright said at 293: "Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

[44] None of those passages supports the proposition that the court may conclude that the statute does not impliedly make the contract illegal merely because there are consequences perceived to be unjust, unreasonable or inconvenient. The critical exercise is to determine the object of the statute and then to deduce from that whether or not the intention of the legislature was to prohibit a contract of the type in question. Where performance of the contract requires the doing of the prohibited act the normal and logical conclusion must be that the contract is prohibited and is therefore illegal. Once, applying ordinary principles of construction, the court concludes that the contract requires the doing of the act made an offence, it would ordinarily follow that such contract was impliedly prohibited. Before reaching that conclusion the court would have to have regard to the legitimate intention of the legislature and consider whether recognising the contract as enforceable would frustrate the object of the statute. Davies JA has pointed out in his reasons that the object of the statute in question here (particularly after its amendment in 1992) was to regulate, in the national interest, the circumstances in which non-citizens could work whilst present in Australia. In my view recognising this contract as enforceable would frustrate the primary object of the statute and would be contrary to the clear intention of the statutory provision. Once that point is reached the position is the same as if the statute expressly prohibited the contract. In those circumstances there may well be occasionally unjust, unreasonable or inconvenient consequences but such considerations cannot overcome the intent and purpose of the statute.

[45] I can find nothing in the authorities to suggest that unjust, unreasonable or inconvenient results would justify a court in arriving at the conclusion that a contract was not rendered illegal and void where on ordinary principles of statutory construction the conclusion was that the contract was expressly or impliedly prohibited. That is made clear by some of the early cases on the topic: *Cope v Rowlands* (1836) 2 M & W 149; 150 ER 707 and *Taylor v The Crowland Gas & Coke Co* (1854) 10 Ex 293; 156 ER 455.

[46] In the leading case of *Anderson Ltd v Daniel* [1924] 1 KB 138 all members of the Court of Appeal concluded that the fact that the statute could only be complied with at "prohibitive expense" did not affect the consequence in law that the contract was

illegal and void (per Bankes LJ at 146, per Scrutton LJ at 149 and per Atkin LJ at 149-50).

[47] Where the question before the court is whether the performance in an illegal way of a contract legally made rendered the contract illegal, or whether a contract collateral to the prohibited act was rendered illegal, considerations of inconvenience or unjust consequences have been held to be relevant. Reference can be made to *Yango* per Gibbs ACJ at 415 and per Jacobs J at 434, *St John Shipping* at 289 per Devlin J, and *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374. The statement by Jacobs J is to the following effect: "Therefore the contract is only unenforceable if the courts should decline to enforce it because it is associated with the illegal purpose or activity of carrying on the banking business. This is where it is necessary to consider public policy. . . . The avoidance of the contract would cause grave injury to depositors . . . I find this a sufficient reason of public policy, based as it is on the scope and purpose of s. 8 itself, to decline to apply any rule of public policy that a contract made in association with an illegal purpose cannot be sued on." McHugh J in *Nelson* at 613 said:

> ". . . courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless: (a) the statute discloses an intention that those rights should be unenforceable in all circumstances; or (b)(i) the sanction of refusing to enforce those rights is not disproportionate to the seriousness of the unlawful conduct; (ii) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies; and (iii) the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only legal consequences of a breach of the statute or the frustration of its policies."

As Cole JA pointed out in *Nonferral* at 315 the statute in the form then under consideration "did not prohibit an illegal entrant from performing work". In consequence that case was not concerned with the situation where the contract was to do the very act prohibited by the statute. The question there was whether the terms of the statute impliedly made illegal a contract where both consideration and matter to be performed were legal but where the necessary permission had not been obtained. In those circumstances it was permissible for the court to have had regard to matters of unreasonableness and inconvenience. Whether in the circumstances of that case such considerations justified the conclusion reached by the majority need not be considered further; the legislation has been amended in a way which calls for a different approach.

[48] Issues such as unjust or inconvenient consequences are relevant where the court is considering whether the sanction of illegality is disproportionate to the seriousness of the unlawful conduct, and that cannot arise where the contract in question is directly or impliedly prohibited by the statute upon the proper construction of its terms. Here the contract has as its whole object the doing of the very act which the statute prohibits the respondent from doing, namely working, and in consequence on the proper construction of the statute such a contract is illegal. The fact that there may be some results which are perceived to be unjust, unreasonable or inconvenient is beside the point. The court must give effect to the statute.

[49] I agree with the reasons of Davies JA and with the orders proposed by him.

[50] **McMURDO J:** The ultimate issue in this appeal is whether the respondent, when injured whilst working for the appellant, was a "worker" within the meaning of that term in the *WorkCover Queensland Act* 1996. Section 12(1) of that Act defines a worker to be "an individual who works under a contract of service". The appellant's case is that the respondent did not work under a contract of service, because the purported contract was prohibited by the *Migration Act* 1958 (Cth).

[51] The issue arises in the context of proceedings in which the appellant originally claimed certain declaratory relief and an order that the respondent repay the amount of the workers' compensation received by him. The declarations sought by the Originating Application were in these terms:

> "1. That the Respondent is not a worker within section 12(1) of the *WorkCover Queensland Act 1996.*
> 2. That the Applicant is not an employer under section 32 of the *WorkCover Queensland Act 1996*;
> 3. That the Respondent is not a person to whom compensation is payable under the *WorkCover Queensland Act 1996* pursuant to section 135(1) of the Act;
> 4. That the Respondent is not a person entitled to seek damages for an injury pursuant to section 253(1) of the *WorkCover Queensland Act 1996*".

[52] The primary judge dismissed the application, holding that the contract was not expressly or impliedly prohibited by the *Migration Act.* Her Honour also considered whether the contract was enforceable having regard to matters of public policy, and concluded that it was enforceable. Whether it was necessary for her Honour to have answered that question, in the context of proceedings in which neither party sought relief which involved the enforcement of the contract, is open to doubt. It is common ground that the contract within the definition of "worker" must be a "valid" contract; but the appellant's argument appears to accept that a contract which is not void *ab initio* is sufficient for the purposes of the definition within s 12, whether or not a court would aid its enforcement. Upon this appeal, the appellant limited its case to a claim for a declaration that the respondent was not a worker within s 12(1). Accordingly, the question of whether the parties' contract, if not void, is enforceable by the respondent is not one which need be answered in these proceedings. The claims for other declaratory relief would seem to have been directed, at least in part, to the question of whether the respondent is disentitled to claim damages at common law for his alleged injury. That is not a question for determination in this appeal.

[53] The appellant's case is that the *Migration Act* prohibited the making of a contract of service between these parties, not by an express prohibition, but by implication, that is by necessary inference, from its express terms. By s 235(3), the *Migration Act* prohibited the respondent, as an "unlawful non-citizen", from performing work in Australia whether for reward or otherwise. The appellant argues that this contract could not be performed other than by the respondent committing an offence against s 235(3), so that having regard to the evident policy of that Act and the purpose of s 235(3), there must be implied a prohibition of a contract such as this.

[54] The respective arguments have accepted that the resolution of the question of whether the contract was impliedly prohibited determines the outcome of this

appeal. However, in this context, an impliedly prohibited contract is not always a contract which is void, in the sense of one which has never been of any legal effect. In *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 413 Gibbs ACJ said:

> "It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is whether the contract is prohibited by the statute. Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed."

Similarly, in the same case Mason J said at 423:

> "The principle that a contract the making of which is expressly or impliedly prohibited by statute is illegal and void is one of long standing but it has always been recognized that the principle is necessarily subject to any contrary intention manifested by the statute. It is perhaps more accurate to say that the question whether a contract prohibited by statute is void is, like the associated question whether the statute prohibits the contract, a question of statutory construction and that the principle to which I have referred does no more than enunciate the ordinary rule which will be applied when the statute itself is silent upon the question. Primarily, then, it is a matter of construing the statute and in construing the statute the court will have regard not only to its language, which may or may not touch upon the question, but also to the scope and purpose of the statute from which inferences may be drawn as to the legislative intention regarding the extent and the effect of the prohibition which the statute contains."

[55] The same distinction was made by McPherson J in *J C Scott Constructions v Mermaid Waters Tavern Pty Ltd* [1984] 2 Qd R 413 at 422-423, in an analysis which was adopted by the Full Court of the Federal Court (Lockhart, Gummow and Lee JJ) in *Farrow Mortgage Services Pty Ltd (in liq) v Edgar* (1993) 114 ALR 1. In *Mermaid Waters*, after identifying the two classes of statutory prohibition of contracts, being express and implied prohibition, McPherson J said at 423:

> "There is a tendency in the textbooks to treat the above two classes of contract or illegality as belonging to a single category of illegality in the formation of the contract. But between the two there is an important distinction in the consequences that flow from contravention of the prohibition. Where, as in the first class, the

> prohibition is levelled directly against an element in the formation of the agreement, the contract is held to be illegal and unenforceable by either party, regardless of the plaintiff's ignorance of the factual circumstances which attract the prohibition, e.g. the absence of a licence, as in *Re Mahmoud & Ispahani (supra).* It is otherwise, where the contract is in the second group, and the plaintiff is not aware of facts which operate to bring it within the prohibition: cf. *Archbolds (Freightage) Ltd. v. Spanglett* [1961] 1 Q.B. 374."

[56] Accordingly when the Federal Court in *Farrow*, citing *Mermaid Waters*, said (at 10) that "an agreement that the prohibited act shall be done is then treated as being impliedly prohibited by the statute and as illegal", it was not suggesting that any agreement, the performance of which requires a party to perform a prohibited act, must be void *ab initio*.

[57] The distinction is important in the present case because of the terms of the definition within s 12 of the *WorkCover Queensland Act*. In my view a person would be a worker as defined in s 12 whilst working under a contract which had some legal effect, although it was unenforceable at least at the suit of one party upon public policy grounds. I do not interpret the term "contract of service" in s 12 to be confined to a contract which is enforceable according to all of its terms, in all contexts and by either party, and I do not understand the appellant to submit that it is so confined. On the other hand, as the respondent's submissions appear to accept, the definition in s 12 requires a contract, that is a legal relationship having some contractual effect, for which a purported contract but one which was void *ab initio* would not suffice.

[58] Therefore, the critical question in this appeal is whether the *Migration Act* impliedly avoided the contract which the parties believed that they had made. That is a question of statutory interpretation, which must be answered through a consideration of, amongst other things, the policy and stated object of the Act.

[59] The object of the *Migration Act* is expressed in s 4 as follows:

> "(1) The object of this Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.
>
> (2) To advance its object, this Act provides for visas permitting non-citizens to enter or remain in Australia and the Parliament intends that this Act be the only source of the right of non-citizens to so enter or remain.
>
> (3) To advance its object, this Act requires persons, whether citizens or non-citizens, entering Australia to identify themselves so that the Commonwealth government can know who are the non-citizens so entering.
>
> (4) To advance its object, this Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act."

[60] Section 235 provides:

"(1) If:

(a) the temporary visa held by a non-citizen is subject to a prescribed condition restricting the work that the non-citizen may do in Australia; and

(b) the non-citizen contravenes that condition;

the non-citizen commits an offence against this section.

(2) For the purposes of subsection (1), a condition restricts the work that a non-citizen may do if, but not only if, it prohibits the non-citizen doing:

(a) any work; or
(b) work other than specified work; or
(c) specified work.

(3) An unlawful non-citizen who performs work in Australia whether for reward or otherwise commits an offence against this subsection.

…

(5) The penalty for an offence against subsection (1), (3) or (4) is a fine not exceeding $10,000."

[61] By s 14, a non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen. By s 13, a non-citizen in the migration zone who holds a visa (being a visa which is in effect) is a lawful non-citizen. It is common ground that the respondent did not hold a visa which was in effect at any time during the period in which he worked for the appellant, so that he was at all material times an unlawful non-citizen.

[62] The contract required the respondent to perform work, and the performance of that work was conduct proscribed by s 235(3). The respondent arrived in Australia on 25 August 1995 on a Visitor Visa which carried a "no work" condition. He applied for a Protection Visa and was issued with a Bridging Visa A and later (2002) with a Bridging Visa C. He held no visa between 4 December 1996 and 9 January 2002. He commenced to work for the appellant on 26 February 1998, having been offered that employment on or about the previous day. As he went to work on 26 February 1998, it was open to him to apply for a visa which, if and when granted, would have permitted him to work. But because he contracted on the basis that he would commence work immediately, it was impossible for him to perform the contract lawfully. In *WorkCover Corporation* (*San Remo Macaroni Co Pty Ltd) v Liang Da Ping* (1994) 175 L.S.J.S. 469, it was held that a contract to employ an illegal entrant to perform work, where the performance of work by that person contravened an express prohibition, was impliedly prohibited and void. The expressed prohibition, within what was then s 83(2) of the Act, was in these terms:

"(2) Where a person who is an illegal entrant performs any work in Australia without permission, in writing, of the Secretary, the person commits an offence against this subsection."

King CJ, with whom Bollen and Mullighan JJ agreed, emphasised the close correlation between what the Act prohibited and what the contract required. The Chief Justice said that:

> "… the consideration that the act to be performed under the contract, namely the performance of work, is the very act forbidden by the statute is a very strong consideration in favour of the implication of a prohibition rendering the contract void."

He concluded as follows:

> "The purported contract of service between the respondent and San Remo could not be lawfully performed by the respondent. He was not obliged to perform it, because performance would have been an illegal act, and San Remo could not insist on performance for the same reason. The statute discloses an intention of the legislature to prohibit such performance in the public interest. That being so the implication that the contract itself is prohibited and void, seems plain."

[63] The New South Wales Court of Appeal, by a majority, held to the contrary in *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312. In the majority judgments, considerable importance was given to the potential adverse consequences for innocent parties from an implied prohibition of contracts, but that was not the only reason given for rejecting the implication. In addition, the majority (Cole JA at 315 and Stein JA at 320) characterised the express prohibition in s 83(2) as indistinguishable from that referred to in *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215, where a contract to perform drilling work, which could not be performed without a licence, was held to be enforceable where unlicensed drilling had occurred. Cole JA cited a passage from the joint judgment of Dawson and Toohey JJ in *Fitzgerald* (at 219) as follows:

> "The drilling contract was not one which the statute expressly or impliedly prohibited. A permit was required if the drilling was not to constitute an offence on the part of the owner, but a contract for the drilling of bores was plainly envisaged by the Act."

Cole JA continued:

> "Similarly, the performance of work by an illegal entrant was contemplated by s 83 and thus a contract to perform that work was also contemplated. However in order that the performance of that work not constitute an offence, a written permission was required."

[64] Similarly, Stein JA (at 318) quoted this passage from the judgment of McHugh and Gummow JJ in *Fitzgerald* (at 226):

> "The contract as framed did not call for the commission of any illegality. Nor did the statute prohibit some particular act that was essential for carrying out the contract. Performance of the work would have answered the requirements of the contract if the owner had obtained licences under s 57."

Stein JA then said (at 318-319):

> "Their Honours were also of the opinion that the contract should be seen as one where each party agreed to do all that was necessary on its part to enable the other party to have the benefit of its performance. Accordingly, there was an implied undertaking by the owner to obtain the permits required by the statute. If applied to the facts of this case, it would mean that the respondent was bound by an implied term in the service contract to take all reasonable steps to obtain the permission of the secretary in order to ensure his performance of the work under the contract was lawful."

The relevance of *Fitzgerald* was then described by his Honour at 320-321 as follows:

> "As I have said, the proper characterisation of the prohibition in s 83 is that it is a prohibition against the performance of work by an illegal entrant who does not have the permission of the secretary. In this case, there is no suggestion that the parties to the contract of employment expressly contracted for the respondent to do the work *as an illegal entrant*. Indeed, if one adopts McHugh J and Gummow J in *Fitzgerald* (at 227), then the respondent was bound to take all reasonable steps to obtain the secretary's permission to ensure his performance of work is lawful."

[65] In *Nonferral*, Sheppard A-JA did not liken the case to *Fitzgerald*, and nor did he see some relevant distinction between a prohibition of work without the Secretary's permission, and a prohibition of work *per se*. His Honour said at 330:

> "It is apparent from a reading of the decisions in *St John Shipping* and *Yango* that public inconvenience or inconvenience suffered by innocent parties played a substantial part in the court's conclusion that the illegality should not lead to the invalidity of the contracts in question in those cases. I shall deal with inconvenience in a moment. Before I do so, I emphasise that this case differs in outcome in my opinion both from *St John Shipping* and *Yango* because of the very clear breach of the law which the respondent's employment involved. As mentioned, the relevant provision of the *Migration Act* 1958 (Cth) forbad, not the contract, although that was a consequence, but the performance of work. The respondent did carry out work contrary to the provisions of s 83(2) of the *Migration Act* 1958 (Cth) and thus acted illegally. To pick up the words of Devlin J in *St John Shipping*, the contract had the object of doing the very act which the statute prohibited. In the language of Gibbs A-CJ in *Yango* this is a case where the statute imposed a penalty upon an unqualified person (an illegal entrant) from acting in a particular capacity, namely engaging in work in Australia. Thus the respondent seeks to benefit from a clear breach of the law. That, in my opinion, is a major factor to be taken into account."

[66] In *Nonferral*, it was possible, at least in theory, for the employee to have procured the permission of the Secretary to enable him thereafter to perform his contract

lawfully, although as an illegal entrant who was working unlawfully he was liable to deportation.[22] In the present case, it was open to the respondent to seek a visa which permitted him to work, although as an unlawful non-citizen, he was immediately liable to detention.[23] But in my view, the contract in *Nonferral*, like that in the present case, was unlike that in *Fitzgerald*. In neither *Nonferral* nor this case was it possible for the employee to perform the contract without some contravention of the express prohibition. In my respectful view, Sheppard A-JA was correct in saying that "contract had the object of doing the very act which the statute prohibited", which he said "was the performance of work".[24] The correlation between the expressly prohibited conduct and the conduct required by the contract was, in my view, just as close in *Nonferral* as it is in the present case. And the evident purpose of that prohibition upon work was just as important as the purpose served by the prohibition within s 235(3).

[67] Although the closeness of that correlation can strongly indicate an intention to prohibit contracts, it is not the only consideration. As Gibbs ACJ said in *Yango* at 414:

> "It would be contrary to reason and principle to allow one circumstance to override all other considerations in the interpretation of a statute. As Devlin J. said in *St. John Shipping Corporation* v *Joseph Rank Ltd.* (28): 'The fundamental question is whether the statute means to prohibit the contract. The statute is to be construed in the ordinary way: one must have regard to all relevant considerations and no single consideration, however important, is conclusive.'"

This question of construction must be answered by reference to established principles according to the authorities, but ultimately it is one "turning on the particular provisions, the scope and purpose of the statute": per Mason J in *Yango* at 425.

[68] Another relevant consideration is the fact that the section imposes a penalty for contravention of the express prohibition. The question then is whether the statute intends merely to penalise the unlawful non-citizen or whether it intends to go further and prohibit relevant contracts, and "In deciding this question the court will take into account the scope and purpose of the statute and the consequences of the suggested implication with a view to ascertaining whether it would conduce to, or frustrate, the object of the statute": per Mason J in *Yango* at 426.

[69] The consequences of an implied prohibition of contracts must then be considered. In *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267, Devlin J, emphasising the importance of this consideration, said that "courts should be slow to imply the statutory prohibition of contracts, and should do so only when the implication is quite clear".[25] Citing that judgment, Stein JA in *Nonferral* said that "the court should not find an implied prohibition in a statute if it would lead to an unjust, unreasonable, inconvenient or absurd result".[26] Statements to the same

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22 Sheppard A-JA at 331.
23 *Migration Act*, s 189.
24 At 330.
25 At 289.
26 At 319.

effect are found, for example, in the judgment of McHugh and Gummow JJ in *Fitzgerald* at 227, the judgment of Kirby J in the same case at 242 and the judgment of McHugh J in *Nelson v Nelson* (1995) 184 CLR 538 at 613. The adverse consequences from such contracts being void could be so extensive that, compared with the extent which the implication would conduce to the object of the statute, it should not be inferred that Parliament intended to inflict them upon the public.[27]

[70] The avoidance of relevant contracts could be seen as consistent with the object of the *Migration Act*. As the prohibition expressed within s 235(3) must be understood to further that object, an implied prohibition of contracts requiring work to be performed, with the consequence that those contracts are void, could be considered as likely to contribute to the prevention of the prohibited work and the continued presence in Australia of unlawful non-citizens. But absent an implication of voidness, the law still provides a substantial deterrent in the penalty imposed by s 235 itself, and as Sheppard A-JA noted in *Nonferral* at 327, a provision such as s 235 would operate in the context of the *Crimes Act* 1914 (Cth), with consequences for a person who contracted for the performance of work knowing that it was to be performed by someone who is prohibited from doing so. In addition, absent such an implication, the court still has the general power, based on public policy, to refuse its aid to a guilty party.[28]

[71] The impact of implied prohibition of contracts must be considered not only in the context of this contract, but in relation to other contracts to which the implication would apply. As the prohibition of the performance of work is not limited according to the type of work or the circumstances in which it is performed by the unlawful non-citizen, so the implied voidness of contracts for the performance of work would be far reaching. Section 235(3) is not limited to work done under a contract, or to work under a contract of a particular kind. The prohibition is not limited to work performed under a contract of service, and nor does it apply only to a contract where that which the contract requires of the non-citizen consists only of the performance of work. For example, a contract for the provision by a non-citizen of work and materials would still require the non-citizen to contravene s 235. The object of the Act, and in particular of s 235(3), is not different according to whether the non-citizen is skilled or unskilled, works full time or part time, or is employed or self employed. If the implication is necessary to achieve the Act's object, it is not possible to interpret s 235 by making void some contracts which require the illegal performance of work, but not others, according to the extent to which the prohibited work represented all or part of the consideration for the contract, or according to the extent of the prejudice to innocent parties. Upon the appellant's argument, any contract by which the unlawful non-citizen agrees to perform work is prohibited and void.

[72] Such an interpretation could then have extensive consequences for persons, who in the particular facts and circumstances of their cases, have rights which depend upon the relevant contract having a legal effect and who are innocent of any contravention of the section. Where the contract is a contract of service, the denial of any effect of the contract might prejudice not only the purported employer, but also third persons whose rights depend upon the fact of the employment relationship. Usually, an employee's obligations under a contract of service go

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27 *Yango* at 427.

28 See e.g. *Archbolds (Freightage) Ltd v S Spanglett Ltd* [1961] 1 QB 374 at 387.

further than the obligation to perform work. They include, for example, the implied, if not express, duty to serve the employer "with good faith and fidelity" which can protect the employer from an actual or threatened use of know-how or information although that information is not confidential information which would be protected by equity: Finn: *Fiduciary Obligations* (1977), p 316; *Riteway Express Pty Ltd v Clayton* (1987) 10 NSWLR 238. The avoidance of the contract would not deny the purported employer the protection of equity, but its protection could be more limited than that which is provided by the duties ordinarily implied in a contract of service, or which the parties might see fit to express.[29] The existence of a contract of service can also affect proprietary rights such as the ownership of copyright[30] or the entitlement to an invention or a patent.[31] The potential impact upon property rights also exemplifies the possible consequences for a person who is not privy to the contract. The existence or otherwise of a relationship of employment could also affect the right of a person to recover damages against the purported employer as vicariously liable for the tort of the employee.

[73] Outside the context of contracts of service, the implied voidness of contracts could have consequences for an innocent party by leaving that party without redress for any breach of contract. For example, in *Mermaid Waters*, McPherson J had to consider whether the provisions of s 53 of the (then) *Builders' Registration and Home-owners' Protection Act* 1979 had the effect of an implied avoidance of a contract for the performance of building work by an unregistered builder. Section 53 provided as follows:

> "(2) A person who is not a registered builder shall not –
>
> (a) perform for himself building construction except in relation to a dwelling-house for his own occupation;
> (b) perform building construction for another whether pursuant to a contract or not;
> (c) tender for or offer to perform building construction for another;
> (d) enter into a contract to perform building construction for another; or
> (e) be entitled to recover by action in a court a fee or charge under a contract to perform building construction for another,
>
> unless the value of the building construction does not exceed $3,000 or he is exempt, pursuant to section 56 or 57, from the requirement that he be registered as a registered builder.
>
> Penalty: $2,000."

In his Honour's view, the imposition of a penalty, considered with the expressed prohibition on the recovery by the builder, made it "most improbable that the legislature intended … to visit the consequences of illegality upon the building

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29 Cf *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181.

30 *Copyright Act* 1968 (Cth), s 35.

31 *Patents Act* 1990 (Cth), s 15; *Patchett v Sterling Engineering Co Ltd* (1955) 72 RPC 50; *Spencer Industries Pty Ltd v Collins* (2003) 58 I.P.R. 425.

owner".[32] His Honour concluded that the contract was not prohibited and further, that the builder could recover damages for its breach.

[74] Examples by reference to proprietary rights, duties in relation to know-how and information, or rights of action for wrongs committed by non-citizens, could appear to be remote from this case, where at least as events have transpired, the purported employer sees no benefit from the existence of a contract of service. In some circumstances, the potential for adverse consequences could be avoided by diligence on the part of the employer, but still the voidness of contracts could have substantial consequences in many cases. If the legislative policy can be secured only by the avoidance of this contract of service, then it requires the same impact upon any contract of which there is no means of performance which does not involve some contravention of s 235(3).

[75] The prohibition of contracts might conduce to the object of the *Migration Act*. But the statute needs to be interpreted according to the likely legislative intent, which is to regulate the presence of non-citizens in Australia, but by laws which do not have disproportionate consequences for the public. In *Vita Food Products Inc v Unus Shipping Co* [1939] AC 277 Lord Wright said:

> "Nor must it be forgotten that the rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds."

[76] In my view, the adverse consequences of the interpretation for which the appellant contends are disproportionate to any likely benefit in furthering the object of the *Migration Act*. The legislative policy and object are sufficiently served by the imposition of the penalty, having regard also to the operation of the *Crimes Act* upon those who would contract with a person known to be an unlawful citizen, and to the court's power to refuse to enforce the contract as considerations of public policy would require in the circumstances of a particular case. In that last respect, Pearce LJ in *Archbolds (Freightage) Ltd v S Spanglett* [1961] 1 QB 374 at 387 cautioned that: "If the court too readily implies that a contract is forbidden by a statute, it takes it out of its own power (so far as that contract is concerned) to discriminate between guilt and innocence".

[77] Whether a person who has worked in contravention of s 235 should be permitted to recover the agreed consideration for his work consistently with public policy is a question that does not need to be answered in this case. My conclusion that contracts requiring the performance of work, inevitably by some contravention of s 235(3), are not impliedly void comes from the apprehended impact upon the rights of innocent parties assessed against the policy of the Act, without the need to consider whether it is consistent with public policy and the Act that in any particular case, an employer who has had the benefit of the work should not have to pay for it.

[78] As the contract of service between these parties was not void *ab initio* it follows that there was a contract which, whether or not it was enforceable by the respondent,

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32 At 424.

was a contract under which he worked, so as to make him a worker as defined in s 12 of the *WorkCover Queensland Act*. This being the only issue which was pursued by this appeal, I would dismiss the appeal with costs.