

# The Shepherd v Felt Principle: Reliance on after-acquired knowledge to justify termination

## – recent consideration by the Federal Court in *Melbourne Stadiums Ltd v Sautner*

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### The issue

In circumstances where an employment contract has been terminated, and the reason for termination is relevant – such as in an unfair dismissal proceeding brought under the Fair Work Act or a wrongful dismissal claim seeking damages in lieu of notice at common law, which is not payable if the contract was terminated for serious misconduct – an employer (or indeed any terminating contractual party) can rely on facts not known to it at the time of the termination to justify the termination, as long as those facts existed at the time of the termination.<sup>1</sup> I will refer to this as the “Shepherd v Felt principle”.<sup>2</sup>

The principle, while well established, remains unclear in application in certain circumstances. For example, can facts known to the employer at the time of termination, but not relied upon to justify the termination at the time, also be later relied upon by the employer to justify the termination? Can after-acquired knowledge be used to defend a claim for debt or damages? These questions are indirectly raised by *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20, a recent decision of a Full Federal Court of five members.<sup>3</sup> The answers, it seems, depend on whether the termination was legally effective in the first place.

### The case

Mr Sautner had been told by Melbourne Stadiums Ltd (MSL) on 3 June 2013 that he was to be retrenched and would be given 6 months’ notice as well as a redundancy payment of 12 weeks’ pay. On 21 June MSL through its solicitors informed Mr Sautner through his solicitors that it had discovered “additional material” following the termination of Mr Sautner’s employment, which it relied on to claim that it was “entitled to terminate [Mr Sautner’s] employment on the basis that [he] engaged in serious misconduct”. MSL’s solicitors stated that their client was entitled to rely upon the Shepherd v Felt principle that, in respect to the discharge of a contract by breach, “the dismissal of an employee may be justified upon grounds on which the employer did not act and of which the employer was unaware when the employee was discharged”. The result was that MSL refused to pay any notice or redundancy pay to Mr Sautner.

Mr Sautner sued for wrongful dismissal in the County Court, claiming both a debt (alternatively damages) for payment in lieu of 6 months’ notice and 7 weeks’ redundancy pay under s 119 of the *Fair Work Act*,<sup>4</sup> plus a penalty under s 546 of the *Fair Work Act*. He was successful at first instance. The County Court decided that his conduct did not justify summary dismissal. This was primarily because the conduct did not demonstrate a repudiation ‘by Mr Sautner of his obligation to honour the essential terms and conditions of his employment contract.’<sup>5</sup> MSL appealed the decision. The Full Federal Court reversed the County Court decision and found in favour of MSL. The appeal went from the County Court to the Full Federal Court because the County Court had been exercising federal jurisdiction under the *Fair Work Act*.

The Full Federal Court decided that although MSL *notified* Sautner that it was terminating his employment by paying him in lieu of notice (which was six months’ pay), according to the proper construction of the relevant contractual clause this was not effective until the actual payment in lieu had been made.<sup>6</sup> In the interim period, MSL decided to change the basis of the termination to summary dismissal for serious misconduct. This change by MSL was upheld by the Court, as the first purported termination was not effective to end the contract due to the mere giving of notice without payment in lieu being insufficient to terminate the contract effectively. Therefore MSL’s ability to end the contract under the summary termination clause of the contract remained. As the Court found that Mr Sautner’s

conduct did amount to misconduct which was sufficient to justify summary dismissal, although not relied upon by MSL at the time, MSL was not required to make any payment to Mr Sautner.<sup>7</sup>

### The reach of the *Shepherd v Felt* principle

MSL contended that the *Shepherd v Felt* principle extends to cover the later justification of a termination on any basis available to the employer at the time of the termination, whether known or not known by the employer at the time of the dismissal, even if there had been an effective termination of Mr Sautner's contract which gave rise to a debt owed by MSL to Mr Sautner in the amount of the contractual amount of remuneration in lieu of the 6 month notice period. If MSL's arguments were accepted an employer could first dismiss an employee with notice, and then elect to dismiss without notice on the basis of summary dismissal. This was rejected by the Full Federal Court. At paragraph [112] it was explained in the following way:

*We do not consider that Shepherd supports MSL's contention that a lawfully terminated agreement, in effect, may be resuscitated and then re-terminated upon some ground not known at the time of the termination. An agreement may be terminated lawfully for any number of reasons: resignation of the employee; redundancy; effluxion of the contractual term of employment or some other contractual basis. A contract cannot be terminated twice ...*

The Court concluded that if the contract had been terminated with lawful effect,

MSL could not rely on after-acquired knowledge, or knowledge it had at the time of the termination, to 'undo' the termination and re-terminate the contract on a different basis or for different reasons. This was to be contrasted with cases where the initial termination was legally ineffective, which could be justified by reference to reasons including those based on after-acquired knowledge. However, on the Court's interpretation of the particular termination clause which permitted termination by the provision of remuneration in lieu of notice, the contract was still on foot because payment of the remuneration in lieu had not been made, only a notification of an intention to do so had been given.<sup>8</sup>

Whether reasons known to the employer and not relied upon at the time of a purported but ineffective termination can be later relied upon to justify the termination did not directly arise and was not made clear in the decision, but it seems the better view is that such grounds:

- (a) could not be utilised to justify an existing effective termination; and
- (b) may be able to be utilised to justify a later, effective termination where a previous purported termination was ineffective, so that the contract remained on foot.

### Footnotes

<sup>1</sup> *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339; *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 377-8 per Dixon J; applied and affirmed in *Lane v Arrowcrest Group Pty Ltd* (1990) 27 FCR 427 at 456; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430 per Brennan CJ, Deane and Dawson JJ and 467 per McHugh and Gummow JJ; *Concut v Worrell* (2000) 75 ALJR 312 at [27]-[29] per Gleeson CJ, Gaudron and Gummow JJ and [51] per Kirby J. See *Macken's Law of Employment*, Thomson Reuters, 7th ed. 2011 at [8.200] and [8.320] and Irving, *The Contract of Employment*, LexisNexis Butterworths 2012 at [10.86]-[10.88].

<sup>2</sup> Referring to *Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359

<sup>3</sup> Tracey, Gilmour, Jagot, White and Beach JJ.

<sup>4</sup> Claimed via s 545(3) for breach of s 44 of the *Fair Work Act* – contravening the national employment standards.

<sup>5</sup> *Sautner v. Melbourne Stadiums Limited* [2014] VCC 476 at [210] (Judge Anderson).

<sup>6</sup> *Melbourne Stadiums Limited v. Sautner* [2015] FCAFC 20 at [123].

<sup>7</sup> [2015] FCAFC 20 at [133].

<sup>8</sup> [2015] FCAFC 20 at [123].

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