Normandy Woodcutters Ltd & Anor v Simpson [2002] NTSC 43

PARTIES:	NORMANDY WOODCUTTERS LTD formerly known as NICRON RESOURCES LTD and ALLIANZ AUSTRALIA LTD and OWEN JAMES SIMPSON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NOS:	LA15 of 2001 (9927317) and 23/2002 (20202941)
DELIVERED:	19 July 2002
HEARING DATES:	21 May 2002
JUDGMENT OF:	MILDREN J

CATCHWORDS:

Administrative Law – possible illegal conduct – referral by Work Health Court to executive authority – whether reviewable.

Appeal – workers compensation - commutation of weekly payments – deed for payment of compensation additional to maximum amount able to be commuted – whether deed needed to be recorded – whether s.108 mandatory or directory – whether deed illegal – whether commutation affected by inducement – *Work Health Act* s.108 and s.186A

Appeal – workers compensation – commutation of weekly payments – deed for payment of additional compensation – whether a sham scheme or whether a pretence

Appeal – workers compensation – commutation of weekly payments – proposed payment of commuted amount less than present net value of

weekly payments – whether just and equitable – relevant factors – *Work Health Act* s.74

Rectification of Deed – clause not reflecting common intention of parties – whether deed should be rectified – factors relevant to discretion

Statutes:

1. *Supreme Court Act* s 78 (repealed)
2. *Work Health Act* ss. 6, 10, 11, 13, 65, 74, 108, 116, 186A
3. *Workers Compensation Act 1987* (NSW) s. 51 (now repealed)

Cases Cited

1. *A G Securities v Vaughan; Antoniades v Villiers* [1990] 1 AC 417 at 462, not followed
2. *Gisborne and Another v Barton* [1988] 3 All ER 760, not followed
3. *Inland Revenue Commissioners v Littlewoods Mail Order Stores Ltd* [1963] AC 135 at 155, referred to
4. *Issa v Berisha* (1981) 1 NSWLR 261 at 265, referred to
5. *KJRR Pty Ltd v Commissioner of State Revenue* [1999] 2 VR 174, referred to
6. *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 346,350, applied
7. *In the marriage of P and P* (1985) FLC 91-605, applied
8. *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381, applied
9. *Pukallus v Cameron* (1982) 180 CLR 447 at 452, followed
10. *Richard Walker Pty Ltd v Commissioner of Taxation* (1996) 67 FCR 243, followed
11. *Sharrment Pty Ltd and Others v Official Trustee in Bankruptcy* (1988) 18 FCR 449, followed
12. *Street v Mountford* [1985] AC 809, referred to
13. *Tasker v Fullwood* [1978] 1 NSWLR 20, applied

REPRESENTATION:

Counsel:

Appellants/Plaintiffs:	Mr C McDonald QC
Respondent/Defendant:	Mr S Southwood QC

Solicitors:

Appellants/Plaintiffs:	Cridlands
Respondent/Defendant:	Rob Jobson

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Normandy Woodcutters & Anor v Simpson [2002] NTSC 43
Nos. LA15 of 2001 (9927317) & 23/2002 (20202941)

BETWEEN:

NORMANDY WOODCUTTERS LTD formerly known as NICRON RESOURCES LTD and ALLIANZ AUSTRALIA LTD
Appellants/Plaintiffs

AND:

OWEN JAMES SIMPSON
Respondent/Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 19 July 2002)

[1] In January 2001, the respondent worker Mr Simpson (the worker) filed an application in the Work Health Court for commutation of his weekly compensation benefits payable under s 65 of the *Work Health Act* (the Act). The worker and his employer, the appellant Normandy Woodcutters Ltd (the employer), had signed a memorandum of agreement dated 25 January 2001 (the Agreement) to commute the worker's weekly payments by a payment of $124,815.60, plus costs, the maximum amount permitted by virtue of the provisions of s 74(3) of the Act.

[2] On 25 January 2001, the worker, the employer and the employer's insurer, Allianz Australia Ltd (Allianz), also entered into a Deed (the Deed) pursuant to the terms of which the employer and the employer's insurer agreed to pay the worker $175,000 –

> ... towards Simpsons (sic) earning capacity in accordance with:
> - With (sic) sections 73 and 76 of the *Work Health Act.*
> - The Investment Plan marked "A" and referred to in Recital "O".

It is common ground that the sum of $175,000 payable under the Deed is in addition to the sum of $124, 815.60 payable under the Agreement.

[3] After the Registrar of the Work Health Court submitted the Agreement to the Court in accordance with s 108(2) of the Act, the Court considered the Agreement and directed the Registrar not to record it. The employer has appealed to this Court from that decision pursuant to s 116 of the Act.

[4] The appeal first came before me on 16 October 2001 for hearing. As it was apparent that the worker supported the employer's appeal, I was concerned that there would not be a proper contradictor. I was informed by Mr Roussos, who then appeared for the appellant, that he had authority from the Work Health Authority to inform me that the Work Health Authority had been informed of the appeal and did not wish to intervene. The Work Health Authority is a statutory corporation established under s 6 of the Act. Its functions and powers are to be found in ss 10 and 11 of the Act. The Authority is, by s 13, subject to Ministerial control. It is doubtful whether the Authority could intervene, although it may have been given leave to

present argument as *amicus curiae*. It occurred to me also that the Attorney-General may wish to intervene, but I note that s 78 of the *Supreme Court Act*, which may have permitted that course, was repealed in 1993. The end result is that I have been left without a contradictor which, whilst rare, is in itself not unusual when this Court is invited to exercise appellate jurisdiction.

[5] During the course of the hearing on 16 October 2001, I indicated to the parties that there was a provision in the Deed that I considered might well be fatal to the appeal, although the learned Magistrate had not relied upon it for the reason that I indicated to the parties. The provision was clause 9.2 which provided as follows:

> The parties to this deed agree:
>
> 9.1 this deed is subject to the *Work Health Act* and, in particular, section 186A of the Act;
>
> 9.2 at any time and at the option of Allianz and/or Normandy, by notice in writing to Simpson from Allianz and/or Normandy, the amount shall become a debt due and payable ("the debt") by Simpson to Normandy, or, in the alternative, and at the option of Allianz and/or Normandy, the debt shall be credited in favour of Normandy against any future award or determination of compensation regarding any provision of the *Work Health Act* including sections 65, 73, 75 and 78.

I indicated that the option to recall the sum of $175,000 was so unlimited that it may be difficult to find that it was fair and reasonable to permit the commutation of the worker's benefits: see s 74(3) of the Act referred to in para [14] below.

[6] Following that intimation, the parties requested that I adjourn the hearing of the appeal *sine die*.

[7] On 26 February 2002, the employer and Allianz brought proceedings in matter 20202941 for rectification of the Deed. The relief sought in the Notice of Motion was to substitute for clause 9.2 the following:

> Should Simpson make a claim for weekly benefits pursuant to s 65 of the *Work Health Act* at any time prior to the application for commutation being approved, then at the option of Allianz and/or Normandy, by notice in writing to Simpson from Allianz and/or Normandy the amount or part thereof shall become a debt due and payable ("the debt") by Simpson to Normandy, or, in the alternative, and at the option of Allianz and/or Normandy, the debt or part thereof shall be credited in favour of Normandy against any future award or determination of compensation regarding section 65 of the *Work Health Act.*

[8] Orders having been made that the appeal and the Notice of Motion be determined together, I heard both proceedings on 21 May 2002. It is convenient to record that it is common ground that the sum of $175,000 payable to the worker under the Deed has already been paid to the worker, but the moneys to be paid under the Agreement have not as yet been paid.

Should the Deed be rectified?

[9] It is well established that the remedy of rectification with respect to a written instrument may be granted where a prior agreement has been reached and the parties have erroneously recorded that agreement in a written document, or where the parties have formed a common intention not amounting to a concluded antecedent agreement and the agreement, when

drawn up, has failed to give effect to that common intention: see *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 346, 350; *Pukallus v Cameron* (1982) 180 CLR 447 at 452.

[10] The evidence of the worker was that, at his own instigation, he met with Mr Nelson, Allianz's Workers' Compensation Manager, in June or July 2000 in the presence of the Allianz's solicitor. At the meeting he raised whether he might commute his weekly payments and, as well, receive the payment of a further amount to be made available under the terms of a deed. It was agreed (inter alia) that any payment under the Deed would be repayable if he were to make a further claim for benefits under s 65 of the Act. At that time, no concluded agreement was reached.

[11] After a number of other meetings between Mr Nelson and the worker, agreement as to the terms of the Agreement and of the Deed was reached at a meeting between Mr Nelson and the worker in October 2000. At that meeting it was agreed that the sum of $175,000 (or part thereof) payable under the Deed would be repayable only if the worker made another claim for weekly payments under s 65 of the Act prior to the successful application for commutation. It was not until after that meeting that the worker engaged a solicitor to act for him.

[12] The worker's evidence is supported by the evidence of Mr Nelson. Allianz, as the insurers of the employer, acted on behalf of the employer through Mr

Nelson during the negotiations and at the time final agreement was reached in October 2000.

[13] Both the worker and Mr Nelson say that the wording of clause 9.2 of the Deed does not reflect the common intention of the parties or the terms of the Agreement reached in October 2000 and that the redrafted clause appearing in the Notice of Motion does accurately reflect their common intention and the parties accordingly seek rectification. Whilst I doubt that a concluded bargain was reached between the parties in October 2000 as to all of the terms of the Deed, I am satisfied that clause 9.2 in its present form does not express the common intention of the parties reached at that time. I am also satisfied that that common intention did not alter at any subsequent time and that the wording of that clause as set out in the Notice of Motion does accurately reflect that intention. Unless there is some reason why relief should be refused on discretionary grounds, the parties are entitled to an order for rectification in terms of the relief sought in the Notice of Motion. If relief is given, the effect of the order is that rectification relates back to the time of execution of the Deed and it is to be read as if it had originally been executed in its rectified form: see *Issa v Berisha* (1981) 1 NSWLR 261 at 265. One reason for refusing relief might be that the Deed is an illegal contract. Another might be that the payment under the Deed brought about the execution of the Memorandum of Agreement by "undue influence or other improper means" as the learned Magistrate seems to have thought. It

will be necessary to consider those matters which are the subject of the appeal before deciding whether or not to grant rectification.

Appeal from the Work Health Court

[14] Section 74 of the *Work Health Act* relevantly provides:

> (1) Where it appears to the Court on the application in writing –
>
> (a) (not relevant) or;
>
> (b) of a worker receiving regular payments of compensation under section 65 that –
>
> (i) his or her condition has stablized;
>
> (ii) rehabilitation is complete;
>
> (iii) he or she is not totally incapacitated within the meaning of section 65(6); and
>
> (iv) he or she has received financial counselling before so applying,
>
> and, in either case, it is satisfied that the person to whom that compensation is payable is fully aware of the effects of the proposed commutation in relation to future benefits under this Act, the Court may, in writing, authorise the commutation of those section 63 or 65 payments at discounted present values and those payments may be commuted and, subject to subsection (3), the commuted amount paid accordingly.
>
> (2) Compensation payments shall not be commuted except in accordance with this section and where payment of compensation is commuted as a result of an authorisation under this section, no person is entitled to any future payments under section 63 or 65 in respect of the injury to which the compensation relates.

(3) The maximum amount that may be paid as a result of a commutation under this section shall be not greater than an amount equal to 156 times average weekly earnings at the time the payment is made; but the Court is not prevented from authorising the commutation of a payment under this section to the maximum 156 times average weekly earnings level, where the calculated commutation exceeds that maximum, if it appears to the Court fair and equitable so to do.

[15] His Worship found that each of the criteria in s 74(1)(b) had been established and accordingly that the Court *may* authorise the commutation. It is to be noted that the only agreement formally before the Court which related to commutation of future weekly entitlements was the Agreement.

[16] Section 108 of the Act provides: -

108 Recording agreement

(1) Where an agreement is made –

(a) for the payment of an amount of compensation;

(b) for the variation of a weekly payment of compensation; or

(c) in respect of any other matter relating to compensation,

a memorandum of the agreement in the form prescribed by the Rules shall be sent, in the manner prescribed by the Rules, by the employer or worker to the Registrar.

(3) After the expiration of 21 days after the giving of the last of the notices under subsection (2)(b), the Court shall consider the memorandum and shall –

(a) where it considers that by reason of –

(i) its inaccuracy;

(ii) the inadequacy of the amount;

(iii) the agreement having been obtained by fraud, undue influence or other improper means;

(iv) its being inconsistent with section 74; or

(v) for any other reason of justice,

the memorandum ought not to be recorded – direct the Registrar not to record the memorandum; or

(b) in any other case – direct the Registrar to record the memorandum on such terms as the Court thinks fit.

(4) Where the Court gives a direction under subsection (3), it may make such order (including an order as to an amount already paid under the agreement) as it thinks fit.

(5) Subject to the Rules, the Registrar shall, on receiving a direction under subsection (3)(b) to do so, record the memorandum in a special register in accordance with the terms of that direction.

(6) A memorandum, on being recorded under subsection (5), is enforceable as if it were a determination of the Court.

(7) The Court may, at any time within 6 months after the recording of a memorandum under subsection (5), order that the record be removed from the special register on proof that the agreement was obtained by fraud, undue influence or other improper means, and the Registrar shall remove the record accordingly.

(8) Where the Court makes an order under subsection (7), it may make such further orders (including an order as to an amount already paid under the agreement) as it thinks fit.

(9) The Court may, at any time, rectify a special register.

[17] In this case, the Agreement was "a memorandum of agreement in the form prescribed by the Rules" (s 108(1)). The Deed was not. The Agreement was sent to the Registrar (s 108(1)) who submitted it to the Court (s 108(2)). That was the Agreement which the Court was required to consider under s 108(3). Nevertheless, during the hearing before the Court, the parties tendered the Deed so that his Worship was well aware of its existence and of its terms.

[18] It is necessary to refer also to one other provision of the Act, viz., s 186A which is in the following terms –

> (1) This Act applies notwithstanding anything to the contrary contained in any contract or agreement, whether entered into before or after the commencement of this section.
>
> (2) A contract or agreement which purports to exclude or limit the application of this Act or to exclude or limit the rights or entitlements of a person under this Act is, to that extent, null and void.
>
> (3) A person who urges, prevails on, persuades or offers an inducement to another person to enter into a contract or agreement whereby that other person would, but for this section, consent or agree to the application of this Act being excluded or limited in respect of that other person, or to waive or limit that other person's rights, benefits or entitlements under this Act, is guilty of an offence.
>
> Penalty: $100,000.
>
> (4) A reference in this section to a contract or agreement is not to be taken to include a reference to –
>
> (a) A proposed commutation under section 74; or

(b) an agreement under section 108.

[19] His Worship found that the maximum amount that may be paid in this case as a result of a commutation under s 74(3) was $124,815.60, the amount payable under the Agreement. However his Worship also found that the actual net present value to the worker of his weekly payments of compensation under s 65 was $227,987.60; that if the commutation were to be approved, the worker would be foregoing an entitlement to over $100,000; and that the commutation should therefore only be approved "if it appears to the Court fair and equitable to do so".

[20] The case presented to the Court in order to show that it would be fair and equitable to approve the commutation, depended, in part, upon the payment of $175,000 under the terms of the Deed. The affidavit of the worker filed in support of the application showed that the worker was injured in 1992 and had been in receipt of compensation ever since. The worker stated in his affidavit that he was presently in paid employment earning $762.09 per week and that, if he were to engage in the most profitable employment vocationally and physically suitable and reasonable available to him, he would earn as much as $1,400 per week. However, his personal choice was to remain in his existing employment which he enjoyed. His pre-accident earnings, indexed as at 1 January 2001, were $1,967.13. The loss was therefore $567.13 per week. Under s 65 of the Act, he was entitled to 75% of that amount, viz., $425.35 per week which was the amount of his present benefit. In his affidavit the worker said:

> As can be seen, I have been on the compensation system too long and I wish to break out of it. I do not wish to continue to remain in dispute with my employer over the cause of the July 1992 injury and its effects. Also, I am at an age [53] where I want some stability in my life. I am happy with my current employer and do not wish to leave the security of such employment. I would feel more secure if I completely paid off my mortgage and bought some blue chip shares to supplement my salary. I do not wish to seek out business opportunities that I know I can obtain and succeed in. I am happy with the current status quo.

[21] The learned Magistrate did not consider this material. His Worship found that the Deed, to the extent that it was an agreement for the payment of compensation, needed to be recorded under s 108 of the Act. However, the parties submitted that this was not so and did not seek to put it before the Court under that section. If that were so, then his Worship observed that the Deed did not come within the protection afforded by s 186A(4) and was "not a payment which is capable of being justified under the Act". In deciding to direct the Registrar not to record the Agreement, his Worship also found:

> (1) that on the material before him the Agreement had been obtained by "undue influence or other improper means", namely the proposed payment of the additional $175,000;
>
> (2) that the commutation should not be authorised because the additional payment of $175,000 was "illegal, as an inducement";
>
> and that
>
> (3) the real settlement is for $300,000, of which only $124,815.60 is permissible under the Act, and that but for the additional payment the worker would not be applying for or agreeing to a commutation of his weekly payments of compensation. I consider that clause 9.2 of the Deed is "smoke and mirrors". I am unable to accept that any party to the Deed seriously

> expects or contemplates the "debt" to be called in (unless criminal charges are successfully laid). It is somewhat reminiscent to the sham debts/loans that were created in some of the income tax scams in the 1980s.

[22] The grounds of the appeal seek to challenge each of these findings.

[23] There was no finding that offences against s 186A(3) had been committed, only a concern that offences against that section may have been committed.

Was it necessary to seek to have the Deed recorded under s 108?

[24] In support of the appeal, it was submitted that his Worship erred in concluding that the Deed was required to be recorded under s 108. Mr Southwood QC, for the worker, submitted that, notwithstanding the use of the word "shall" in s 108(1), that provision was merely directory, because the only consequences open were that if the Agreement was directed to be recorded and was in fact recorded, it was enforceable as if it were a determination of the Court (see 108(6)). The effects of directing that it not be recorded is not that the Agreement is not binding. There is no provision to that effect unless it is to be found elsewhere in the Act; nor does s 108 specifically provide for any consequences where Agreements are directed not to be recorded.

[25] The problem raised by s 108(1) is to be resolved by construing the statute to see whether the legislature intended that a failure to comply with the provision would invalidate the Agreement, or whether the Agreement would still be a valid contract, albeit unforceable as a determination of the Court.

The intention of the legislature is to be discerned having regard to a number of factors including the language of the provision, the purpose of it, its place in the legislative scheme and by construing the provision in its legislative context: see *Tasker v Fullwood* [1978] 1 NSWLR 20; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

[26] I accept Mr Southwood's analysis of s 108 that the only stated consequence of that provision is that if a memorandum of agreement is directed to be recorded, the agreement has the force of a determination of the Court. I note in this respect, that s 108 seems to distinguish between "an agreement for the payment of an amount of compensation" (s 108 (1)(a)) and "a memorandum of the agreement", although it may be, as in this case, that the agreement and the memorandum of the agreement is the same document. Nevertheless, the section seems to contemplate that there might be two separate instruments. This view of the provision is enforced by s 186A(4) which refers to "an agreement under section 108" and "a proposed commutation under section 74". It is far from clear what is meant by "an agreement under section 108". Perhaps it means "a memorandum of the agreement", but if so, why did it not say so? Perhaps it means an agreement of the kind referred to in s 108(1)(a), (b) or (c) in respect of which a memorandum has been lodged with the Registrar; but if so, is the agreement invalid until so lodged *vide* s 186A(2) and has an offence been created unless and until it is lodged? There is nothing in s 108 placing any time limit upon "sending" the memorandum to the Registrar. And when is the

memorandum "sent"? Is it "sent" the moment it leaves the solicitor's office on its journey to the Registrar, or only when it is delivered to the registry? Perhaps it means a memorandum of agreement which has been recorded by the Registrar but it does not say that either, and why would it be necessary to specifically exclude from s 186A a memorandum which is enforceable as a determination of the Court? Whatever this fuliginous provision means, I am inclined to think the learned Magistrate was right when he found that the Deed was not protected by s 186A(4). But that does not mean that every agreement must be sent to the Registrar under s 108(1). I consider that Mr Southwood's submission is correct. Section 108(1) is merely facilitative.

Does the Deed offend s 186A?

[27] In this case, the Deed clearly does not offend s 186A(2). By its terms it does not "purport to exclude or limit the application of this Act or to exclude or limit the rights or entitlements of a person under this Act". The Deed is expressly stated to be subject to s 186A but, more importantly, there is no provision in the Deed releasing the employer or the insurer from any of its obligations under the Act. Assuming that the Deed is rectified, the only consequence to the worker is a requirement to repay monies at the option of the employer or the insurer if he enforces his rights to weekly compensation at any time before the Agreement is "approved" (which I presume means authorised under s 74(2)). There is however, nothing in the Deed which otherwise seeks to prevent the worker from insisting on his strict entitlements. There is not even a requirement upon the worker that he seek

commutation of his weekly benefits, although it is clear that it is contemplated that he will, or at least may, do so.

[28] It is also clear, in my opinion, that entry into the Deed does not offend s 186A(3). There is, as I have said, nothing in the Deed requiring the worker to apply for commutation of his weekly benefits. The learned Magistrate did not find that entry into the Deed was an inducement; rather it was the proposed payment of $175,000 which he found was an illegal inducement, although he made it clear he was not finding that a breach of s 186A(3) had occurred. It is impossible to reconcile these two statements in his reasons. If it was an illegal inducement there must have been a breach of s 186A(3).

Was there an inducement under s 186A?

[29] It was submitted that on the facts of this case, neither the insurer nor the employer offered anything to the worker. It was put that it was the other way around – it was the worker who made the offer to the insurer. That may be so, but there is no doubt that it was the insurer who paid the money, or at least promised to do so. Nevertheless, I do not think that the payment or the promise of the payment was an inducement to the worker to enter into a contract or agreement to which s 186A(3) refers. By its terms, the words "a contract or agreement" in s 186A(3) does not include a proposed commutation under s 74: see s 186A(4). It appears that an inducement to enter into a proposed commutation is not caught by s 186A(3) by the plain

words used by the draftsman. Clearly the Agreement was a proposed commutation. I accept Mr McDonald QC's submission for the appellants on this topic.

Undue influence?

[30] There was no evidence in this case of undue influence. The worker was separately and independently advised, both by his own solicitor and by his accountants. The finding of his Worship that the Agreement was obtained "by undue influence or other improper means" cannot stand.

A sham scheme?

[31] Although his Worship did not expressly refer to s 108(3)(a)), I take it that his Worship's finding that the real payment was for $300,000 and his Worship's comment that this was a sham scheme to get around the provisions of the Act, is a reference to the limitation in amount placed on commutation by s 74(3) and if that is right, the question is whether his Worship was entitled to so find.

[32] The argument of Mr McDonald QC for the appellant was that in reaching this conclusion, his Worship focused too narrowly on the construction to be given to s 74 and should have construed s 74 in its true context. It was submitted that a primary purpose and objective of the Act is to achieve rehabilitation, which is specifically addressed in Part V of the Act. It was submitted that one way in which rehabilitation may be achieved is by commutation. It was further submitted, that there is nothing in the Act

which precludes additional payments to workers other than what the worker is entitled to under the Act and that payments for possible s 73 and s 76 rehabilitation costs were payments expressly contemplated as permissible payments. It was argued that, if the aim of the payment of $175,000 was to enhance the rehabilitation prospects of the worker, the payment was justified and permitted by the Act.

[33] I accept the general proposition of Mr McDonald QC, supported by Mr Southwood QC, that there is nothing in the Act which prevents an insurer or employer making a payment to a worker which is in addition to any strict entitlement the worker may have under the Act. Such a payment may not be a payment of compensation under the Act at all, or it may be payment in respect of compensation but for a larger amount than the worker is entitled. Whilst insurers and employers are not noted for their generosity, if they wish to be generous, I can see nothing in the Act – except perhaps s 74(3) – which prevents this from occurring so long as s 186A is not breached.

[34] Mr Southwood QC submitted that s 74(3) is to place a cap on the employer's and their insurer's liability so that workers cannot force insurers or employers to commute a larger sum than the maximum. It was submitted by both counsel that where payments had been made already, whether in respect of lost earning capacity or towards future rehabilitation costs, or for any other purpose, those payments can be taken into account in order to see if it is fair and equitable to approve a further payment in commutation of weekly benefits under s 74.

[35] I accept the thrust of these submissions. I do not consider that in the circumstances of this case, the employer and the insurer was precluded from paying the sum of $175,000 to the worker. There were no strings attached other than that the money, or some of it, might be called upon to be repaid or taken into account if the worker sought weekly payments before the Court approved his commutation benefit. There is nothing in the Act to prevent employers making payments of weekly compensation before the due date: cf. s 88(1). In a real sense, the payment was for the worker's benefit. The Deed expressely contemplates that the $175,000 will be used, in part, to pay off the worker's debts, the repayments of which absorb a large portion of his weekly payments, with the balance to be invested in accordance with an investment plan into superannuation or some other suitable investment to provide for his retirement. The "debts" appear to refer to a loan over the worker's home which is secured by a mortgage. I accept that such a payment can be legitimately considered to be in respect of the worker's rehabilitation. (I note in passing, that s 51(1)(c)(iii) of the *Workers Compensation Act 1987* (NSW) [now repealed]expressly contemplated that there may be special circumstances where a lump sum would be likely to assist substantially in a worker's rehabilitation.) Such payments would appear to be within the objects of the Act, even if not strictly within its provisions, given that the pre-amble to the Act provides that the Act is an Act "... to promote the rehabilitation and maximum recovery from incapacity to injured workers." The Court was not in fact asked to approve a

commutation in excess of the maximum under s 74(3) and the position was that, notwithstanding the payment of $175,000, the worker's entitlement to weekly payments under s 65 was not affected by the Deed.

[36] There remains the question of whether it was open to the learned Magistrate to find that the provisions of clause 9.2 of the Deed were a sham. In *Sharrment Pty Ltd and Others v Official Trustee in Bankruptcy* (1988) 18 FCR 449, the Full Court of the Federal Court of Australia considered what is meant by a "sham". Lockhart J, after comprehensively reviewing the authorities, said at 454:

> A "sham" is therefore, for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive.

[37] Lockhart J went on to observe (at pp 444-445) that "the artificiality of the transaction does not give rise to its characterisation as a sham or to the characterisation of the constituent documents as a sham so long as each document had the effect that it purported to have", and so long as none of the documents purported "to do something different from what the parties had agreed to do": see *Inland Revenue Commissioners v Littlewoods Mail Order Stores Ltd* [1963] AC 135 at 155 per Lord Reid. At p456, his Honour observed that:

> it is the intention of the parties to the transaction which determines the question whether the act or document was never intended to be operative according to its tenor at all but rather was meant to cloak another and different transaction.

In the absence of evidence of the parties' intentions, they must be able to be inferred from the form of the transaction and the surrounding circumstances: see Lockhart J at p445; and see generally Beaumont J at 467-8.

[38] In *Richard Walker Pty Ltd v Commissioner of Taxation* (1996) 67 FCR 243, Hill J, after referring to an oft-cited passage from the judgment of Diplock LJ in *Snook v London & West Riding Investments Ltd* [1967] 2QB 786 at 802 and Lockhart J's judgement in *Sharrment*, said at p257-8:

> Without in any way derogating from the views expressed by Lockhart J in *Sharrment*, I would prefer to define a transaction as being a sham transaction where it involves:
>
> > A common intention between parties to the apparent transaction that it be a disguise for some other and real transaction or for no transaction at all.

[39] If clause 9.2 of the Deed in its original form is a "sham", but the rest of the Deed had the meaning and content intended by the parties on the face of the Deed, as on one view of the learned Magistrate's reasons he seems to have found, the effect would be that clause 9.2 would have been treated *pro non scripto*. It is difficult to see why that would lead to the result that the whole transaction constituted by the Deed and the Agreement would suffer the same result, particularly as clause 13 of the Deed expressly provides that a

provision of the Deed which is invalid or unenforceable is to be severed and the rest of the Deed will continue to operate.

[40] Alternatively, his Worship, in reaching the conclusion that the "real settlement was for $300,000", may have concluded that in reality the whole transaction was a sham. His Worship made no findings of fact justifying this conclusion other than a finding that clause 9.2 was "smoke and mirrors" - not intended by the parties to be enforced. There is nothing in the documents themselves, or in the material presented to his Worship, which in my opinion lends itself to the conclusion that the Deed and the Agreement were not intended by the parties to have effect according to their terms. Even if clause 9.2 is rectified to give effect to the true intentions of the parties, I am of the same opinion. If the transaction considered as a whole was a sham, one would have thought that the two documents had to be linked in some way. In this case there is a linkage, but that depends upon there being a claim for weekly payments being made before the commutation is approved. If the commutation is approved, there is no linkage. This is some evidence that the payment of $175,000 was intended to be linked to the fact of commutation. However, that is the only link between the two documents and that does not mean that the Deed was not a real transaction, or a disguise for some other transaction, even when read with the Agreement. I do not consider that it can be inferred that the parties intended that the Deed was not intended to have effect according to its terms, or that the transaction as a whole was a mere cloak for some other transaction. It

may be that the sole purpose of the Deed was to drive a prime mover and all four dogs through s 74 of the *Work Health Act,* but unless the Deed is illegal or unlawful, the *Work Health Act* is irrelevant to defining the legal effect of the rights granted by the Deed.

[41] In England, the House of Lords appears to have extended the notion of sham devices to include what Lord Templeman described in *Street v Mountford,* [1985] AC 809, as "sham devices and artificial transactions" whose only object is to evade statutory provisions which are not able to be contracted out of and which are designed to provide protection to the public, such as the Rent Acts. Subsequently, in *A G Securities v Vaughan; Antoniades v Villiers* [1990] 1 AC 417 at 462, his Lordship said that "it would have been more accurate and less liable to give rise to misunderstandings if I had substituted the word "pretence" for the references to "sham devices" and "artificial transactions"." His Lordship reiterated that in considering whether one or more documents was a pretence, the Court should look at the true nature of the transaction considered as a whole, including the surrounding circumstances, the course of negotiations, the relationship between the parties, the nature and extent of the accommodation and the intended and actual mode of occupation of the accommodation.

[42] These authorities have yet to be adopted in this country. The only reported discussion of them to date is in *KJRR Pty Ltd v Commissioner of State Revenue* [1999] 2 VR 174. In that case, Tadgell JA said, at pps 182-183 [para 16]:

It seems probably that the "pretence" to which Lord Templeman referred several times in *Antoniades* was not intended to be understood in the sense in which "sham" is usually understood – that the parties have in effect agreed or reached an understanding that the written agreement should not mean what it said: *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, at 802, per Diplock LJ. Indeed, in turning away in his opinion in *Antoniades* from the phrase "sham devices" that he had used in *Street v Mountford*, Lord Templeman indicated that he appealed to a novel, wider and more flexible doctrine: cf. Bright and Gilbert, op.cit, pp 132-33. Those learned authors suggest that the doctrine where it applies, would enable a term of an agreement to be ignored if inserted for the purpose of avoiding statutory protection, such as that offered by the Rent Acts. At pp 133-4 they interestingly develop the view that, whereas what they call the "Snook doctrine" of sham is easily reconcilable with conventional contract theory, the "pretence doctrine" is at odds with it. The latter novel, doctrine is there perceived to be "policy-driven"; and one according to which, notwithstanding the terms actually agreed between the parties, the court will disregard any provision inserted for the purpose of avoidance of a statutory scheme or provision. There are evident difficulties in settling the limits of such a doctrine and its application. How, for example, is it to be determined whether a term has been inserted for an impermissible and ulterior purpose? How are the courts to decide whether or not to read the agreement at its face value? Some cases are obvious: Lord Oliver regarded the relevant aspects of the agreements in *Antoniades v Villiers* as having an air of "total unreality"; and the other Law Lords regarded them as more or less artificial or fanciful. There was eloquent evidence available to their Lordships, apart from the mere terms of the agreement, leading easily to that conclusion. Similarly, in *Radaich v Smith* it was readily evident from the uncomplicated agreement there in question, and from the nature of the very simple business for the pursuit of which occupation of the premises was given and taken, that a grant of exclusive possession must have been intended. In *Street v Mountford* Lord Templeman noted, at 817, that "[i]n the case of residential accommodation there is no difficulty in deciding whether the grant confers exclusive possession". It may be a question, with respect, whether that proposition is universally true; but the matter was apparently there so plain that it was common ground. It is suggested in Bright and Gilbert, op.cit., at p 137, that the approach in *Street v Mountford* will apply equally to commercial agreements, but that there will be fewer commercial cases in which the factual matrix will reveal obvious pretence. *Shell-Mex and B.P. Ltd. V Manchester Garages Ltd* [1971] 1 WLR 612; [1971] 1 All ER

841 and *Dresden Estates Ltd v Collinson* (1987) 55 P & CR 47 provide examples.

[43] The extent of the "novel doctrine" is illustrated by the decision of the Court of Appeal in *Gisborne and Another v Barton* [1988] 3 All ER 760, a case involving an attempt to avoid the provisions of the *Agricultural Holdings (Notices to Quit) Act 1977* (UK). In that case, s 2(1) of the Act placed restrictions upon a landlord serving a notice to quit upon his tenant. However, the Act did not apply to a sub-tenancy. The owner of the farm in question leased the property to his wife at a rack rent and on the usual covenants relating to agricultural land. The wife entered into a sub-lease over the same land to one Barton on the same day. The Court of Appeal, by a majority, found that the arrangement was artificial and the documents were a sham because the agreements did not reflect what was actually happening, that the wife was a mere nominee of the landlord/husband, and that the scheme must fail because the landlord and his wife were trying to do by the documents what the law does not permit, viz. to grant the defendant an agricultural tenancy without statutory protection. Consequently, the majority found that the defendant was a tenant of the landlord. Ralph Gibson LJ, in dissent, observed, at 768, that "the courts have never claimed the power to treat a transaction in private law between private individuals as something other than it really is merely because the social purpose of some legislation would be served by so treating it." He approached the matter in accordance with the concept of what is a sham as described by Diplock LJ in *Snook's* case and upheld the finding of the trial judge that the arrangement

was not a sham because on the evidence the intention of the parties was to create a sub-tenancy, not a tenancy.

[44] There are inherent difficulties in applying the "pretence doctrine" to an artificial arrangement (if this is what this be) designed to avoid the statutory limit imposed by s 74(3) of the *Work Health Act*. First, the mere fact that a transaction is artificial does not have the consequence in this country that the transaction is a sham: see the passage in *Sharrment*, cited above. I consider that sitting as a single Justice I am obliged to prefer a decision of the Full Court of the Federal Court of Australia to that of the House of Lords where there is conflict and that therefore the pretence doctrine is not part of the law of the Northern Territory.

[45] Secondly, the process involved in cases such as *Street v Mountford; A G Securities v Vaughan and Antoniades v Villiers,* starts with the proposition that the parties to an agreement cannot avoid the consequence of an instrument being in fact a lease by calling it a licence. As Lord Templeman put it in *Street v Mountford* at 819 in a passage since oft-quoted:

> Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.

[46] There is a world of difference between considering the overall effect of an agreement or series of agreements and whether, in reality, what was created amounted to a lease or series of leases, or a licence or licences, because of the nature of the interest granted on the one hand, and whether the true nature of the Deed and the Agreement in this case was in reality an agreement to commute the worker's weekly benefits for a sum of $300,000. The former exercise depended upon the very nature of what is a lease, i.e., whether the "tenant" obtained a legal right to exclusive possession of the property. In the latter, there is no underlying reality of what is a commutation unless there is a release and the Deed made no provision for that as I have already observed, but rather, preserved the worker's rights under the Act to continue to claim weekly compensation. There is, in short, no evidence of any "pretence" in this case. The Court is not asked to assume, when considering whether or not to approve the commutation, that the real present net value of the worker's entitlements is only $124,815.60. The Court was advised and accepted, that the present net value of the commutation is $227,987.60 and is asked to exercise its discretion under s 74(3). It is difficult to see how there is any pretence.

[47] It follows, that the appeal must be allowed.

The purposes of s 74.

[48] As for s 74(3) and the submission that it places a "cap" on the amount of the commutation, the purposes of this limit are not clearly spelt out, but the

inference from looking at s 74 as a whole is that the provision is designed to protect workers from their own folly. It is clear that except where the amount to be commuted is small, the employer cannot apply to the Court; an application can only be made by a worker: see s74(1). This is designed to protect workers who wish to stay on weekly payments rather than having a lump sum forced upon them by the employer. It is clear from s 74(1)(b) that workers are only able to successfully apply where the condition has stabilised, rehabilitation is complete and the worker is only partially incapacitated. The inference from this is that it is relevant to look at the extent to which the worker has means of economic survival other than from his or her weekly payments, in case the worker's lump sum is squandered by poor investments or lost in some other way. Section 74(1)(b) refers to the need for financial counselling and this implies that it is relevant to look at what the worker proposes to do with the lump sum and how it is to be invested. These are the sort of considerations relevant to the exercise of the discretion conferred upon the Court by s 74(1). An application of this kind may be made even if the employer opposes it. An employer may be contemplating serving a notice under s 69 reducing or stopping weekly payments. It is relevant to consider the employer's position as well. The power to approve a commutation, notwithstanding that the worker is to receive by way of lump sum an amount capped at less than the true present net value, exists where it is "fair and equitable" to do so. That means that

there is fairness and equity as between the employer and the worker, not only in the amount to be paid, but generally.

Should the commutation be approved?

[49] In terms of s 116 of the Act, the appeal having succeeded, it is open to me to exercise the discretion of the Court. The evidence is that the worker is in receipt of an income of $762.09 per week in his current employment. He could, if he chose to do so, earn as much as $1,400 per week. He has his own home and the $175,000 paid to him under the Deed. He has received financial counselling and proposes to pay off his mortgage and invest the rest. The learned Magistrate found that he has met each of the criteria required by s 74(1). There is nothing to suggest that the worker is a gambler or an alcoholic or is otherwise likely to depart with his money unwisely. On the evidence he is unlikely to become a burden on society in the future; he has sufficient economic security to survive even if he were to become unfortunate in his investments. He is 53 years of age and has a wife and family. He enjoys his present employment. He wishes to avoid future disagreements with his employer over his benefits and seeks stability in his life. He has been in receipt of weekly payments for over eight years and he is aware that the employer has evidence that the present level of his incapacity may be unrelated to his injury in 1992. Some of the medical experts have commented that his condition will not improve whilst he is receiving weekly benefits. It is understandable that he wishes to regain his independence and self-esteem by severing his relationship with his former

employer and its insurers. It is desirable to bring this relationship to an end if it can be done without any harm or hardship to either party. The employer supports the application and there is no demonstrated hardship or lack of fairness to the employer or its insurer.

[50] In the circumstances, I am satisfied that the redemption is just and equitable as between the parties and that the discretion should be exercised in favour of the commutation. In the light of my findings, there are no reasons why the Court should not order the Registrar to record the Agreement.

[51] Before formally making orders in relation to the appeal, I should return briefly to the question of rectification. Having regard to my findings, there is no reason on discretionary grounds why an order for rectification of the Deed ought not to be made. Accordingly, there will be an order in matter number 20202941 rectifying the Deed by deleting clause 9.2 of the Deed and replacing it with the new clause 9.2 as set out in paragraph [7] of these reasons.

[52] As to the appeal from the Work Health Court, the appeal is therefore allowed. I order that the commutation is authorised. I direct the Registrar to record the Memorandum of Agreement.

Referring the matter to the executive authority.

[53] Finally, I should deal with a submission by Mr McDonald QC that I should set aside that part of the decision of his Worship which referred the matter to the Work Health Authority to see if possible charges for offences should

be laid. In the light of my findings and the lack of interest shown by the Authority in these proceedings and the fact that no charges have so far been laid, this would seem to me to be unnecessary. In any event, a judicial officer who believes that offences have been committed is under a duty to refer the proceedings to the relevant authority. That duty arises by virtue of the ethical duty of persons occupying judicial office to uphold the law. It is not an exercise of judicial power: see *In the marriage of P and P* (1985) FLC 91-605. No investigative role by the judicial officer is involved. No recommendation is made. There are no findings made. There is no injury to anyone's reputation by a mere referral. Nor is the judicial officer exercising executive power. All he is doing is:

> simply directing the attention of the executive arm of government to a breach of the law so that it may, if it sees fit, investigate the matter and, as a consequence of that investigation, take such steps as it sees fit to enforce the obligation of a citizen under the law. (per Lindenmay J in *P and P, supra,* at 79, 923)

Such an act does not affect anyone's rights or interests and, in my opinion, is not subject to appeal or to administrative review. Whether the duty arose in the circumstances in this case is not for me to say. The judicial officer is not, in my opinion, required to give anyone an opportunity to be heard in such a matter. In my opinion, I have no jurisdiction to interfere with what the learned Magistrate did. The ground of the appeal relating to this aspect of the case must be dismissed.
