

AUSTRALIAN FINANCIAL SERVICES AND LEASING PTY LIMITED v HILLS INDUSTRIES LIMITED & ANOR (S163/2013)

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 380

Date of judgment: 4 December 2012

Special leave granted: 16 August 2013

This appeal concerns the attempt by the Appellant (“AFSL”) to recover funds it paid out on the basis of fraudulent documents provided by a third party, Mr Richard Skarzynski.

Total Concept Projects (Australia) Pty Ltd and Total Concept Productions (Australia) Pty Ltd (together, “TCP”) were companies controlled by Mr Skarzynski. Both of the Respondents, Hills Industries Ltd (“Hills”) and Bosch Security Systems Pty Ltd (“Bosch”) were creditors of TCP. Mr Skarzynski arranged with AFSL for it to purchase certain equipment from each of the Respondents and then lease that equipment to TCP. In doing so he fabricated certain documents. In August 2009 Mr Skarzynski informed the Respondents that TCP’s debts to them would soon be paid with funds to be provided by a third party. AFSL then made payments directly to each of the Respondents, who received the monies in good faith and discharged TCP’s debts owed to them. (AFSL also began to receive payments from TCP under the leases that had been entered into.) Bosch then consented to the setting aside of default judgments obtained against TCP for debts owed to it. Bosch also abandoned other proceedings that it had on foot.

After learning that Mr Skarzynski’s companies were in serious financial difficulty, AFSL obtained a mortgage over his family’s home in February 2010. Six months after its payments to the Respondents, AFSL also discovered Mr Skarzynski’s fraud. It then commenced proceedings in restitution against the Respondents for the recovery of monies it had paid out.

On 5 April 2011 Justice Einstein ordered Hills to pay restitution to AFSL, but dismissed AFSL’s claim as against Bosch. His Honour found that Hills had given no consideration for the monies it had received from AFSL. Nor had Hills suffered detriment arising out of a (speculative) change of its position after receiving those monies. Justice Einstein upheld Bosch’s defence however of “change of position”, as Bosch had incurred a detriment by extinguishing its legal claims against AFSL. AFSL then appealed against Bosch, while Hills appealed against AFSL.

On 4 December 2012 the Court of Appeal (Bathurst CJ, Allsop P & Meagher JA) unanimously dismissed AFSL’s appeal and allowed that of Hills. Their Honours held that the “change of position” defence was made out by both Bosch and Hills. This was because, by discharging the debts owed to them by TCP, they had each given up an opportunity to enforce payment of those debts by TCP. The Court of Appeal found that in such circumstances it would be unjust for either Bosch or Hills to be required to pay restitution to AFSL.

The grounds of appeal include:

- The Court of Appeal erred by finding at [160] that it was not a requirement of the law in Australia of change of position as described by the High Court in *David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353 to point to actual expenditure or financial commitment or loss by the Respondents in order to make out the defence of change of position in a claim for payment by mistake.

On 6 September 2013 Hills filed a notice of contention, the grounds of which include:

- To the extent it did not do so, the Court of Appeal ought to have concluded that restitution by Hills to AFSL should not be required because Hills' discharge of TCP's debt gave rise to a defence of bona fide discharge.

On 6 September 2013 Bosch also filed a notice of contention, the grounds of which include:

- The Court of Appeal failed to decide that AFSL is not entitled to restitution for unjust enrichment as Bosch's receipt and application of \$177,689.06 of the \$198,000.00 from AFSL was a bona fide discharge of the indebtedness of TCP to Bosch. (Bathurst CJ [2] and Meagher JA [200]).