

06/07; [2006] VSCA 262

SUPREME COURT OF VICTORIA — COURT OF APPEAL

SCHIERHOLTER v COUNTY COURT of VICTORIA & ANOR

Warren CJ, Chernov and Nettle JJ A

16 November 2006 — (2006) 15 VR 583; (2006) 160 IR 19

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. On appeal to the Supreme Court the appeal was dismissed. Upon appeal—

HELD: Appeal dismissed.

The following aspects of the instrument made it obvious that L. signed it as a person duly authorised to do so by the CEO.

(a) At the outset, the document stated that L. was "authorised" by the CEO to issue s48(2) authorisations.

(b) The instrument contrasted her identified capacity with that of the CEO who, it is made plain, is a *delegate* of the Authority.

(c) The instrument explained that the authorisation in favour of L. was made by the CEO pursuant to the power vested in him by the delegation.

(d) The authorisation concluded by stating that it was made "pursuant to the instrument of authorisation". These matters make it abundantly clear that L. executed the instrument in her capacity as a person duly authorised to do so by the CEO and not as a delegate. On that basis the appeal must fail.

Meng Developments Pty Ltd v County Court of Victoria & Anor MC35/05; [2005] VSC 468, affirmed.

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

Re Reference Under Section 11 of the Ombudsman Act 1976 (1979) 2 ALD 86, (judgment of Brennan J) distinguished.

WARREN CJ:

1. I invite Chernov JA to deliver the first judgment.

CHERNOV JA:

2. This is an appeal by Peter Adrian Schierholter ("the appellant") from orders of a judge of the Trial Division made on 1 December 2005 dismissing his application, and that of Meng Developments Pty Ltd (In Liq) ("the company")^[1], for orders pursuant to Order 56 of the Rules of the *Supreme Court (General Civil Procedure) Rules 1996* that their convictions in the County Court on 10 November 2004 for offences against the *Occupational Health and Safety Act 1985* ("the Act") be quashed.^[2] The convictions were challenged before her Honour only on the basis that the County Court record disclosed an error of law on its face. More particularly, it was said that the County Court judge erred in ruling that the written instruments authorising the second respondent to

bring proceedings as required by s48(2) of the Act^[3] were valid. Her Honour concluded that no such error was made by the County Court judge and dismissed the applications.

3. The relevant background circumstances were these. The offences in question arose in early 2001 when the company was engaged in a multi-residential unit construction at Lilydale and the site was under the control of the appellant. The second respondent was at all relevant times an employee of the Authority and an inspector appointed under Part 5 of the Act. On 1 October 2002 the appellant and the company were each charged by the second respondent with numerous charges under the Act. As regards the company, the charges alleged that, in contravention of relevant provisions of the Act, it failed to provide adequate fall protection and maintain a safe working environment. The charges against the appellant alleged several failures to comply with Prohibition Notices and with Improvement Notices, and with refusing inspectors of the Authority access to the workplace. The matters were heard in the Magistrates' Court at Ringwood. The Magistrate rejected the defence that the second respondent was not validly authorised to institute the proceedings for the purposes of s48(2) of the Act and convicted the defendants, fining the company \$12,000 and the appellant \$6,000. Appeals against these convictions, by way of hearing *de novo*, were dismissed by the County Court, as I have mentioned.

4. Before us the appellant argued, as he had done in all the courts below, that the charges against him brought by the second respondent were invalidly laid because the second respondent was not authorised to bring the proceedings. It was claimed that the instrument that purported to grant him that authority was invalid and, thus, the requirements of s48(2) of the Act were not satisfied. It was said that the person who executed the instrument, the then director of Legal Services at the Authority – Athanasia Lagogiannis – purported to do so as delegate of the person in whom the power to issue s48(2) authorisations was vested, whereas no such delegation had been made to her. Thus, it was argued, Ms Lagogiannis purported to execute the document in a capacity that she did not have and, therefore, the instrument in question did not confer authority on the second respondent to launch the impugned proceedings. In order to put this contention in context, it is necessary first to summarise in general terms the scheme of the legislation that enables the Authority to cause proceedings for breaches of the Act to be brought by its officers, and then to look at the specific provisions of the legislation and the instruments in question. Broadly, the *Accident Compensation Act* 1985 establishes the Authority^[4] and authorises it to delegate certain of its powers, including the power to issue s48(2) authorisations and its powers of delegation, to its Chief Executive Officer ("the CEO") such that he may, with the approval of the Authority, authorise officers to issue s48(2) authorisations. More specifically, the relevant provisions, for present purposes, are ss21 and 245 of the *Accident Compensation Act*. Their terms are set out below:

"21. Delegation

(1) The Authority may, by instrument, 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, or in the case of a body corporate that has a common seal, under its common seal, 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 was 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.

(10) A delegation must not be made under this section to any person, other than a Director of the Board appointed under section 25 or 26 or an officer or employee of the Authority, in respect of any power, function, authority or discretion to which section 10B of the *Dangerous Goods Act 1985* applies."

"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."

5. Acting pursuant to s21(1) of the Act, the Authority executed an instrument of delegation dated 8 July 1996, delegating to its CEO, save for irrelevant exceptions, all of its powers, functions, authorities, duties and discretions under identified Acts, including the Act and any regulations made pursuant to it, and including its power of delegation, and it also thereby approved the authorisation by the CEO of "any officer or employee of the Authority [in the performance] of the powers, authorities, functions, duties or discretions delegated to the [CEO] by this instrument." Plainly, this approval extended to the issue of s48(2) authorisations. Pursuant to that power and the provisions of s21(3) of the *Accident Compensation Act*, the CEO executed an instrument of authority dated 8 August 2001 authorising Ms Lagogiannis to issue authorities contemplated by s48(2) of the Act. The instrument is relevantly in the following terms:

VICTORIAN WORKCOVER AUTHORITY
ACCIDENT COMPENSATION ACT 1985
OCCUPATIONAL HEALTH AND SAFETY ACT 1985
EQUIPMENT (PUBLIC SAFETY) ACT 1994
AUTHORITY TO PROSECUTE

I, **William Raymond Mountford**, being the person occupying the position of Chief Executive of the **VICTORIAN WORKCOVER AUTHORITY** ('the Authority'), a person to whom the Authority by instrument under its common seal dated 8 July 1996 has delegated, under section 21 of the Accident Compensation Act 1985 ('the Act'), the functions and powers described in the said instrument, **HEREBY AUTHORISE**, pursuant to section 21(3) of the Act and by virtue of any and all other powers enabling me to do so, **Athanasia Lagogiannis** to authorise inspectors in writing generally or in any particular case to bring proceedings for offences against the *Occupational Health and Safety Act 1985* ('the OHSA') (and any Regulations made thereunder) in accordance with the requirements of section 48(2) of the OHSA and for offences against the *Equipment (Public Safety) Act 1994* ('the EPSA') (and any Regulations made thereunder) in accordance with the requirements of section 28(2) of the EPSA.

6. By instrument dated 8 December 2001, Ms Lagogiannis authorised the second respondent to bring the subject proceedings. Its relevant terms are as follows:

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 section 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 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 **Peter Schierholter** for offences pursuant to section 47(1) of the OHSA in relation to the following sections: **Occupational Health and Safety Act 1985 (Vic)**

Section 52(1)&21(1)&(2)(a)x3

Section 52(1)&21(1)&(2)(d)x2

Section 42(1)(a)

Section 43x4

Section 44x5

7. It is relevant to note that, although the appellant contends that the s48(2) authorisation in question is invalid, Mr Lim, who appeared for the appellant, said that there was no challenge to the validity of the delegation from the Authority to the CEO or the latter's authorisation of Ms Lagogiannis to issue s48(2) authorisations. The sole complaint, as I have said, is that the instrument by which Ms Lagogiannis sought to authorise the second respondent to bring the proceeding is invalid because she purported to execute it in a capacity that she did not in fact have, namely, as a delegate of the CEO. Thus, the narrow question before us is whether her Honour erred in rejecting this contention. Put another way, did Ms Lagogiannis execute the instrument in the capacity attributed to her by the appellant?

8. Mr Lim's claim that Ms Lagogiannis signed the s48(2) authorisation purportedly as delegate of the CEO was based essentially on the contention that she signed it in her own name. It was said that if she had acted pursuant to the authorisation from the CEO she would have had to execute the instrument in his name, which plainly she did not do. The appellant submitted that Ms Lagogiannis was not a delegate of the CEO – clearly that is the case – and, therefore, the authorisation is invalid.

9. Before analysing this argument, it is convenient to dispose now of a contention put by Mr Lim that, since Ms Lagogiannis was not called to give evidence that she signed the authorisation as an authorised person and not as a delegate of the CEO, the inference should have been drawn that she signed the instrument as delegate and her Honour erred in rejecting that argument. In my view it is plain that this contention is misconceived because Ms Lagogiannis could not have given admissible evidence as to the legal capacity by which she signed the authorisation. That is a question to be determined by the court from the terms of the relevant instrument and surrounding circumstances. Thus, no relevant inference could have been drawn from the fact that Ms Lagogiannis was not called to give evidence on this matter and her Honour's rejection of that argument was fully justified.

10. In support of the claim that the execution of the s48(2) authorisation by Ms Lagogiannis in her name demonstrates that she purported to act in that regard as delegate of the CEO, Mr Lim relied essentially on what Brennan, J. said in *Re Reference Under Section 11 of the Ombudsman Act 1976*^[5] ("the Reference case"), namely, that "where an authority [a person in whom the power

is reposed] has not delegated his power but he has authorized another to act in exercise of his power, the act is to be done in the name of the authority ... But where a delegate is exercising the power delegated to him, he may validly exercise that power in his own name." This statement was the springboard for the appellant's above claim, although reference in that regard was also made to other authorities, including *O'Reilly v Commissioners of the State Bank of Victoria*^[6] and *Secretary, Department of Social Security v Alvaro*^[7] which were said to support the principle stated by Brennan J. Mr Lim submitted that this principle applies to the present situation so that the execution of the s48(2) authorisation by Ms Lagogiannis in her own name meant that she impermissibly purported to act in that regard as a delegate of the CEO.

11. In the *Reference* case, the relevant power was exercised by the delegate of the Director. But in the letter to the claimant advising him of the outcome of this action, the delegate signed the letter in the name of the Director, thereby making it appear that it was the Director who exercised the power. Brennan J considered that, by signing the letter in the name of the Director, the delegate effectively denied the power that was vested in him as delegate and which, if exercised in that capacity, would have given him validity so to act. Thus, his Honour said, the purported exercise of the power miscarried. In analysing this issue his Honour recognised^[8] the existence of what he called a "confusing similarity" between the exercise of the authority's power by the authorised acts of another, and the exercise by an authority's delegate of the power delegated to him. In either case, said his Honour, the act is a valid exercise of power. Nevertheless the sources of validity are different, said Brennan J, and for some purposes a distinction must be made. His Honour had earlier explained that "where the relevant power is delegable and has been delegated, the delegate may – without further authorization – act in effective exercise of the power. His acts are not treated as acts vicariously done by the authority. He is not an agent to exercise the authority's power; he may validly exercise the power vested in him." It was in that context that Brennan J made the statement on which Mr Lim relies. His Honour went on to conclude that, in light of the statutory provisions that contemplate only delegation of powers to the relevant officer, the delegate could not validly assume a dual character, namely, as a delegate and as one who has been authorised to exercise the power. Since he purported to exercise the power as an authorised person, the attempted exercise of it miscarried.

12. Mr Holdenson, for the respondent, submitted that the principle stated by Brennan J does not apply in the present case. Counsel argued that there are indicia in the *Accident Compensation Act* that render his Honour's decision inapplicable to the present situation. More particularly, Mr Holdenson referred, amongst other matters, to ss245(1), 21(1), (5), (6), (7) of the *Accident Compensation Act* which, it was said, recognise that the issue of the s48(2) authorisations over the signature of a duly authorised person is a valid exercise of power conferred upon that person by the CEO. Moreover, it was pointed out, correctly, I think, that in the present case, contrary to the position in the *Reference* case, an authority was in place in favour of Ms Lagogiannis to issue s48(2) authorisations.

13. I will come back to this submission. I consider, however, that even if the principle stated by Brennan J applied here, it was not breached as Mr Lim contends. His claim that Ms Lagogiannis signed the authorities as delegate is simply untenable. The following aspects of the instrument make it obvious that she signed it as a person duly authorised to do so by the CEO.

(a) At the outset, the document states that Ms Lagogiannis is "authorised" by the CEO to issue s48(2) authorisations.

(b) Next, the instrument contrasts her identified capacity with that of the CEO who, it is made plain, is a *delegate* of the Authority.

(c) The instrument further explains that the authorisation in favour of Ms Lagogiannis was made by the CEO pursuant to the power vested in him by the delegation.

(d) Importantly, the authorisation concludes by stating that it was made "pursuant to the instrument of authorisation".

As I have said, these matters make it abundantly clear that Ms Lagogiannis executed the instrument in her capacity as a person duly authorised to do so by the CEO and not, as Mr Lim would have it, as a delegate. On that basis alone the appeal must fail.

14. As to Mr Holdenson's submission that the principle stated by Brennan J has no application to this case, I think it should be accepted, briefly for the following reasons. First, on a proper construction of the instrument of authorisation, it is plain that it was Ms Lagogiannis who exercised the power and that she did so as a person duly authorised by the CEO. By way of contrast, as I have noted, in the *Reference* case, the letter was misleading in the sense that it showed that it was the Director who exercised the power whereas, in fact, it was exercised by his delegate. Secondly, for the reasons I have given, the authorisation makes it plain that Ms Lagogiannis did not exercise the power in a capacity which she did not have, namely, as delegate of the CEO. Thirdly, the sections of the *Accident Compensation Act* to which Mr Holdenson referred make it plain, I think, that the legislative scheme contemplates that s48(2) authorisations would be signed in the name of the person who is duly authorised to do so. Section 245, in particular, makes it apparent that the legislative scheme envisages that a person in the position of Ms Lagogiannis would sign the relevant authorisation in her name. Such an instrument plainly falls within the opening words of sub-s.(1). The provision also requires that such a signature be given recognition until "the contrary is proven" and that judicial notice of it is to be taken.

15. I note for completeness that the statutory scheme, as I see it, whereby a duly authorised officer of the Authority can perform the Authority's function to issue a s48(2) authorisation by signing the authorisation in his or her name has recently been considered and approved by this Court in *AB Oxford Cold Storage Co Pty Ltd v Arnott*.^[9] The legislative provisions dealt with in that case were the same as those that arise for consideration here and the instruments of delegation and authorisation were relevantly identical to those here. In particular, the authorisation to prosecute was signed by the executive director, who was, relevantly, in the same position as Ms Lagogiannis. It is true that, as Mr Lim pointed out, in that case the challenge to the validity of the authorisation to prosecute under the Act was based on different grounds to those here – principally, inadequate particularisation in the authorisation of the proceeding to be brought and the claim that the Authority's power to authorise a prosecution was said to be non-delegable. Nevertheless, the comprehensive analysis of the legislation and the instruments by Nettle JA in that case^[10] does not suggest that the signing of an authorisation to prosecute by a duly authorised officer in his or her name involves an invalid exercise of that power.

16. Consequently, I consider that the appellant's claim that the authorisations in question were invalid must be rejected and that the appeal should be dismissed.

WARREN CJ:

17. I agree with the reasons of Chernov JA and would dismiss the appeal.

NETTLE JA:

18. I also agree. In my view the judge was plainly right to hold that the instrument of authorisation made clear that Ms Lagogiannis issued the document in the exercise of her authorisation pursuant to s21(3) of the Act to perform the function of the delegate to authorise an inspector to bring proceedings. The document in terms stated that it was issued by Ms Lagogiannis pursuant to her authorisation to authorise an inspector to bring proceedings.

19. Contrary to the appellant's submission, there was no requirement that the document be signed in the name of the delegate who authorised Ms Lagogiannis to authorise inspectors to bring proceedings. To the contrary, s245 of the Act recognises that a document issued by a person authorised by a delegate should be deemed to have been duly signed. There could be no point in such a provision if a person authorised by a delegate were required to sign in the name of the delegate who authorised that person to authorise an inspector to bring proceedings.

20. The decision of Brennan J in *Re Reference* under s11 of the *Ombudsman Act 1976*^[11] is also not to the point. In that case, a delegate signed an instrument in the name of the delegator. It was held that the attempted exercise of his own power as delegate thereby miscarried because, by signing in the name of the delegator, the delegate purported to deny his power as a delegate and so, on the face of the instrument, misrepresented that the instrument had been issued by the delegator. That is not so here. Here, as I say, Ms Lagogiannis purported to, and did, act in exercise of her authorisation to authorise inspectors to bring proceedings.

WARREN CJ:

21. The formal orders of the Court are:

1. Appeal dismissed.
2. The appellant pay the costs of the second respondent of the appeal including any reserved costs.

^[1] At all relevant times the appellant was the director of the company. The company was placed in liquidation on 9 March 2006 and by letter of 16 November 2006 the liquidator consented to the notice of appeal that was filed on behalf of the company being dismissed. The Court made an order to that effect at the commencement of the hearing of the appeal.

^[2] The Act was repealed by the *Occupational Health and Safety Act* 2004.

^[3] Section 48 relevantly provided:

"(1) Proceedings for an offence against this Act may be brought by the [Victorian Workcover] Authority ["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 any particular case."

^[4] Section 18.

^[5] (1979) 2 ALD 86 at 94.

^[6] [1983] HCA 47; (1983) 153 CLR 1; (1982) 44 ALR 27; (1983) 57 ALJR 130; (1982) 13 ATR 706; 82 ATC 4,671.

^[7] [1994] FCA 1124; (1994) 50 FCR 213; (1994) 34 ALD 72; (1994) 19 AAR 460; (1994) 81 SSR 1191.

^[8] At 94.

^[9] [2005] VSCA 111; (2005) 11 VR 298; (2005) 145 IR 61.

^[10] The other members of the Court – Callaway JA and Byrne AJA – agreed with Nettle JA.

^[11] (1979) 2 ALD 86.

APPEARANCES: For the appellant Schierholter: Mr F Lim (solicitor). Francis Lim, solicitor. For the second respondent (Victorian WorkCover Authority): Mr OP Holdenson QC with Dr KL Emerton, counsel. Victorian WorkCover Authority.
