

35/05; [2005] VSC 468

SUPREME COURT OF VICTORIA

**MENG DEVELOPMENTS PTY LTD v COUNTY COURT & ANOR;
SCHIERHOLTER v COUNTY COURT & ANOR**

Williams J

30 August, 1 December 2005

OCCUPATIONAL HEALTH AND SAFETY – INSTRUMENT OF AUTHORISATION EXECUTED BY PERSON AT VICTORIAN WORKCOVER AUTHORITY – INSPECTOR AUTHORISED TO BRING PROCEEDINGS AGAINST DEFENDANT – WHETHER INSTRUMENT VALIDLY EXECUTED – WHETHER PERSON EXECUTED INSTRUMENT OF AUTHORISATION IN THE CAPACITY OF DELEGATE OR AUTHORISED PERSON – WHETHER COURT IN ERROR IN RULING THAT THE INSTRUMENT AUTHORISING THE INSPECTOR TO BRING CHARGES WAS VALID: OCCUPATIONAL HEALTH AND SAFETY ACT 1985, S48; ACCIDENT COMPENSATION ACT 1985, SS21, 245.

The Victorian WorkCover Authority ('Authority') delegated to its Chief Executive officer its powers, functions, authorities, duties or discretions under the *Occupational Health and Safety Act* 1985 ('Act') and approved the authorisation of any of the delegated powers or functions. In 2001, the Chief Executive officer of the Authority authorised L. the Director of Legal Services and Investigations of the Authority to give to inspectors the written authority to bring proceedings required by s48(2) of the Act. Subsequently, L. executed an instrument authorising proceedings to be brought by an Inspector against MDP/L. At the hearing, it was submitted that L. did not act as an authorised person of the Chief Executive officer but rather acted as a delegate. The court concluded that the inspector was validly authorised to bring the proceedings. Upon appeal—

HELD: Appeal dismissed.

In relation to the submission that the court erred in finding that the inspector had discharged the burden of proving that L. acted in her capacity as a person authorised under s21(3) of the *Accident Compensation Act* when giving the authority to bring proceedings, the evidence of the instrument and the statutory scheme contemplated that such an authorised person would sign documents in his or her own name. L. complied with the relevant statutory provisions when authorising the inspector to bring the proceedings. L. did not act as a delegate when executing the instrument of authorisation in her own name. Accordingly, the court was not in error in ruling that the written instrument authorising the inspector to bring the proceedings was valid.

***AB Oxford Cold Storage v Arnott* MC08/05; [2005] VSCA 111; (2005) 11 VR 298; (2005) 145 IR 61, applied.**

WILLIAMS J:

1. By originating motions, filed in each proceeding on 7 January 2005 and amended with leave of the Court on 30 August 2005, the plaintiffs seek orders under O56 of the *Supreme Court (General Civil Procedure) Rules* 1996 ("the Rules") quashing their respective convictions, on 10 November 2004, in the County Court of Victoria for offences under the *Occupational Health and Safety Act* 1985 ("the OH&S Act"). They also seek the quashing of costs orders made against them.

2. The convictions were imposed by a judge of the County Court, after unsuccessful appeals from orders made in the Magistrates' Court of Victoria at Ringwood, on 27 April 2004, convicting the plaintiffs of the same offences. The applications were heard together and the plaintiffs were represented by their solicitor. The first defendant took no part in the proceeding, in accordance with established practice, and the second defendant in each proceeding ("Mr Reiss") was represented by counsel.

The grounds for relief

3. Although the plaintiffs stated a number of grounds upon which they sought the quashing of their respective convictions in the originating motions, their solicitor has informed the Court that they challenge their convictions only on the basis that the County Court record discloses an error of law on its face^[1].

4. The learned County Court judge is said to have erred in ruling that the written instrument authorising Mr Reiss, for the purposes of s48(2) of the OH&S Act, to bring the proceedings against the plaintiffs was valid.

The record

5. It is conceded^[2] by senior counsel for Mr Reiss that the reasons for the challenged ruling are sufficiently disclosed by the affidavit material, to enable the issue to be addressed by the Court. I am persuaded that this is the case.

The plaintiffs' contention

6. The judge ruled that Mr Reiss, an inspector appointed under the OH&S Act, was duly authorised to bring the proceedings which resulted in the convictions of each of the plaintiffs.

7. His Honour is said to have erred by failing to conclude that Ms Lagogiannis, the officer purporting to so authorise Mr Reiss to bring the proceedings, acted as a delegate of Mr William Mountford, the Chief Executive of the Victorian WorkCover Authority ("the Authority"), in circumstances in which she was not a delegate, but was only a person authorised under s21(3) of the *Accident Compensation Act* 1985 ("the Accident Compensation Act") to give Mr Reiss the requisite authority. It appears from the face of the instrument of authorisation of Mr Reiss in evidence in the County Court that Ms Lagogiannis had executed it in her own name, rather than in the name of Mr Mountford. This evidence is relied upon to found the argument that the judge erred in failing to conclude that Ms Lagogiannis acted as a delegate.

8. It is also put that the judge should have reached this conclusion because Ms Lagogiannis was not called to give evidence as to the capacity in which she acted.

Common ground

9. A number of matters are not in dispute.

10. It is agreed that, by an instrument dated 8 July 1996, under s21(1) of the Accident Compensation Act, the Authority validly delegated to its Chief Executive officer from time to time, its "powers, functions, authorities, duties or discretions" under the OH&S Act and approved the authorisation of any officer or employee of the Authority in the performance or exercise by that officer or employee of *inter alia* any of the delegated powers or functions. Mr Mountford was the Authority's Chief Executive officer at relevant times.

11. It is also agreed that Mr Mountford had the power under s21(3) to authorise another person to exercise a delegated function or power.

12. Section 21 of the *Accident Compensation Act* relevantly provided:

"21 Delegation

(1) The Authority may, by instrument under its common seal, delegate to any person any function or power of the Authority under this Act or any other Act including, subject to sub-section (3), this power of delegation.

...

(3) A person to whom a function or power has been delegated under sub-section (1) may, subject to and in accordance with the approval of the Authority given generally or in a particular case, by instrument in writing, ... authorise another person to perform the function or exercise the power so delegated.

(4) An authority given by a delegate of the Authority under sub-section (3) may be revoked at any time by the delegate by instrument in writing and, where a delegation under which the authority is given is revoked, the authority is revoked.

(5) Any act or thing done in the performance of a function or the exercise of a power by a person to whom that function or power is delegated by the Authority under sub-section (1) or by a person authorised by a delegate of the Authority under sub-section (3) to perform that function or exercise that power has the same force or effect as if it had been done by the Authority.

(6) Where the performance of a function or the exercise of a power by the Authority is dependent on

the opinion, belief or state of mind of the Authority in relation to a matter and that function or power has been delegated under sub-section (1), that function or power may be performed or exercised by the delegate or by a person authorised by the delegate under sub-section (3) upon the opinion, belief or state of mind of the delegate or of the authorised person, as the case may be, in relation to that matter.

(7) The giving of an authority under sub-section (3) does not prevent a performance of the function or the exercise of the power by the person by whom the authority was given.

(8) Where a person purports to perform a function or exercise a power under this Act, it shall be presumed, unless the contrary is established, that the person is duly authorised by a delegation under sub-section (1) or by an authority under sub-section (3) given pursuant to such a delegation to perform the function or exercise the power.

(9) A delegation under sub-section (1) or the giving of an authority under sub-section (3) may be made subject to such conditions or limitations as to the performance or exercise of any of the functions or powers to which it relates or as to time or circumstance as is specified in the instrument of delegation or in the authority."

13. It is convenient at this point to note that s245 of the *Accident Compensation Act* also provided:

"245. Signature

(1) Any document or copy of a document issuing out of the office of the Authority and bearing the written, stamped or printed signature of the chief executive of the Authority or a delegate of the Authority or a person authorized by a delegate, shall until the contrary is proved, be deemed to have been duly signed by the person by whom it purports to have been signed.

(2) Judicial notice shall be taken of every such signature and of the fact that the person whose signature it purports to be holds or has held the office of chief executive of the Authority or is or has been a delegate of the Authority or a person authorized by a delegate, as the case may be."

14. It is common ground that, by a written instrument dated 8 August 2001, acting under s21(3) of the *Accident Compensation Act*, Mr Mountford authorised Ms Lagogiannis to give to inspectors the written authority to bring proceedings for offences, required by s48(2) of the OH&S Act.

15. Section 48 (referring to the Authority as "the Authority", in accordance with the definition in s4 of the OH&S Act) relevantly provided:

"48. Proceedings may be brought by inspectors etc.

(1) Proceedings for an offence against this Act may be brought by the Authority or an inspector.

(2) No proceedings for an offence against this Act shall be brought by an inspector without the authority in writing of the Authority given generally or in a particular case."

16. It is also not disputed that Ms Lagogiannis executed an instrument in the following form:

"AUTHORISATION OF PROCEEDINGS

Occupational Health and Safety Act 1985 (VIC)

Equipment (Public Safety) Act 1994 (Vic)

Athanasia Lagogiannis, being the person occupying the position or performing the duties of Director, Legal Services and Investigations Division, WorkSafe Victoria, of the Victorian WorkCover Authority ("the Authority"), is duly **AUTHORISED** by **William Raymond Mountford**, Chief Executive of the Authority, to authorise Inspectors in writing generally or in any particular case to bring proceedings for offences against the *Occupational Health and Safety Act 1985 (Vic)* ("the OHSA") (and any regulations made thereunder) in accordance with the requirements of s 48(2) of the OHSA and/or for offences against the *Equipment (Public Safety) Act 1994 (Vic)* ("the EPSA") (and any regulations made thereunder) in accordance with the requirements of section 28(2) of the EPSA, under and by virtue of an instrument of authorisation executed by William Raymond Mountford on 8 August 2001 ("the instrument of authorisation").

William Raymond Mountford, being the person occupying the position or performing the duties of Chief Executive of the Authority, is a person to whom all of the Authority's powers, functions, authorities, duties or discretions under, *inter alia*, the OHSA (and any regulations made thereunder)

and the EPSA (and any regulations made thereunder) have been delegated by the Authority pursuant to section 21(1) of the Accident Compensation Act 1985 (Vic) ("the ACA"), except and excluding the power of the Authority to appoint any officer or employee of the Authority to be an Inspector for the purposes of the OHSA and the EPSA, by an instrument of delegation dated 8 July 1996 and executed by the Authority under its common seal ("the instrument of delegation").

The instrument of authorisation is made pursuant to the power to authorise under the instrument of delegation in which the Authority approves of the authorisation by the Chief Executive of any officer or employee of the Authority in the performance or exercise by that officer or employee of any of the powers, authorities, functions, duties or discretions delegated by the Authority to the Chief Executive and pursuant to section 21(3) of the ACA.

Pursuant to the instrument of authorisation, I, **Athanasia Lagogiannis, HEREBY AUTHORISE Henry Reiss** being an Inspector appointed under the OHSA to bring these proceedings against **Meng Developments Pty Ltd ACN: 004 594 021** for offences pursuant to sections 47(1) of the OHSA in relation to the following section.

Occupational Health & Safety Act 1985 (Vic)

Section 21(1)(a) & (2)(a) x 6

Section 21(1)(d) & (2)(d) x 5

Dated this 8th day of December 2001

(Signed)

Athanasia Lagogiannis

Director, Legal Services and Investigations Division

WorkSafe Victoria."

17. The written authority in relation to the prosecution of Mr Schierholter executed by Ms Lagogiannis was in similar terms. There is no dispute as to the authenticity of the instruments purporting to authorise Mr Reiss to bring the proceedings.

Submissions

18. The plaintiffs do not dispute that Ms Lagogiannis was a person duly authorised by Mr Mountford to authorise another to bring proceedings^[3]. Indeed, their solicitor argues that she could only relevantly act in her capacity as an authorised person and not as a delegate, because she was not a delegate. He submits that, under the relevant legislative scheme, a delegate acted in his or her personal capacity, whereas an authorised person did not have statutory power vested in him or her and, therefore, could act only on behalf of the person who did. The solicitor for the plaintiffs relies upon a number of authorities to some of which I will now turn.

Re Reference under Section 11 of Ombudsman Act 1976 for an advisory opinion; Ex parte Director-General of Social Services

19. In *Re Reference under Section 11 of Ombudsman Act 1976 For An Advisory Opinion; Ex Parte Director-General of Social Services*^[4], Brennan J, as President of the Administrative Appeals Tribunal, held that a delegate, writing a letter in the exercise of delegated power, should have exercised the power in his own name and acted invalidly in writing in the name of the delegator of the power. The plaintiffs' solicitor relies upon the following passage in his Honour's judgment:

"An act done in purported exercise of a statutory power is valid if the act falls within the statutory provision which confers the power. *Prima facie* an act will not fall within the statute unless it be done by the person in whom the statute reposes the power (whom I shall call 'the authority'). Validity is thus dependent upon the identity of the authority and the doer of the act."^[5]

20. The solicitor for the plaintiffs submits that the principle upon which he relies was stated by Brennan, J when his Honour subsequently stated:

"Where an authority has not delegated his power but he has authorised another to act in exercise of his power, the act is to be done in the name of the authority: *London County Council v Agricultural Food Products Limited* [1955] 2 QB 218 per Romer LJ at 224. But where a delegate is exercising the power delegated to him, he may validly exercise that power in his own name: *Owendale Proprietary Limited v Anthony* [1967] HCA 52; (1967) 117 CLR 539 at 562, 611; 40 ALJR 446."

21. Counsel for Mr Reiss respond that the reference by Brennan J to the authorisation of another to act in the capacity of the authority was a reference to an authorisation of the type permissible at common law under the operation of the principle in *Carltona Ltd v Commissioners*

of Works^[6] to which his Honour himself adverted, when saying:

“Where the power is not delegable, but the authority could not have been expected by the Parliament to have exercised it personally in the multitude of instances when its exercise would be required, it has been held that some classes of acts done by others for and on behalf of the authority should be treated as though they were the acts of the authority.”^[7]

22. According to counsel for Mr Reiss, the source of Ms Lagogiannis’s power was the written instrument, executed by Mr Mountford under s21(3) of the *Accident Compensation Act*, which she identified in the document by which she purported to authorise Mr Reiss to bring the proceedings against the plaintiffs. The authorisation of Ms Lagogiannis to perform functions and exercise powers involved a statutory conferral of those powers and functions, not an exercise of an implied power to act through the agency of another of the type recognised in *Carltona*.

23. Counsel for Mr Reiss also contend that the facts of this case are very different from those before Brennan J in which the delegate had exercised his power in a way which *denied* the power enabling him to act. Nothing Ms Lagogiannis did was inconsistent with the provisions of s21 of the *Accident Compensation Act*.

24. The plaintiffs’ solicitor replies that, on the contrary, the facts in the two cases are very similar. According to him, the delegate in the case before Brennan J phrased his letter in a way which indicated that he was acting as a delegate. However, he signed the letter on behalf of the delegator, rather than in his own name. The plaintiffs’ solicitor contends that Ms Lagogiannis “merely parroted the provisions of s21” and “suddenly” acted as a delegate when signing her name. He argues that Ms Lagogiannis should have signed in the name of Mr Mountford, putting his name at the foot of the document and initialling it to show that she was acting on his behalf, rather than signing without reference to him. Her failure to do so was fatal.

AB Oxford Cold Storage Co Pty Ltd v Arnott

25. Each party seeks support from the recent decision of the Court of Appeal in *AB Oxford Cold Storage Co Pty Ltd v Arnott*^[8]. In that case, the appellant appealed from the dismissal by a judge of the Court of an appeal from orders of the Magistrates’ Court, convicting it of offences against s21(1) of the OH&S Act. The appellant had posed two questions for consideration by the judge. The relevant question, for present purposes, enquired as follows:

“Whether for the purposes of section 48(2) of the [OH&S Act] the informant was authorised either generally or in the particular case to bring the proceeding against the Appellant?”

26. The question was answered in the affirmative, in circumstances in which the bringing of proceedings had been authorised by a Mr Durham, himself authorised to do so by Mr Mountford, the delegate of the Authority. Like Ms Lagogiannis, Mr Durham had signed the instrument authorising the bringing of proceedings, in his own name.

27. The document authorising proceedings was challenged for lack of particularity in relation to the proceedings which were purportedly authorised. The argument failed, as did another to the effect that the authority was unintelligible.

28. The appellant also argued that the magistrate and the judge had erred because they had not decided that the authorisation was deficient on its face. The argument was to the effect that the magistrate had been wrong to act on the bases of oral testimony as to the administrative steps preceding the issue of the authority and placing reliance upon the presumption of regularity.

29. The plaintiffs rely, in particular, upon the following paragraphs of the judgment of Nettle, JA in which his Honour stated and considered those arguments:

“The admissibility of *viva voce* evidence

[24] The appellant argued that the magistrate was wrong in law and that the judge below was in error in not determining that the authorisation was deficient on its face. The thrust of that contention was that the magistrate was wrong to act on the basis of oral testimony as to the administrative steps taken preceding the issue of the authority and to place reliance upon the presumption of regularity. The appellant submitted that:

s48(2) requires authority in writing and accordingly that there was no basis for the receipt of oral evidence for the purposes of proving the authorisation;

- the presumption of regularity is only capable of application in circumstances where there is a gap in the evidence, and it is said that there were no gaps in the evidence;
- in any event, it was not permissible to invoke the presumption of regularity, because the effect of the presumption would be to shift the burden of proof to the defence.

[25] Taking each of those propositions in turn, there is in my opinion no inconsistency between the requirement for authority to be in writing and the receipt of oral testimony to establish the nature and provenance of the authority in writing. As has already been seen, *Berwin v Donohoe* explains why it was not necessary that an authorisation to bring a prosecution precisely identify the authorised proceeding. It is sufficient that the description of the authorised proceeding be adequate to encompass the actual proceeding and that there be no suggestion of other prosecution or offence or challengeable conduct on the part of the accused [1915] HCA 79; (1915) 21 CLR 1 at 25, per Isaacs J. Consistently with that sort of approach, an informant might well give oral evidence or tender other documentary evidence to prove that the description of proceedings in an authority in writing relates to the subject proceeding. Oral and other written evidence might also be given to prove such things as the execution of the authority and that the prosecutor holds an office to which the authority applies.

[26] Turning then to the presumption of regularity, it is trite that courts will not presume the existence of facts which are central to an offence. *Scott v Baker* [1969] 1 QB 659 at 672-674; [1968] 2 All ER 993; [1968] 3 WLR 796 and *Dillon v R* [1982] AC 484 at 487; *Impagnatiello v Campbell* [2003] VSCA 154; (2003) 6 VR 416 at 427 [27]-[29]; (2003) 39 MVR 486; *Cross on Evidence*, Aust Ed, at [7280]. It is also clear that proof of authorisation is essential to the validity of a prosecution for an offence. *R v Waller* [1910] 1 KB 364 at 366; *R v Bates* [1911] 1 KB 964 at 965. But it is not an element of the offence. *Thompson v R* [1989] HCA 30; (1989) 169 CLR 1 at 12-13; (1989) 86 ALR 1; (1989) 63 ALJR 447; 41 A Crim R 134 and therefore, so long as a defendant does not object that a prosecutor's authorisation has not been proved, the authorisation will be presumed in accordance with the maxim *omnia praesumuntur rite et solemniter esse acta*. *R v Metz* (1915) 11 Cr App R 164 at 165-166; *R v Waller* [1910] 1 KB 364 at 366; 26 TLR 42; *Berwin v Donohoe* [1915] HCA 79; (1915) 21 CLR 1 at 28-29; *Palos Verdes Estates Pty Ltd v Carbon* (1991) 6 WAR 223 at 227; (1991) 72 LGRA 414. Needless to say, if objection is taken, it will be necessary for the prosecutor to prove the authorisation. But because the authorisation is not an element of the offence, the standard of proof of the authorisation is only on the balance of probabilities. *Thompson v R* [1989] HCA 30; (1989) 169 CLR 1 at 12-13; (1989) 86 ALR 1; (1989) 63 ALJR 447; 41 A Crim R 134. In the result, an authorisation may ordinarily be proved by production of an authority in writing and oral testimony as to the nature and provenance of the document. *MacCarron v Coles Supermarkets Australia Pty Ltd* [2001] WASCA 61; (2001) 23 WAR 355 at 366-367."

30. The plaintiffs submit that, as they challenged the validity of the instruments authorising Mr Reiss to bring the proceedings, the Court ought to draw an adverse inference against Mr Reiss and hold that Ms Lagogiannis purported to act as a delegate of Mr Mountford when she signed the authorisation instruments, because she was not called to give evidence "to assert or prove that she acted as an authorised person of William Mountford and not as his delegate"^[9]. I have taken this submission to be to the effect that the learned County Court judge erred by failing to reach the conclusion that she acted as a delegate after having drawn the suggested adverse inference. The plaintiffs also cite *Jones v Dunkel*^[10], *Citibank v City Commissioner of Taxation*^[11] and *Surinakova v Minister for Immigration, Local Government and Ethnic Affairs*^[12] in support of their proposition.

31. Counsel for Mr Reiss, on the other hand, rely upon the Court of Appeal decision in *AB Oxford Cold Storage* as an authority recognising the validity of an authorisation signed by a person who had also been authorised to do so by Mr Mountford. They also seek to use it in support of their alternative proposition that Ms Lagogiannis was, in any event, properly characterised as a delegate of Mr Mountford under the statutory scheme.

32. Counsel for Mr Reiss rely, further in the alternative, upon a number of authorities to the effect that, generally, an act purporting to be done under one statutory power may be supported under another.^[13] They contend that, if the Court were of the view that either Mr Mountford or Ms Lagogiannis had mistaken either the source or identity of the statutory provision under which he or she acted or purported to act or the capacity in which he or she has acted or purported to act, then the mistake would be of no consequence, in the context of the various statutory provisions authorising the delegation to Mr Mountford of the Authority's functions and powers, Mr Mountford's authorisation of Ms Lagogiannis and the authority given by her to Mr Reiss to bring proceedings.

33. The solicitor for the plaintiffs replies that the authorities cited by counsel for Mr Reiss

should be distinguished, because in each case there were alternative sources of power to support the impugned actions. Ms Lagogiannis, on the other hand, had only one source of power, as an authorised person. Contrary to the submission of Mr Reiss, she was not Mr Mountford's delegate for relevant purposes.

Conclusions

34. I am not satisfied that the record discloses that the learned judge erred in concluding that Mr Reiss was validly authorised to bring the proceedings against the plaintiffs. I am not persuaded that his Honour erred by failing to conclude, on the basis of the evidence that she executed the relevant instrument of authorisation in her own name, that Ms Lagogiannis purported to execute it as a delegate of Mr Mountford.

35. The argument fails because the document of authorisation executed by Ms Lagogiannis in evidence in the County Court itself refers to her authorisation by the earlier instrument of authorisation executed by Mr Mountford on 8 August 2001 (defined as "the instrument of authorisation") and states that Ms Lagogiannis authorises Mr Reiss to bring the proceedings "[p]ursuant to the instrument of authorisation". I am satisfied that the judge did not err in finding that she executed the instrument as an authorised person in accordance with the statutory scheme represented *inter alia* by the provisions of s21 and s245 of the *Accident Compensation Act* and s48 of the *OH&S Act*. I am not persuaded by the plaintiffs' argument that those provisions only mean that the acts of the authorised person have the same force and effect as those of the Authority or that the Authority will be bound by them.

36. Further, the authorities relied upon by the plaintiffs do not, in my opinion, establish the propositions for which they contend.

37. In *Re Reference Under Section 11 Ombudsman Act 1976* Brennan J was concerned with the different issues of the validity of an instrument executed by a delegate in the name of the delegator and the proper manner of execution of a document by a person authorised to carry out a function or exercise a power under the common law *Carltona* principles. The common law is subject to a contrary statutory provision.

38. In *AB Oxford Cold Storage* the Court of Appeal rejected different challenges to a virtually identical document, executed by Mr Durham, a person authorised by Mr Mountford to give the requisite authority to the inspector to bring proceedings under the *OH&S Act*.

39. I note that, although Nettle, JA did refer to the tender, in the Magistrates' Court, of an instrument dated 17 April 2001 "purporting to be the delegation by [Mr Mountford] as the person occupying the position of the Chief Executive Officer of the Authority, to Barry Durham of the power to approve prosecutions under s48(2) of the [OH&S Act]"^[14], the "Authorisation of Proceedings" document set out in his Honour's judgment^[15] stated that Mr Durham acted pursuant "the instrument of authorisation" dated 17 April 2001. The judgments do not set out the content of the instrument of authorisation under which Mr Durham purported to authorise the inspector to bring the proceedings, so I am unable to determine whether there was a separate instrument of *delegation*, as opposed to *authorisation*, which might have been said to validate the execution of the instrument giving the inspector the authority to commence proceedings, were it to have been argued that it had been executed by Mr Durham as a delegate of Mr Mountford. Suffice it to say that it does not appear from the judgments that the issue as to the capacity in which Mr Durham executed the document was raised in the Court of Appeal and the appeal was ultimately dismissed.

40. The plaintiffs have also failed to persuade me that the reference to the admissibility of *viva voce* evidence in the passage quoted from the judgment of Nettle, J A in *AB Oxford Cold Stores* supports the conclusion, based on the rule in *Jones v Dunkel*^[16], that the judge erred by failing to draw an adverse inference as to the legal effect of the signature on the instrument, because Ms Lagogiannis was not called to give oral evidence that she acted as an authorised person and not as the delegate of Mr Mountford. The plaintiffs' solicitor submitted that she was the person who signed the document and "should know what capacity she was acting under and she should front up to be cross-examined."^[17] However, there is and was no issue as to the nature or provenance of the instrument of authorisation which was in evidence in the County Court. The issue raised

by the plaintiffs relates to the validity of the document and the legal effect of the manner of its execution. The rule in *Jones v Dunkel* is not applicable, in my opinion. I agree with the submissions of counsel for Mr Reiss to the effect that Ms Lagogiannis could not give admissible evidence as to the legal effect of her execution of the instrument in her own name.

41. I note in this regard that, in each of the other cases relied upon by the plaintiffs in support of their submission, *Citibank* and *Surinakova*, the court applied the principle in *Jones v Dunkel* and drew an adverse inference in relation to a relevant factual matter about which a person could have given admissible evidence.

42. In so far as the plaintiffs persist with their written submission^[18] to the effect that the learned judge erred in finding that Mr Reiss had discharged his burden of proving that Ms Lagogiannis acted in her capacity as a person authorised under s21(3) of the Accident Compensation Act when giving Mr Reiss the authority to bring proceedings, I note the evidence of the instrument and my view that the statutory scheme contemplated that such an authorised person would sign documents in his or her own name. Ms Lagogiannis complied with the relevant statutory provisions when authorising Mr Reiss to bring the proceedings against the plaintiffs.

43. Because I have rejected the argument that Ms Lagogiannis acted as a delegate when executing the instrument of authorisation in her own name, it is unnecessary for me to comment further with the alternative submission of counsel for Mr Reiss that she might properly also be characterised as a delegate under the statutory scheme.

44. The applications will be dismissed and I will hear the parties as to the form of orders and in relation to costs.

^[1] T 1 123 – T2 16.

^[2] T 4 124 – T9 15.

^[3] T 19 117-9.

^[4] (1979) 2 ALD 86.

^[5] (1979) 2 ALD 86 at 93.

^[6] [1943] 2 All ER 560.

^[7] (1979) 2 ALD 6 at 93.

^[8] [2005] VSCA 111.

^[9] Written summary of plaintiffs' arguments filed on 22 August 2005 at [33].

^[10] [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395.

^[11] (1988) 83 ALR 144; 19 ATR 1479; (1988) 16 ALD 486 at 496.

^[12] [1991] FCA 596; (1991) 33 FCR 87 at 93; 26 ALD 203.

^[13] *R v Bevan; ex parte Elias & Gordon* [1942] HCA 12; (1942) 66 CLR 452 at 487; [1942] ALR 170; *Lockwood v The Commonwealth* [1954] HCA 31; (1954) 90 CLR 177 at 184; [1954] ALR 625; *Brown v West* [1990] HCA 7; (1990) 169 CLR 195 at 203; 91 ALR 197; (1990) 64 ALJR 204; *Mercantile Mutual Life Ins Co Ltd v ASC* (1993) 40 FCR 409; (1993) 112 ALR 463 at 465-6, 477-9 and 488-91; (1993) 29 ALD 616; 10 ACSR 140; (1993) 11 ACLC 235; *Johns v ASC* [1993] HCA 56; (1993) 178 CLR 408 at 426; 11 ACLC 1; 67 ALJR 850; 31 ALD 417; 11 ACSR 467; 116 ALR 567; *Newcrest Mining (WA) Ltd v Commonwealth of Australia* [1997] HCA 38; (1997) 190 CLR 513; (1997) 147 ALR 42 at 117; (1997) 71 ALJR 1346; (1997) 13 Leg Rep 22.

^[14] [2005] VSCA 111 at [12]; (2005) 11 VR 298; (2005) 145 IR 61.

^[15] [2005] VSCA 111 at [11]; (2005) 11 VR 298; (2005) 145 IR 61.

^[16] [1959] HCA 8; (1959) 101 CLR 298; [1959] ALR 367; 32 ALJR 395.

^[17] T31 1 1-3.

^[18] In para. [32] of their written submissions filed on 22 August 2005.

APPEARANCES: For the plaintiff Meng Developments Pty Ltd: No counsel was briefed. Francis Lim, solicitor. For the second defendant Victorian Workcover Authority: Mr OP Holdenson QC and Dr K Emerton, counsel. Victorian WorkCover Authority, solicitors.