SUPREME COURT OF QUEENSLAND

CITATION:	*Australia Meat Holdings Pty Ltd v Kazi* [2003] QSC 225
PARTIES:	**AUSTRALIA MEAT HOLDINGS PTY LTD** **ACN 011 062 338** **(applicant)** **v** **MAINUDDIN AHMED KAZI** **(respondent)**
FILE NO:	S3521 of 2003
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	24 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	3 June 2003
JUDGE:	Mullins J
ORDER:	**That the originating application filed on 17 April 2003 be dismissed**
CATCHWORDS:	WORKERS COMPENSATION – ENTITLEMENT TO AND LIABILITY FOR COMPENSATION – statutory prohibition pursuant to s 235 *Migration Act* 1958 (Cth) against the doing of any work by an unlawful non-citizen – where employee who was an unlawful non-citizen performed work in breach of prohibition and was injured at work – whether employee at the time of sustaining injury at work was a worker within the meaning of s12 *WorkCover Queensland Act* 1966 (Q) – whether employment contract is illegal and void CONTRACT – ILLEGAL AND VOID CONTRACTS – pursuant to s 235 *Migration Act* 1958 (Cth) an unlawful non-citizen is prohibited from the doing of any work – where s235 *Migration Act* 1958 (Cth) does not expressly make the contract pursuant to which the unlawful non-citizen performs the work illegal, void or unenforceable – whether prohibition should be implied – no prohibition on enforcing contract implied – reasons of public policy do not require the court to refuse to enforce the contract *Migration Act* 1958 (Cth) *Workcover Queensland Act* 1996

Fitzgerald v FJ Leonhardt Pty Ltd (1997) 189 CLR 215
Nelson v Nelson (1995) 184 CLR 538
Nonferral (NSW) Pty Ltd v Taufia (1998) 43 NSWLR 312
Workcover Corporation (San Remo Macaroni Co Pty Ltd) v Da Ping [1994] SASC 4466
Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410

COUNSEL: GJ Cross for the applicant
DC Rangiah for the respondent

SOLICITORS: Abbott Tout for the applicant
Maurice Blackburn Cashman for the respondent

[1] **MULLINS J:** The respondent commenced employment with the applicant on 26 February 1998. On 14 December 2000 the respondent provided the applicant with an application for compensation with respect to left knee pain and soreness from an injury to his knee which he claimed occurred on 25 August 2000 in the cold store of the applicant's premises at Dinmore. The applicant claims that strapping on the floor held his leg and he fell over the conveyor belt and hurt his knee. Between December 2000 and June 2002 the respondent was provided with medical treatment and rehabilitation for this injury. On 18 June 2002 the respondent ceased employment with the applicant.

[2] By originating application filed on 17 April 2003 the applicant seeks a number of declarations including that the respondent is not a worker within the meaning of s 12(1) of the *WorkCover Queensland Act* 1996 ("*WQA*"). The other declarations sought by the applicant depend on whether the applicant can show that a declaration should be made that the respondent is not a worker within the meaning of the *WQA*.

[3] Between December 1996 and January 2002 the respondent did not hold a valid visa to reside in Australia. He was therefore an unlawful non-citizen within the meaning of s 14 of the *Migration Act* 1958 (Cth) ("the *Migration Act*") during this period. The applicant was granted a bridging visa on 9 January 2002 which did not permit the respondent to work in Australia. That visa was cancelled on 1 October 2002, as a result of the respondent working in Australia. The respondent departed Australia on 30 October 2002. The question which therefore arose for determination on this application was whether the respondent who was an unlawful non-citizen at the time of sustaining the injury at work was a "worker" within the meaning of s 12 of the *WQA*.

[4] In each of the application for employment with the applicant dated 18 February 1998 and the employment declaration for purpose of income tax deductions dated 25 February 1998 which were completed by the respondent, the respondent's date of birth was shown as 12 April 1966. According to the first page of the respondent's 2002 tax return his date of birth was 12 January 1964. According to the Department of Immigration's records, the respondent's date of birth was 2 February 1961.

Relevant legislation

[5] The object of the *Migration Act* is set out in s 4:

> "(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."

[6] The relevant provisions of s 235 of the *Migration Act* are:

> "**235** (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."

[7] Relevantly, a "worker" is defined in s 12 of the *WQA* as "an individual who works under a contract of service".

Submissions

[8] In essence, it is submitted on behalf of the applicant that as the respondent was working in breach of s 235(3) of the *Migration Act*, the purported contract of service between the applicant and the respondent could not be lawfully performed by the respondent with the consequence that the contract was prohibited and void. The applicant submits that s 12 of the *WQA* requires the employee to have worked under a valid contract of service.

[9] The respondent concedes that s 12 of the *WQA* does not apply to a person employed under a contract which is illegal. The respondent submits, however, that even if he did commit an offence against s 235(3) of the *Migration Act* by

performing work for the applicant, it did not follow that the contract of service was illegal and void and that, in all the circumstances, the court should not decline to enforce the contract on the grounds of public policy due to any breach of s 235 of the *Migration Act*.

Relevant authorities

[10] The High Court held in *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 that the breach by a company of a statute which prohibited the company from carrying out any banking business without a licence did not invalidate a mortgage given to the company in carrying on the unauthorised banking business. Mason J stated at 423:

> "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."

[11] If the conclusion is reached that the statute as a matter of construction does not make the contract illegal or void, the next issue is whether as a matter of public policy the court should decline to enforce the contract which is made in breach of the statute or the performance of which results in a breach of the statute. This was expressed by McHugh J in *Nelson v Nelson* (1993) 184 CLR 538 ("*Nelson*") as follows at 613:

> "Accordingly, in my opinion, even if a case does not come within one of the four exceptions to the *Holman* dictum to which I have referred, courts should not refuse to enforce legal or equitable rights simply because they arose out of or were associated with an unlawful purpose unless:
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> (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."

[12] The approach of McHugh J in the passage set out above from *Nelson* was referred to with approval in the joint judgment of McHugh and Gummow JJ and the judgment of Kirby J in *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215, 228-230, 249-250.

[13] That decision involved a contract between the owner of land and a driller for the drilling of bores on the land. The relevant statute required the owner to obtain a bore construction permit which the owner had not done at the time that a number of the bores were drilled. A dispute arose between the owner and the driller as to how much was owing under the contract and the owner raised the issue of illegality. The statute did not prohibit the making of the relevant contract, but prohibited the owner from causing a bore to be drilled or constructed without a permit for the purpose. The case was whether, as a matter of public policy, the court should decline to enforce the contract because of its association with the illegal activity of the owner in not obtaining a permit.

[14] The High Court was unanimous in holding that the contract was not unenforceable. Dawson and Toohey JJ decided on the basis that, as a matter of construction, the relevant statutory provision intended to penalise conduct in breach of the provision, but not to prohibit contracts and there was no illegality on the part of the driller. McHugh and Gummow JJ followed the approach of McHugh J in *Nelson* and found that the purpose of the statute was sufficiently served by the imposition of the penalty imposed on the owner for failing to obtain the permit. Kirby J held that the refusal to enforce the driller's rights would be disproportionate to the seriousness of the unlawful conduct.

[15] The most recent and relevant authority is *Nonferral (NSW) Pty Ltd v Taufia* (1998) 43 NSWLR 312 ("*Nonferral")* which concerned the effect of s 83(2) of the *Migration Act* (the forerunner of s 235(3)) which was in the following terms:

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

[16] The employee in *Nonferral* was an illegal entrant who was injured while working for the employer. The employee did not have written permission from the secretary of the department to work for the employer. The employer appealed against the award for compensation which the employee was successful in obtaining. The New South Wales Court of Appeal dismissed the appeal, with the majority holding that the contract of employment between the parties was not rendered illegal because of the breach of s 83(2) of the *Migration Act*.

[17] The leading judgment of the majority was given by Stein JA who, consistently with the High Court authorities abovementioned, undertook the approach of determining whether, as a matter of construction of the statute, the contract was impliedly illegal (as it was conceded that there was no express prohibition rendering illegal a contract of employment of an illegal entrant) and then looked at the separate public policy question of whether the court should decline to enforce the contract because of the breach, even though the contract were not void as a matter of statutory construction.

[18] On the statutory construction question, Stein JA stated at 320:

> "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. In my opinion, it is not necessary, in order to further the object of the statute, to imply that the performance of all contracts of service entered into without the secretary's written permission are prohibited and unlawful.
>
> There is no doubt that the section is intended to protect the Australian public and not merely to extract a penalty. However, the protection of the public can be achieved without implying into the section a statutory prohibition of the nature contended for by the appellant. The imposition of a criminal penalty for the offence, and the possibility of deportation, may be seen as a sufficient sanction to protect the public and serve the purpose of the statute."

[19] In considering whether the court should find an implied prohibition in s 83(2) of the *Migration Act,* Stein JA considered whether an implied prohibition would lead to an unjust, unreasonable, inconvenient or absurd result. Stein JA stated at 321:

> "Is there a need for an additional sanction to fulfil the objects of the statute? The answer to this question involves an assessment of the consequences which may follow if there is a finding of implied prohibition rendering the contract of employment wholly void and unenforceable. A moment's reflection will reveal that the consequences can be drastic. For example, the contract could be rendered unenforceable even if the employer, as one may here assume, had no knowledge of the respondent's status as an illegal entrant. The employer would be unable to enforce the employee's duties under the contract, for example, the duty of confidentiality. Such a situation would be unreasonable: *Yango* (at 415).
> On the other hand, an unscrupulous employer could deliberately recruit illegal immigrants in order to pay them less than award wages. An implied prohibition would mean that a worker could not sue for unpaid wages. One could well envisage consequences which would result in an unjust, unreasonable or absurd result."

[20] Stein JA concluded that there was no implied statutory provision in s 83(2) of the *Migration Act* which rendered the contract of service illegal and void.

[21] On the public policy considerations, Stein JA applied the propositions proposed by McHugh J in *Nelson* at 613 and set out above at para [11] which resulted in the following answers at 321:

> "1. The statute does not disclose an intention that any rights to compensation of the respondent under the *Workers Compensation Act* should be unenforceable in all the circumstances.
> 2. The sanction of refusing to enforce those rights would be disproportionate to the seriousness of the unlawful conduct.
> 3. The imposition of the sanction is not necessary to protect the objects of the *Migration Act* (1958) (Cth).

> 4. The *Migration Act* 1958 (Cth) discloses an intention that the penalty for breach should be a fine and possibly deportation. In other words, the Act is silent as to any other consequences of breach."

Stein JA noted that what was prohibited by s 83(2) was the performance of work by an illegal entrant without the permission in writing of the secretary, not the entering into the contract of service or the performance of work under it. Stein JA concluded that the Court should not decline to enforce the contract on the grounds of public policy. In reaching that conclusion Stein JA declined to follow the decision of the Full Court of the Supreme Court of South Australia in *WorkCover Corporation (San Remo Macaroni Co Pty Ltd) v Da Ping* [1994] SASC 4466 (30 March 1994) ("*San Remo*").

[22] Cole JA agreed that the appeal should be dismissed, holding that the statute did not prohibit an illegal entrant from performing work and, on the public policy aspect, stating at 316:

> "In my view the statute does not disclose an intention that rights dependent upon a contract of employment entered into in breach of the statutory prohibition against the performance of work without the necessary permission should be unenforceable because of illegality. The sanction of refusing to enforce those rights would be disproportionate to the seriousness of the unlawful conduct. It is not necessary to impose such a sanction to protect the objects of the *Migration Act* 1958 (Cth) because that Act imposes sanctions in the form of a penalty."

[23] In contrast, Sheppard A-JA concluded that the *Migration Act* evinced a clear intention forbidding illegal entrants to work and that, although a penalty was provided for as was deportation, in order to give effect to the policy and purpose of the *Migration Act*, any contract pursuant to which work was unlawfully done by an illegal entrant should be held invalid, as a matter of statutory construction.

Submissions in respect of the authorities

[24] The applicant relies on the change to the legislation from that considered in *Nonferral* to the form in which s 235(3) is now found. Whereas s 83(2) of the *Migration Act* specified the breach as the performance of work by an illegal entrant without obtaining written permission of the secretary of the department to the work being undertaken, s 235(3) of the *Migration Act* makes the performance of work by an unlawful non-citizen an offence. The applicant therefore submits that it must follow that the contract to perform work entered into by the unlawful non-citizen is illegal. The applicant submits that the decision in *Nonferral* can be distinguished on the basis that each of Cole and Stein JJA approached the issue of statutory construction on the basis that the relevant provision did not make performance of work a breach of the statute, but made performance of work without the permission of the secretary of the department the relevant breach.

[25] The applicant submits that as the object of the *Migration Act* as it stood at the time that the respondent was injured whilst working for the applicant was to regulate in the national interest the coming into and presence in Australia of non-citizens and that Parliament intended the *Migration Act* to be the only source of the right of non-

citizens to so enter and remain, effect is given to that object by s 235(3) barring an unlawful non-citizen from working and that the object of the *Migration Act* can be given effect only if s 235(3) is construed as making the contract pursuant to which the respondent was working illegal.

[26] The respondent submits that the issue is whether s 235(3) of the *Migration Act* impliedly prohibits the entry into and performance of a contract for work that results in a breach of that provision, as s 235(3) does not expressly state that the contract providing for performance of work in breach of that provision is void or illegal. It is submitted on behalf of the respondent that such an implied prohibition is not warranted by the harshness, inconvenience and unjust results that would flow from the contract being illegal. It is submitted that these results include that an injured person in the position of the respondent would be deprived of any entitlement to compensation in respect of an injury that may be entirely due to the fault of the employer, a self-insured employer or the insurer would correspondingly benefit when the injured employee was an unlawful non-citizen, an employer may be encouraged to turn a blind eye to the possibility that the employee was an unlawful non-citizen and there may be reduced incentive for the employer to take care for the safety of an employee who happened to be an unlawful non-citizen. As was suggested in *Nonferral*, it would also follow that the employee who was the unlawful non-citizen could not sue for unpaid wages. It could also follow that the employer may seek to recover the wages paid to an employee who was an unlawful non-citizen, even though the employer may have obtained benefit from the work undertaken during the course of employment by the unlawful non-citizen.

[27] The respondent relies on the extent of the penalty imposed for a breach of s 235(3) of the *Migration Act*, being a fine not exceeding $10,000 and submits that this potential penalty, liability to detention under s 189, cancellation of any visa under s 116 and deportation under s 198 of the *Migration Act* are sufficient sanctions to protect the public and to serve the purpose of the *Migration Act*. It is also submitted that the penalty provided for and the harsh consequences of holding that the contract of employment is void and unenforceable do not justify implying the additional sanction of making the contract illegal. For the same reasons, it is submitted that public policy does not require the court to decline to enforce the contract, as a result of any breach of s 235 of the *Migration Act*.

Construction of s 235 of the *Migration Act*

[28] As there is no express statement in s 235 of the *Migration Act* that the contract pursuant to which the unlawful non-citizen performs work is prohibited or illegal or void or unenforceable, it is a question of whether such a prohibition should be implied.

[29] The object of the *Migration Act* is to regulate the entry into Australia and the continuing presence in Australia of the non-citizen. Part of regulating the presence of the unlawful non-citizen in Australia is to make it an offence for the unlawful non-citizen to perform any work (whether for reward or otherwise) whilst in Australia. The *Migration Act* has a comprehensive regime for dealing with changing the status of an unlawful non-citizen and the detention and removal from Australia of the unlawful non-citizen. The *Migration Act* contemplates that, despite the comprehensive regime for dealing with the presence in Australia of an unlawful

non-citizen, there may still be an opportunity for that lawful non-citizen to perform work and that is dealt with by the performance of work being made an offence. The fine that can be imposed for such an offence is not insubstantial.

[30] If an unlawful non-citizen manages to engage in employment, in the absence of legislative prohibition on that contract of employment, that would normally carry with it all the rights and obligations that both parties to an employment contract assume. As was suggested by Stein JA in *Nonferral*, the consequences could be quite drastic for an unlawful non-citizen who engaged in work for reward, but who did not have the protection of being able to enforce the contract of employment and the right to benefits that accrue to an employee. The most obvious example is where the unlawful non-citizen is severely injured whilst working, as a result of the employer failing to provide a safe system of work or otherwise breaching the duty owed by an employer to an employee.

[31] In looking at this question of whether there should be an implied prohibition in respect of the contract of employment entered into by the respondent, the applicant points to the conduct of the respondent in utilising different dates of birth in order to facilitate obtaining work and working, whilst an unlawful non-citizen. That certainly suggests how the respondent managed to commit the offence provided for in s 235(3) of the *Migration Act*. That conduct, however, does not assist in undertaking the process of statutory construction required to determine whether the implied prohibition exists.

[32] Facilitating the object of the *Migration Act* in regulating the presence in Australia of an unlawful non-citizen does not require the additional sanction of depriving the unlawful non-citizen of the right to enforce the contract of employment which the unlawful non-citizen has entered into in breach of s 235(3) of the *Migration Act*. The consequences for the unlawful non-citizen in not being able to enforce such a contract could be severe. The object of the *Migration Act* is achieved by the application of the comprehensive legislative regime which covers an unlawful non-citizen and the imposition of a criminal penalty for breaching s 235(3) of the *Migration Act*.

[33] In coming to this conclusion, it has not been a matter of simply applying the decision of Cole and Stein JJA in *Nonferral*. I have followed the same approach to the issue of construction, but undertaken the task of construction in the light of the current terms of s 235(3) of the *Migration Act*. It does not follow from the change in the legislation that the result in this case should be different to that which was reached in *Nonferral*. For the reasons given by Cole and Stein JJA in *Nonferral*, the decision in *San Remo* should not be followed.

Public policy

[34] For similar reasons for reaching the conclusion that there should not be an implied prohibition on enforcing the contract of employment entered into in breach of s 235(3) of the *Migration Act*, I am not persuaded that public policy requires the court to refuse to enforce the rights which accrue to the respondent, as a result of entering into a contract of employment with the applicant. The fact remains that the respondent undertook work in the course of a normal employee - employer relationship with the applicant. It would advantage the applicant and any insurer

under the *WQA*, if the respondent as an unlawful non-citizen were not entitled to pursue the right to seek compensation and/or damages, as a result of being injured in the course of employment. The public policy which underlies the *WQA* and the normal safeguards which an employee can expect when undertaking paid employment is a powerful consideration in favour of enforcing the contract of employment. The dishonest conduct of the respondent in using different dates of birth does not negate this consideration. The sanction of not enforcing the contract of employment is not required to protect the object of the *Migration Act* in light of the comprehensive regime provided for in the *Migration Act* in respect of unlawful non-citizens. The imposition of a criminal penalty for the offence of performing work whilst an unlawful non-citizen is a sufficient sanction for that offence.

Order

[35] The order which should be made is that the originating application filed on 17 April 2003 be dismissed. I am disposed to order that the applicant pay the respondent's costs of the originating application, but will defer making an order in respect of costs, until the parties have an opportunity to make submissions on that issue.