FEDERAL
MAGISTRATES
COURT OF
AUSTRALIA

20 September 2007

Mr L Connolly Clayton Utz Lawyers BY FAX: (03) 9629 8488	Ms Gayle Johnston Simmons Wolfhagen BY FAX: (03) 6224 4166	Ms K Baumeler Butler, McIntyre & Butler BY FAX: (03) 6223 6321

LNG 39 of 2006

Dear Sir/Madam,

INSPECTOR RAYMOND MURRAY SMITH

-v-

ACN 090 444 518 PTY LTD T/AS GRANADA TAVERN & ORS

In *Smith v Granada Tavern & Ors (No. 3)* [2007] FMCA 1548 delivered yesterday by Federal Magistrate Burchardt, his Honour imposed upon the Second and Third Respondents respectively penalties of 75 and 30 per cent of the applicable maximum.

At paragraph [3] of the judgment, the applicable maximum for the Second and Third Respondents was stated to be $10,000.00. This figure is incorrect and should in fact be $6,600.00.

Accordingly, figures stated in the judgment at paragraphs [3], [26] and [29] have been changed to reflect the revised penalty figures, and the Orders have been amended pursuant to Rule 16.05(2)(e) of the *Federal Magistrates Court Rules 2001* to reflect same.

I have *attached* a copy of the reasons for judgment and sealed copy Orders of the Court made on 19 September 2007 as amended, and have posted same today.

Yours sincerely

ANN PRETTY
Deputy Associate to
Federal Magistrate Burchardt

Chambers of Federal Magistrate Burchardt
Commonwealth Law Courts
305 William St., Melbourne VIC 3000

Telephone (03) 8600 4324
Fax (03) 8600 8249
Internet: www.fmc.gov.au

FEDERAL MAGISTRATES COURT OF AUSTRALIA

SMITH v GRANADA TAVERN & ORS (No.3) *[2007] FMCA 1548*

INDUSTRIAL LAW – Imposition of penalty where finding of duress – consideration of matters relevant to penalty – accessorial liability.

Workplace Relations Act 1996 (Cth), s.400(5)

FSU v Commonwealth Bank of Australia [2005] FCA 1847
Kelly v Fitzpatrick [2007] FCA 1080
Canturi v Sita Coaches Pty Ltd [2002] FCA 349
Trade Practices Commission v TNT Australia Pty Ltd (1995) ATPR 40

Applicant:	INSPECTOR RAYMOND MURRAY SMITH
First Respondent:	ACN 090 444 518 PTY LTD T/AS GRANADA TAVERN
Second Respondent:	MICHAEL DAVID HIBBERD
Third Respondent:	JOCELYN MAREE BERECHREE
File number:	LNG 39 of 2006
Judgment of:	Burchardt FM
Hearing date:	2 July 2007
Date of last submission:	2 July 2007
Delivered at:	Melbourne (and by video link to Hobart)
Delivered on:	19 September 2007

REPRESENTATION

Counsel for the Applicant:	Mr J. Bourke & Mr M. Felman
Solicitors for the Applicant:	Clayton Utz Lawyers
Counsel for the First & Second Respondents:	Mr N.J. Clelland SC
Solicitors for the First & Second Respondents:	Simmons Wolfhagen
Counsel for the Third Respondent:	Ms K. Baumeler
Solicitors for the Third Respondent:	Butler, McIntyre & Butler

ORDERS

(1) That the First Respondent pay to the consolidated revenue fund by way of penalty $24,750.00.

(2) That the Second Respondent pay to the consolidated revenue fund by way of penalty $4,950.00.

(3) That the Third Respondent pay to the consolidated revenue fund by way of penalty $1,980.00.

FEDERAL MAGISTRATES COURT OF AUSTRALIA AT HOBART

LNG 39 of 2006

INSPECTOR RAYMOND MURRAY SMITH
Applicant

And

A.C.N. 090 444 518 PTY LTD T/AS GRANADA TAVERN
First Respondent

MICHAEL DAVID HIBBERD
Second Respondent

JOCELYN MAREE BERECHREE
Third Respondent

REASONS FOR JUDGMENT

1. On 19 June 2007 I declared that each of the Respondents had contravened s.400(5) of the *Workplace Relations Act 1996* (Cth) ("the Act") and gave my reasons for doing so.

2. The only matter still outstanding is what, if any, penalties I should impose on the three Respondents because of the duress that I have held they applied to Emily Wills, an employee of Granada Tavern in 2006.

3. Inspector Smith submitted that I should impose a penalty of 90 per cent of the applicable maximum on Granada Tavern and Michael Hibberd and a penalty of 50 per cent of the applicable maximum upon Ms Berechree. The maximum for Granada Tavern is $33,000.00 and for the others it is $6,600.00.

4. Counsel for Granada Tavern and Mr Hibberd submitted that no penalty should be imposed on Granada Tavern and a relatively light penalty upon Mr Hibberd.

5. Counsel for Ms Berechree urged me to impose no financial penalty upon Ms Berechree at all.

6. For the reasons that follow I regard the conduct of the Respondents as being serious in character and such as to justify the imposition of a penalty on each of the Respondents.

7. It is not necessary to traverse again all the findings I made in my reasons for judgment. The following paraphrase gives some idea of what it was all about. In 2006 Granada Tavern, through Mr Hibberd became aware that the Australian Workplace Agreements (AWAs) previously in place for some considerable time were not valid. Mr Hibberd wanted to get AWAs in place to avoid award obligations that would otherwise obtain. His desire to do so was plainly interrelated with a fear of underpayment claims which he sought in part to avoid by including a draft deed of release when he first met his employees to discuss the possibility of a new AWA.

8. Mr Hibberd and Ms Berechree realised at a very early stage that Ms Wills might be a problem in relation to signing an AWA. They rapidly came to the view that Ms Wills was a ringleader of employee resistance to the signing of AWAs.

9. When Ms Wills unequivocally indicated that she wished to be paid as the award required, her shiftwork pattern, which had been in place for a long time and was known to be congenial to her, was removed from her as part of the pressure put upon her to sign the AWA.

10. Mr Hibberd, as part of the pressure brought to bear upon Ms Wills, sought to indicate to Ms Wills and others that those who did not sign the AWA would have the issue of poor performance raised against them, when their performance did not justify such an approach.

11. Mr Hibberd behaved throughout in a domineering fashion and suggested to Ms Wills that he was in a position to control the outcome of any litigation and he further indicated that he might not be truthful in so doing. Mr Hibberd further involved Ms Berechree in the reduction

of hours of Ms Wills and thus in the pressure upon Ms Wills to sign the AWA.

12. This conduct took place over a period of about two months. It also involved Mr Hibberd's reference to running the Granada Tavern like a concentration camp if the AWAs were not signed.

13. The above is only a digest of the relevant findings but gives a clear indication as to why I regard the conduct of the Respondents as being significant. It should be noted further that Ms Wills was a young woman, a casual employee who needed the money from her work and who was at all times in a very significantly disadvantaged position, as compared to Mr Hibberd, who was a part-owner of the company for which she worked, and Ms Berechree, who was its manager.

14. The Respondents have expressed no contrition for the offending conduct nor any contrition for the stress imposed on Ms Wills by the trial process. Ms Wills was cross-examined for some 80 pages of transcript.

15. Against this, counsel for the First and Second Respondents pointed to the fact that this was a first transgression by the Respondents, the obloquy of the finding of duress against the Respondents, particularly in a relatively small community such as Hobart, the alleged absence of evidence of any necessity for specific deterrence in respect of the Respondents and the unique circumstances of the case which were said to make considerations of general deterrence inappropriate.

16. Counsel for the First and Second Respondents also pointed to the good character of the Respondents, in particular that of Mr Hibberd, and counsel for Ms Berechree pointed to the likely difficulties she would face because of the findings made.

17. Notwithstanding these submissions, in my opinion, the conduct of the Respondents as disclosed in my earlier reasons for judgment and outlined above was egregious. It was intended to and I have no doubt did place a great deal of strain on a young woman in a completely disempowered situation. That she was able to stick up for herself is to her credit and not that of the Respondents.

18. The scheme of the legislation is one in which general deterrence is significant. General deterrence has been referred to by Merkel J in *FSU v Commonwealth Bank of Australia* [2005] FCA 1847 at [41] – [43]. I should impose a penalty that deters not only Granada Tavern but other employers and their directors and managers from the sort of conduct that I have found to have taken place in this case.

Granada Tavern and Mr Hibberd

19. These Respondents submitted that there should be no penalty imposed upon the corporation because its liability was purely accessorial, in the sense that it was conducted by Mr Hibberd alone.

20. The Respondents placed reliance upon the decision of Ryan J in *Canturi v Sita Coaches Pty Ltd* [2002] FCA 349 ("*Sita*") in this regard. In that case Ryan J was concerned with a company of which an individual, Mr Sita, was the moving spirit behind the contraventions, which he did as the agent of the two companies involved in that case. Ryan J imposed a penalty only on the two companies.

21. The analogy sought to be drawn here was that in effect it was only the actions of the one party, namely Mr Hibberd, and therefore a penalty should be imposed only upon him.

22. There is nothing in the Act which suggests that proprietary limited companies and their directors cannot both be made liable for penalties in these sorts of circumstances. The facts in *Sita* were different. Not only was the penalty imposed on the company and not the individual, contrary to the position contended for here, but in that case the finding made by Ryan J was that Mr Sita was the sole person involved. He was the sole controller of the company, as I understand Ryan J's decision.

23. Here, the position is more opaque. Not only was there active involvement by other persons, including Ms Berechree, in the conduct that contravened the legislation, but the Granada Tavern has another co-owner, Mr Prescott. While as I have already found, Mr Hibberd was the moving force in the conduct of the Respondents that gave rise to this proceeding, counsel for the First and Second Respondents in submissions on 2 July 2007 stated at (P-11):

> *"I am instructed that the First Respondent, as part of the Hibberd and Prescott Group is now well and truly informed about requirements in relation to AWAs... The group operates three hotels and employs approximately 120 people. Mr Hibberd and Mr Prescott came into the industry some 10 years ago and they have employed, as one might expect over the last 10 years, a large number of Tasmanian residents."*

It is apparent from that extract that Mr Prescott is certainly no mere cipher.

24. Even if this was not the case and Mr Hibberd was the sole owner of Granada Tavern, I would regard it as appropriate to discourage the corporation from any further misconduct. I would have imposed the penalty on the corporate entity as Ryan J did in *Sita*, in any event. In my view, however, the circumstances taken as a whole make it appropriate that both the corporation and Mr Hibberd face a penalty.

25. In *Trade Practices Commission v TNT Australia Pty Ltd* (1995) ATPR 40,161 at 40,165 Burchett J said:

> *"It cannot be denied that the fixing of the quantum of the penalty is not an exact science. It is not done by the application of a formula, and within a certain range, courts have always recognised that one precise figure cannot be incontestably set to be preferable to another."*

26. I have taken into account the objects of the legislation, including relevantly the intention that parties negotiate AWAs free from duress, the fact that certainly at the Granada Tavern a large number of young people like Ms Wills are employed from time to time - and I would be prepared to go so far as to infer that this is not uncommonly the case in other taverns, both in Tasmania and elsewhere - and the desirability of protecting young employees generally. I have had regard to all the conduct of the Respondents. In my view, both Granada Tavern and Mr Hibberd should pay a penalty of 75 per cent of the applicable maximum, i.e. $24,750.00 for Granada Tavern and $4,950.00 for Mr Hibberd.

Ms Berechree

27. Ms Berechree falls to be considered in another light. She was at all times a subordinate employee. Although, for the reasons I have expressed, I have no doubt that her conduct contravened the legislation, it involved only one act in the chain of acts that constituted duress applied to Emily Wills. For the reasons I have already expressed in my earlier reasons for judgment, I have no doubt that this was because Mr Hibberd told her to do it. I do not accept that this was not an order she could overcome. She could have refused to break the law. She has to face the consequences of her own unlawful conduct.

28. I note, however, that Ms Berechree, unlike the other Respondents did not stand to gain directly from her conduct. She has suffered the embarrassment, like Mr Hibberd, of exposure within the community. I accept that the decision I make may have effects upon her holding of a gaming licence, although it is not clear that that will necessarily be the case.

29. In all the circumstances, in my opinion, Ms Berechree should be the subject of a penalty of $1,980.00.

30. Inspector Smith seeks that the penalties I impose ought to be paid to the Commonwealth, and I will so Order.

I certify that the preceding thirty (30) paragraphs are a true copy of the reasons for judgment of Burchardt FM

Associate: Brooke Evans

Date: 19 September 2007

IN THE FEDERAL MAGISTRATES
COURT OF AUSTRALIA
AT MELBOURNE

FILE NO: (P)LNG 39/2006

RAYMOND MURRAY SMITH
APPLICANT

ACN 090 444 518 T/AS GRANADA TAVERN
FIRST RESPONDENT

MICHAEL DAVID HIBBERD
SECOND RESPONDENT

JOCELYN MAREE BERECHREE
THIRD RESPONDENT

ORDER

BEFORE: FEDERAL MAGISTRATE BURCHARDT

DATE: 19 September 2007

MADE AT: MELBOURNE

Amended pursuant to Rule 16.05 (2)(e) of the Federal Magistrates Court Rules 2001

UPON HEARING Mr L. Connolly of Counsel for the Applicant, Mr G. Livermore of Counsel for the First and Second Respondents and Ms K. Baumeler of Counsel via video link for the Third Respondent

THE COURT ORDERS THAT:

1. The First Respondent pay to the consolidated revenue fund by way of penalty $24,750.00 within 30 days.

2. The Second Respondent pay to the consolidated revenue fund by way of penalty $4,950.00 within 30 days.

3. The Third Respondent pay to the consolidated revenue fund by way of penalty $1,980.00 within 30 days.

By the Court

FEDERAL MAGISTRATE BURCHARDT

DATE ENTERED: 20 Sep. 07