

Welcome to our latest edition of **GD NEWS** that brings to you information on new trends and issues that impact on employment and the insurance market in Australia. We can be contacted at any time for more information on any of our articles.

## Does A Contractor Owe A Non Delegable Duty Of Care?

A recent decision of the NSW Court of Appeal has revisited the vexed question of whether or not a contractor is responsible for the negligence of its independent contractor. In other words, does a contractor who engages an independent contractor owe a non delegable duty of care?

It is often argued that a contractor is vicariously liable for the negligence of its independent contractors or its independent contractors are acting as agents for the contractor such that when the independent contractor breaches a duty of care the contractor that engaged the independent contractor should be held liable for the negligence. Alternatively it is argued the contractor had a duty that could not be delegated due to the special relationship that a person has with the wrongdoer and that person's vulnerability.

In *Transfield Services (Australia) Pty Limited - v - Hall* the Court of Appeal has confirmed that the imposition of the doctrine of a non delegable duty of care should not flow to contractors.

Hall worked for the Navy four days a week as a facilitator and maintainer at a physical fitness facility at HMAS Sterling in Western Australia. At the facility there was a course of low ropes and a course of high ropes on each of which the participant could carry out physical activities. The course was located in the bush but near the sea. It had been built or installed in 1993 by Rope Tech Australia Pty Limited, a predecessor of Adventure Training Systems Pty Limited ("ATS").

Part of Hall's duties involved periodical inspection and maintenance of the high ropes course. One day after carrying out an inspection of the course he was abseiling down from it. He attached the anchoring device for his abseiling device to a loop of flexible steel rope. That loop was at one end of a length of wire rope called the safety stop. The other end of the safety stop was affixed to one of the rigid poles of the rope course. The Trial Judge found Hall adopted the correct abseiling procedure, however when he placed his weight on the abseiling rope, the safety stop from which it was suspended broke. He fell about 10 metres to the ground, suffering significant injuries. The Trial Judge assessed his damages at \$1,457,711.91.

Hall sued ATS, Transfield Services Australia Pty Limited ("Transfield") and QBE Insurance (Australia) Limited ("QBE"). He did not sue his employer, presumably because Section 45 of the Safety Rehabilitation & Compensation Act, 1988 (Commonwealth) significantly restricts the circumstances in which a Commonwealth employee can bring an action for damages in respect of an injury sustained by the employee in the course of his employment.

Transfield was a contractor engaged by the Commonwealth of Australia to provide a comprehensive maintenance of defence establishments situated in WA including HMAS Sterling. QBE was the public and product liability insurer of ATS and had been joined as a defendant principally as ATS would not be in a position to pay any verdict obtained against it. ATS took no active part in the trial or in the appeal.

In the original proceedings the Trial Judge found that Transfield was responsible for the negligence of ATS notwithstanding that ATS was an independent contractor engaged by Transfield because Transfield owed a non delegable duty of care to users of the rope course.

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ATS had inspected the rope course in 2001. The Court of Appeal noted after Hall's injury shrink wrap was removed from the strop and it was found that the wire rope underneath the shrink wrap was badly corroded. Uncontested engineering evidence stated that the corrosion underneath the shrink wrap was foreseeable in an open air environment near the sea. The Trial Judge found that the shrink wrap should have been removed by ATS during the inspection, that removal of the shrink wrap was easy, replacement of it was inexpensive and the corrosion such that it would be readily visible had the shrink wrap been removed. On this basis she found ATS negligent.

The Court of Appeal noted that a non delegable duty is one where the duty is of such a nature that its performance cannot be delegated to a contractor on the footing that delegation to a competent contractor is a sufficient compliance with the duty. It is not a duty of strict liability in the sense that the defendant is liable for any damage suffered regardless of whether the defendant or anyone else has been negligent. As the Court of Appeal noted, before a plaintiff can succeed in a case based on a breach of a non delegable duty, the plaintiff must establish that someone has been negligent. However, the situation differs from an ordinary duty of care and negligence in that a person subjected to such a duty cannot perform it by taking reasonable care to select an appropriate independent contractor to carry out the acts that eventually injured the plaintiff.

The Court of Appeal noted that there are special rules governing liability for inherently dangerous activity.

The Court of Appeal noted that Transfield had undertaken its contractual responsibility to the Commonwealth, however that did not mean it had undertaken responsibility to Hall in the sense in which that expression is understood in tort law.

The Court of Appeal held that the contract between Transfield and the Commonwealth did not create a pre-existing duty owed by Transfield to Hall which Transfield could not escape by delegation. As noted by the Court of Appeal, the High Court has rejected the proposition that an independent contractor required to perform extra hazardous operations owes a non delegable duty of care to someone who it was foreseeable could be injured in the course of those operations. Nevertheless, where there is a relationship of proximity giving rise to special dependence or vulnerability on the part of a person, a non delegable duty of care may exist. Notwithstanding, in this case the fact remained that it is not sufficient to impose on the employer a non delegable duty of care concerning the carrying out of those activities by independent contractors.

As noted by the Court of Appeal:

*"Commonplace features of building contracts between a builder and a landowner are that the builder is permitted to sub-contract and that the builder will cause all the work to be carried out in a proper workmanlike manner. If (Hall's Counsel's) submissions were right then any head building contractor under a contract exhibiting these commonplace features would be likely to owe a non delegable duty to persons who it was foreseeable could be affected in a serious way by collateral negligence of the sub-contractor. Recognising such a duty would involve a radical alteration in the law. The argument in the present case does not provide a reason for making such an alteration in the law ..."*

Accordingly, the Court of Appeal concluded that Transfield did not owe a non delegable duty of care.

At the end of the day Transfield were not liable for the negligent acts of the contractor, ATS.

No doubt the motivation to fight so hard to retain the judgment against Transfield stemmed from the apparent inability to recover any verdict from ATS and ATS' insurer's attitude to decline to pay the claim made by ATS which was upheld by the Court in the original trial.

Generally contractors who engage independent contractors will not be liable for the negligence of independent contractors provided there has been appropriate care taken in the selection of the independent contractor.

## **Public Liability & Product Liability Insurance - Exclusions For Advice For Reward And Professional Advice**

The NSW Court of Appeal's recent decision in Transfield Services (Australia) Pty Limited - v - Hall (referred to above) gave rise to an interesting dispute between Hall and QBE Insurance (Australia) Limited ("QBE"), the insurer of ATS. ATS had effected a public liability and products liability contract of insurance with QBE and QBE had declined to indemnify ATS in relation to the claim. The crux of the issues before the Court of Appeal was the impact of exclusion clauses that excluded liability for professional advice or advice for a fee.

ATS in its proposal described the nature of its business as:

*"Fabrication, installation, sale and training of outdoor education activities".*

Its occupation had been described as:

*"Sale of adventure equipment (retail) that is packs, sleeping bags, rock climbing gear and the sale, installation and training of rope confidence courses."*

In response to a question ATS declared annual payroll for away from home premises was \$25,000.00.

The away from home premises activities were declared as

*"Assembly and installation of rope course activities".*

The general operative clause noted that the indemnity only applied to such liability arising out of the Insured's Business and is defined by each section of the policy.

The definition of Product in the policy was:

*"Any commodity, article or thing (after it has ceased being a possession or under the control of the insured) which is or is deemed (whether by law or otherwise) to have been manufactured, constructed, grown, extracted, produced, processed, assembled, directed, installed, treated, altered, serviced, repaired, sold, handled, supplied or distributed by the insured or by others trading under the name of the insured including any container thereof but does not mean a motor vehicle."*

ATS made no claim under the public liability cover but claimed under the product liability cover and the scope of indemnity under the product liability cover was as follows:

*"The insured is indemnified by this section in accordance with Clause 1 of the General Operative Clause against claims arising out of or in connection with any Product in respect of injury and/or damage first happening during the period of insurance as the result of an occurrence."*

There were exclusion clauses which excluded liability caused by or arising out of the rendering of or failure to render professional advice or service by the insured or any error or omission connected therewith and liability caused by or arising out of advice, design, formula or specification given for a fee.

It was common ground on a proper construction of the policy wording a claim for Product Liability was within the scope of cover only if both the general operative clause and the specific indemnity wording relating to product liability were satisfied.

There was an initial issue as to whether or not the claim fell within the definition of business. The Trial Judge held that the liability of ATS did not arise out of the insured's business within the meaning of the policy. On appeal the Court of Appeal held that it did.

The information supplied to the insurer included a statement that the company provided a guarantee/warranty on workmanship and attached a document which demonstrated that the company warranted that it would replace or repair any part of the ropes courses supplied by its predecessor company for a period of time. The proposal also disclosed that ATS offered a maintenance inspection of the rope courses it installed.

The original Trial Judge found that the policy defined business by reference to a non-existent schedule. The Court of Appeal did not agree. A renewal certificate had been issued by the underwriting agency which made a reference to an occupation and it was the occupation which was the business for the purpose of the policy.

However, the Court of Appeal noted "that if a person, in the course of carrying out a business as an "X" carries out certain type of activities that are incidental to that business, those activities are part of carrying on business as an "X", even if, where activities of that type to be the only activity that some other entrepreneur engaged in, the business of that entrepreneur would be characterised as something different to carrying on business as an "X".

Thus the fact that carrying out inspection and reporting on rope training courses did not of itself fall within the language "sale, installation and training of rope confidence courses", it was not enough to show that the inspection or reporting is not an incident of the business of selling such courses. Further, the proposal form made it clear ATS had taken over the business of a predecessor and disclosed they offered maintenance inspection of rope courses that had been installed. Accordingly, the liability that ATS incurred was one arising out of its business it disclosed.

The Trial Judge had previously held the public liability section of the policy applied because the rope system was a product. QBE challenged that finding. QBE argued that the rope course was not a product within the meaning of the policy. QBE submitted that the only candidate for being a product was the safety stop that failed and the safety stop had not been shown to be serviced, prepared or handled by ATS and the concept of product required something that was at one time in the possession or under the control of ATS and that the safety stop never had that characteristic. The Court of Appeal accepted that the rope training course as a whole was a product, the course as a whole was serviced by ATS and ATS carried out an inspection of the rope and that the possession or control required was satisfied as ATS had the practical opportunity of dealing with the item in question.

Accordingly, the Court of Appeal accepted that the definition of product had been satisfied.

The case then came down to the two exclusion clauses. The original Trial Judge found that ATS' liability was not one caused by or arising out of the rendering of professional advice. The Court of Appeal noted that in interpreting an exclusion clause where the language permits more than one interpretation, the Court takes into account both the contra proferentum principle (the ambiguity is construed against the author of the contract) and the principle that it would not give effective business operation of a contract if an exclusion clause inappropriately circumscribed the cover provided by the insuring clause.

The Trial Judge formed the view that the proposal had disclosed the nature of the advice and service that was to be provided by ATS and the services and advice provided was within that description and in those circumstances the services or advice were not "professional services" as required by the exclusion clause.

The Trial Judge also formed the view that when ATS compiled a report after an inspection of the rope course and concluded that an "inspection was carried out on all elements and found to be in safe working order" that was a positive act of giving advice and that giving advice was for a fee and that the giving of the advice resulted in the reopening of the ropes course and that the giving of the advice resulted in Hall sustaining the injury that led to ATS' liability. For that reason the QBE policy did not respond as the exclusion clause applied.

However, the Court of Appeal did not agree.

Chief Justice at Common Law McLellan effectively concluded that by its arrangements with Transfield, ATS was offering to do no more than a general maintenance check in the course of its ordinary business. ATS was asked to assess the course and certify and replace all strand devices to the high ropes course with new and hard eyes and this is what it did. McLellan CJ concluded that certification by ATS that the course was safe to use was no more than confirmation that it had carried out the inspection and maintenance tasks as required albeit that some further maintenance work was required. To the extent that the communication by ATS (a certificate) that the course was safe can be characterised as advice at all, it was advice so interwoven with an incident to the insured business of ATS that to exclude it would strike fundamentally at the commercial purpose of the policy.

McLellan CJ concluded:

*"the word "advice" in the exclusion clause should be determined by construing the clause according to its natural ordinary meaning read in the light of the contract as a whole thereby giving due weight to the context on which the clause appears, including the nature and object of the contract and where appropriate, construing the clause contra proferentum (against the insurer's interests) in case of ambiguity."*

McLellan CJ noted:

*"The policy was effected for the purpose of indemnifying ATS with respect to risks in carrying out its business. That business included the maintenance of facilities which it had supplied. Excluded from the indemnity was any liability for professional advice or advice given for a fee. Also excluded are design, formula or specification given for a fee. Providing a "design formula or specification" is to provide a specific form of advice. Common to each of the matters excluded is the provision of information in the nature of intellectual property. This, quite unlike the task involved in carrying out maintenance inspection (which included various repairs) of existing equipment and providing an assurance that it is safe for it to be used. The exclusion clause would only operate to exclude liability for advice given for a fee where that advice was given pursuant to a separate professional engagement of ATS in the nature of a consultancy distinct from its maintenance function."*

It was noted the invoice supplied by ATS was of assistance to ATS as the invoice quoted the work performed as:

*"Inspection, maintenance and upgrade work for Endeavour Rope Course"*

McLellan CJ concluded the description of the work was work within the normal business of ATS, insured by QBE and not excluded by the terms of the policy. Acting Justice Beazley agreed whilst Acting Justice Campbell concluded the exclusion clause concerning "advice for a fee" did apply.

Accordingly, the exclusion clause did not apply as a result of the majority view and QBE were liable for the damages awarded against ATS.

It was also argued there were two acts of negligence, one being a negligent inspection and secondly, the negligent advice issued by way of the certificate. The Court of Appeal noted that where the liability in question has one clause that falls within an insuring clause and another cause that falls within the exclusion and those causes are concurrent in the sense that the coexistence of them is necessary to produce a loss in the circumstances the exclusion prevails. Despite this principle, an exclusion clause should not be interpreted so as to expressly circumscribe the insuring clauses. However, the Court of Appeal in this case concluded treating the exclusion clause as applying would excessively circumscribe the insuring clause in this case.

The commercial intent of the policy is a real issue for the Courts when considering exclusion clauses. Exclusion clauses must not be taken at face value. Where the very nature of the exclusion clause is such that it attacks the underlying nature of the insurance that is intended to be provided, the exclusion clause is unlikely to be applied.

Problems will arise for insurers where public liability and product liability policies contain professional advice and advice for fee exclusions if the nature of the business insured requires advice to be provided as part of the activities incidental to the business.

## **Who Is Liable For The Tree Falling?**

Have you ever wondered whether or not a Local Council has a liability for damage caused by a falling tree? The location of the tree on Council owned or controlled land can create a risk for a Council, however the fact that the tree falls and injures someone does not necessarily mean that the Council breached a duty of care. Much will depend on the circumstances leading up to the tree collapse. The knowledge of a risk that the tree will fall or Council's knowledge of a disease affecting the tree, are issues which will be relevant. In addition, works carried out in the vicinity of the tree may ultimately lead to a weakening of the root systems of the tree and if the works are carried out negligently those who carry out the works can be held liable for the results of the tree collapse.

Careful analysis of the cause of the collapse will be required.

So, what are some of the considerations?

A recent decision of the NSW Court of Appeal provides useful guidance on some of the issues which are relevant in claims brought against Councils by persons injured by falling trees.

Napoleone Turano was critically injured on 18 November 2001 when a Grey Box Eucalyptus tree fell onto his car whilst he was driving along Edmondson Avenue in Austral. He died the following day. The deceased's wife, Maria Turano, and their two children, were passengers in the car at the time and sustained injury. Mrs Turano brought proceedings on her own behalf and on behalf of her own children against Liverpool Council and Sydney Water for physical and psychological injury and loss of dependency as a consequence of the accident.

The claims proceeded to hearing in relation to liability only before His Honour Judge Delaney in the District Court. Judge Delaney determined that the Council was liable in negligence but there was no liability on the part of Sydney Water.

Liverpool Council appealed arguing that they should have no liability. A cross-appeal was filed by Turano arguing that Sydney Water were negligent.

At trial, the main issue before the District Court was what caused the tree to fall and there was a lot of expert evidence on this issue. The immediate cause of the tree falling was strong wind however the root system showed signs of having been affected by a pathogen. There was a culvert drain installed near the site of the accident. Water drained from east to west into a pit that was cut out of the surrounding impermeable clay, then drained out over pastureland through a tail-out drain. In 1981, a water main travelling north to south and traversing the culvert pit had been installed by Sydney Water. The water main was

laid in sand, which was itself laid in the clay that formed the wall of the culvert pit. When the accident occurred, the tail-out drain no longer functioned and it was likely that it had not functioned for a long period of time. Turano and the Council both argued that water from the culvert had been diverted away from the pit via the sand bed in which the water main was laid and this had affected the tree roots.

At trial, Judge Delaney found that the Council was negligent as they had a duty to maintain the culvert, but Sydney Water was not, as they had installed the water main in accordance with accepted engineering practice.

The Court of Appeal disagreed. The Court of Appeal found that the Council did not have a duty of care to maintain the culvert drainage system. Her Honour Justice Beazley stated:

*"Accordingly, without needing to consider the other paragraphs to which the Council referred in its submissions, I am not satisfied that there was a duty on the Council in the terms defined by His Honour. Such a duty would only have arisen if the Council knew, or ought to have known, at the time of installation that the culvert and its discharge draining system was likely to become clogged or obstructed, so that water might not drain away but could seep into the surrounding soil, adversely affecting the surrounding vegetation, including trees in the vicinity. None of those things were established."*

The trial judge had also erred when considering the liability of the Council as His Honour had failed to properly consider the question of breach of duty (an analysis of the magnitude of the risk as compared to the costs of protecting the risk) and His Honour had also failed to adequately consider section 42 of the Civil Liability Act 2002 (functions and resources of a public authority) and section 45 of the Civil Liability Act 2002 (actual knowledge of particular risks of the failure of the culvert drain). Both of these sections would have afforded protection to the Council if properly considered.

But what about Sydney Water? The Court of Appeal found that Sydney Water were liable in negligence. The Court of Appeal found that it was foreseeable that by laying the water main in sand, which acted as a conduit for water, in circumstances where the water main was installed in a position that both breached the existing drainage system and obstructed the drainage of water from the culvert, there could be an effect on the surrounding area which might cause harm. Sydney Water had breached their duty of care in laying the drain at a higher level than the discharge drain from the culvert, which caused periodic damming of the drain, and laying the drain in sand. This permitted the water to drain northwards, and to undermine the roots of the tree.

The claim against Sydney Water was therefore remitted to the District Court for an assessment of damages (as mentioned above, the hearing before the trial judge had been in relation to liability only).

A win ultimately for the Council, the case again reminds claimants of the difficulties in suing Councils where they are afforded protection on a number of levels.

Whilst in this case the Court found there was a party responsible for undermining the root system of the tree which was ultimately a cause of the tree collapse, in many situations a falling tree is unlikely to give rise to a claim for damages by a person injured unless knowledge of a foreseeable risk exists and the party has not addressed the risk.

## **Change To Gratuitous Care Assessments**

In our June 2008 edition we discussed the landmark decision of the New South Wales Court of Appeal in *Harrison v Melhem*. In NSW, people who are injured are entitled to compensation for gratuitous assistance provided to them as a consequence of needs created as a consequence of their injuries and disabilities. In NSW the *Civil Liability Act 2002* and the *Motor Accidents Compensation Act 1999*, at the time of the *Harrison* decision, provided that before any damages could be awarded for gratuitous domestic assistance an injured person must have required domestic assistance for at least 6 hours a week and for 6 months. Before the decision in *Harrison* the approach of the Courts had been to interpret these thresholds as preventing claims for domestic assistance where both thresholds were not satisfied. With the *Harrison* decision this interpretation changed - 5 judges of the Court of Appeal determined that if either threshold was met, then subject to satisfying the other requirements within the legislation, a claimant would be entitled to recover damages for domestic assistance.

So what was the response to this decision? Not surprisingly an application for special leave to appeal to the High Court was filed by the defendant. However, before this application could be heard, as predicted in our June edition, the NSW government amended section 15(3) of the *Civil Liability Act 2002* to overcome the impact of the *Harrison* judgment.

Section 15(3) of the *Civil Liability Act 2002* was amended as a consequence of the Civil Liability Legislation Amendment Act 2008 which was assented to on 12 November 2008.

Section 15(3) now states:

*"(3) Further, no damages may be awarded to a claimant for gratuitous attendant care services unless the services are provided (or to be provided):*

- (a) for at least 6 hours per week, and*
- (b) for a period of at least 6 consecutive months."*

Section 128 of the *Motor Accidents Compensation Act 1999* which relates to the award of damages for domestic assistance was similarly amended.

The effect of the new wording in essence brings back the old interpretation; that is, both thresholds must be satisfied. Whilst Harrison was the law, a claimant who, for example, had received domestic assistance for 6 hours a week for 3 months could have received compensation for gratuitous domestic assistance; now they cannot as they do not reach the threshold required as the assistance has not been provided for at least 6 consecutive months.

So what about proceedings that are already on foot? Are they governed by the new law? Section 32 of the Civil Liability Legislation Amendment Act 2008 provides that the amendment applies to civil liability arising, and proceedings commenced, before the commencement of the amendment but does not apply to any proceedings determined before that commencement. In essence, the amendment applies to all claims apart from those that have resolved or judgment has been handed down, regardless of whether or not proceedings are already on foot.

So what about the special leave application? Perhaps not surprisingly in circumstances where the legislation had already been amended the application for special leave was refused.

The amendment to the legislation no doubt causes all defendants to breathe a sigh of relief as the impact of the Harrison decision on claims for domestic assistance would have been monumental.

## **Employer's Obligations Are Onerous**

The recent decision of the NSW Court of Appeal in *Conceicao - v - Visypack Operations Pty Limited* serves as a reminder to all employers that they have onerous obligations to ensure the safety at work of employees.

Conceicao was employed as a forklift driver. He was also required to perform relief duties dealing with other aspects of the manufacturing process of Visypack Operations Pty Limited. The Visypack factory manufactured plastic bottles. One job which had to be done was to check pallets for damaged bottles. The normal process was to stop the pallet, remove the pallet, place it on the ground and then inspect the pallet with the use of a stepladder. As the Court of Appeal noted, when forklifts were not available or when they were not readily available, the system was that the workman would stand on top of the conveyor belt, with the pallet still on the conveyor belt and inspect the pallet. The conveyor belt was 500 mm above the ground.

Conceicao injured his ankle when he was jumping down from the conveyor belt and struck some angle bar on the factory floor.

There was expert evidence available which demonstrated that where there was a platform of more than 300 mm a step should be in place. The expert evidence suggested that a system of work should have been implemented to ensure workers were not permitted or required to gain access to the potentially hazardous location on the conveyor belt and it should have, for example, ensured that there were an adequate number of forklifts capable of being operated with the production schedule and the number of workers present in the factory. There were also suggestions that there ought to have been a mobile step or a permanent step to access the conveyor.

The Court of Appeal noted that the step down from the conveyor belt could not be described as an ordinary step and to negotiate that without the benefit of any step or handrail clearly carried with it risks of falling or injuring oneself. The Court of Appeal noted that there was a considerable risk that over time people would simply turn over on their ankles and suffer that sort of injury. For that reason the employer was seen as negligent.

The employer had argued that the worker's negligence had contributed to his demise. It was argued that the damages should be reduced for the contributory negligence of the worker. This argument failed. In essence, the Court of Appeal noted that, at most, the worker had a careless mis-step or fall and that at the end of a 12 hour shift if there were some misjudgement involved in the method of making the jump then that is the very sort of casual, careless, inadvertence which a system of work should guard against. The choice between a careless mis-step and a fall due to the system of work was the real issue and in this case the Court of Appeal accepted that it was a system of work at fault and not the worker. Ultimately the original Trial Judge's findings of negligence were upheld and the appeal was dismissed.

Requiring workers to climb onto platforms without providing appropriate means of access to climb to and descend from the platform exposes employees to a significant risk of injury and as can be seen in this case, a damages claim.

### **Building Industry- Security Of Payment Claims**

The NSW Court of Appeal in *Plaza West Pty Limited - v - Simons Earthworks Pty Limited* has recently delivered a judgment which clarifies the way in which adjudicators should determine payment claims in circumstances where construction contracts contain condition precedents to payment such as obtaining a superintendent's certificate.

Simon's Earthworks Pty Limited ("Simon's Earthworks") were engaged by Plaza West Pty Limited ("Plaza West") to carry out earthworks for a development. The earthworks were sub-contracted to a third party, Mirmac Pty Limited ("Mirmac"). Mirmac served a payment claim on Simon's Earthworks, claiming \$524,555.54. On the same day Simon's Earthworks made a payment claim on Plaza West, a copy being provided to the superintendent, claiming \$958,553.53 which included the amount of the claim of Mirmac. This was a payment claim under the *Building & Construction Industry Security of Payments Act, 1999* and a progress claim under the construction contract.

Plaza West terminated their arrangements with Simon's Earthworks and paid Mirmac its fees and Mirmac then completed the contract works.

The security of payment claim proceeded to adjudication and the adjudicator determined an amount of \$958,553.53 was payable by Plaza West to Simon's Earthworks. The difference between the awarded amount and the amount paid to Mirmac was remitted by Plaza West to Simon's Earthworks. Subsequently Simon's Earthworks obtained a judgment in the District Court for the adjudicated amount less the payments it had been paid. Plaza West applied to the District Court to set aside the adjudication and that application was unsuccessful. Ultimately the matter came before the Court of Appeal.

The Court of Appeal, in exercising its powers, considered the actions of the adjudicator and concluded that the adjudicator was acting within his jurisdiction and made a determination which was within his jurisdiction and therefore the determination was valid and his adjudication was not vitiated. The Court of Appeal noted that this was an unusual case where Simon's Earthworks were entitled to the benefit of an award in respect to an amount of money which had already been paid to a sub-contractor.

Despite the conclusion that the adjudication should not be disturbed, the Court of Appeal concluded that the adjudicator had erred in law in reaching his determination. In the Court of Appeal the Court must determine whether or not the adjudicator has attended to his task under Section 22 of the *Building & Construction Industry Security of Payments Act, 1999* not whether or not the law has been applied correctly.

The adjudicator in the adjudication had concluded that the expiration of fourteen (14) days from the service of the claim by virtue of the operation of the contract made the claim due under the contract.

An error of fact or law by an adjudicator is not sufficient to invalidate an adjudication.

As Hodgson JA noted Section 9A of the *Building & Construction Industry Security of Payment Act, 1999* does not engage contract preconditions determining what is due under the contract, independently of calculations referable to work performed. This means that contractors are not deprived of an entitlement to payment under the Act because of a condition precedent such as obtaining of the superintendent's certificate which has not been satisfied and it means equally that contractors are not ipso fact entitled to payment because of the operation of a deeming provision which specifies a progress claim is deemed to be accepted.

In this case the adjudicator made an error of law in accepting that the absence of the superintendent's certificate meant that

the payment was due and payable due to the deeming provisions in the contract notwithstanding the adjudication determination still stands.

So, at the end of the day Simon's Earthworks were entitled to the judgment they obtained. Nevertheless, the Court of Appeal noted that "the result of this case may seem unsatisfactory, because it leaves Simon's Earthworks with the benefit of a determination (and consequent judgment), arrived at through an error of law and which includes about \$500,000 claimed on the basis of Simon Earthwork's liability to Mirmac which has been satisfied by Plaza West." Any remedy for Plaza West would have to be pursued in proceedings brought under Section 32 of the Act. If such proceedings are brought and it can be shown that a judgment has been obtained under the Act which was unmeritorious, and particularly if it can be shown that the payment of the judgment is likely to be irrecoverable Plaza West may be able to obtain a stay of the judgment and an injunction against enforcement of it. One must remember Section 32 of the Act provides that provisions of the Act do not affect any rights that a party to a construction contract may have under the contract.

## OH&S Roundup

### Industrial Relations Commission Gets It Wrong - Will WorkCover Continue With The Prosecution?

The NSW Court of Appeal for the first time has recently determined that a conviction by the Industrial Relations Commission of Bros Bin Systems Pty Limited ("Bros Bin"), under Section 17 of the *Occupational Health & Safety Act* ("OH&S Act") should be quashed. The Court of Appeal's decision involved a careful analysis of the appeal procedures available in occupational health and safety prosecutions in the Industrial Relations Commission.

Bin Bros conducted a waste disposal system. In November 1999 it sent one of its garbage tip trucks to an auto electrician in order to repair an electrical fault in its blinker system. During the course of the repair process the jib on the truck was raised so that the auto electrician could gain access to the site of the fault. The jib collapsed, killing the worker.

Section 17 of the OH&S Act provides that each person who has to any extent control of any plant which has been provided for the use or operation of a person at work shall ensure that the plant is safe and without risks to health. Plant is defined to include: "Any machinery, equipment and appliance."

Section 17 is directed to persons at work who are not employees of the person at fault. The principal issue in this case was whether or not the owner of equipment who submits that equipment to another person for repair is capable of falling within the scope of Section 17 of the Act.

The prosecution originally proceeded before Justice Marks in the Industrial Relations Commission who acquitted the employer. WorkCover appealed. The Full Court of the Industrial Relations Commission determined the appeal in favour of WorkCover and remitted the case back to Justice Marks, to be redetermined in accordance with the law as had been spelt out by the Full Court. Subsequently Justice Marks convicted the employer. The original trial before Marks had proceeded for four days. The retrial before Justice Marks had occupied a further three days.

Not satisfied with the conviction, a second appeal was filed by Bin Bros and the Full Bench heard the second appeal and confirmed the conviction and sentence.

The Full Bench of the Industrial Relations Commission, in the first appeal noted that Justice Marks originally had found that plant was limited in its application to "fixtures, implements and apparatus used in carrying on the work process". This would exclude the product of work processes and objects on which work processes are carried out, notwithstanding these products and objects may be machinery, equipment or appliances and have been provided for the use or operation of persons at work. The Full Court could see no basis, given the nature of the statute and its objectives, for reading down the definition of plant in that way.

Bros Bin were not happy with the end result and somewhat ingeniously decided to appeal to the NSW Court of Appeal, not on the basis that the Industrial Relations Commission was wrong in its determination on whether or not the jib was plant within the definition of the Act but rather, the Full Court fell into a jurisdictional error when it dealt with the first appeal and everything done by the Industrial Relations Commission thereafter was invalid.

Interestingly, the Court of Appeal entertained the appeal and found in favour of Bros Bins. The Court of Appeal noted that Marks J heard the original prosecution and WorkCover were entitled to bring an appeal to the Full Bench of the Industrial

Relations Commission. It was not appropriate for the Court of Appeal to revisit the decision made by the Full Court on appeal but rather, it was necessary to determine whether or not there had been a jurisdictional error by the Full Court, in the determination to remit the matter to the original Judge who had acquitted Bros Bins.

The Court of Appeal noted the issue which the Industrial Relations Commission had to determine was whether the employer had control of plant to any extent, being plant provided for use or operation of persons at work. It was for the Full Bench to determine that issue on the facts and the Court of Appeal noted that in doing so, it could not detect a misconception and disregard to the nature or limits of the Full Court's jurisdiction nor any decision outside the limits of its functions and powers conferred. In determining that the acquittal was wrong, the Court of Appeal noted that the Full Bench had the power to decide whether or not the equipment provided for repair constituted plant provided for the use or operation of persons at work within Section 17 of the OH&S Act and if there was an error by the Full Court, it was an error made within the Full Court's jurisdictional power and that question could not be revisited by the Court of Appeal.

During the second appeal an issue arose in the course of the appeal as to whether or not the Full Court had the power to remit the hearing of the prosecution to Justice Marks.

The Court of Appeal effectively determined that once the Full Bench in the first appeal had determined to set aside the first decision of Justice Marks to acquit, it was obliged to proceed to make a decision as to guilt or innocence. It failed to do so and remitted the case for redetermination to Marks J and in doing so, its failure constituted a misunderstanding of its jurisdiction of a fundamental character. The decision to remit the case to Justice Marks was beyond the Court's jurisdiction and therefore the second hearing before Justice Marks and the second appeal before the Full Bench were conducted without jurisdiction.

The Court of Appeal noted there was a clear distinction between the decision of the Full Bench to set aside the order dismissing the proceedings and the order remitting the matter for a new Trial. The decisions were clearly separable.

Subsequently, the Court of Appeal quashed the convictions. As the Court of Appeal noted, this now leaves it open to WorkCover to pursue proceedings before the Full Court. Whether such proceedings will be taken involves an exercise of prosecutorial discretion on the part of WorkCover.

The end result is now that the convictions found by Justice Marks and the Full Court have been set aside, as were the costs order made in those proceedings.

The OH&S legislation provides the Industrial Relations Commission of NSW with the power to deal with appeals from prosecutions under the OH&S Act. However, when dealing with those appeals the Full Bench must exercise the powers with which it is vested and act in accordance with its jurisdiction. Overstep that jurisdiction and the NSW Court of Appeal will intervene.

So, what does the decision really mean? It simply means that the next time an appeal is heard by the Full Bench on appeal from a conviction or acquittal, the Full Bench will need to determine the guilt or innocence of the party and not remit the case to a single judge to determine the issue based on guideline principles published by the Full Court in a judgment. In addition, watch out for Section 17 of the OH&S Act as you are liable for your plant even when you send it to the repairer as the Full Court's decision on this issue will be the prevailing law.

## **Controllers Of Premises Owe Duties Under The Occupational Health & Safety Act**

A recent decision of the NSW Industrial Relations Commission highlights the obligations that controllers of premises have for safety. Visy Paper operated a material recovery facility at Taren Point. Inside the facility was stored recyclable material, consisting of paper, plastic, cardboard, metal, cans and glass. The recyclable material was stacked some seven metres high along a length of Besser Block wall. A part of the wall collapsed and fell outwards onto an adjacent parking area. Two persons were in the parking area at the time of the collapse and the collapsing section of the wall narrowly missed the two persons but damaged some eight parked vehicles. One of the persons received a graze to her arm.

Section 10 of the OH&S Act provides that a person who has control of premises used by people as a place of work must ensure that the premises are safe and without risk to health. The charge to which Visy pleaded guilty involved a failure to maintain a safe system of work and failure to carry out a risk assessment and a failure to provide such instruction, training and supervision to workers engaged in its undertakings to ensure that product was stacked in a manner that was safe and without risk of injury. These failures caused a risk to arise, namely the risk of injuries to person who may be located in the adjacent

parking area from a collapsing wall of the premises controlled by the defendant.

Visy had implemented a system to avoid having material piled against a wall but failed to maintain its system. Despite knowing that material placed against the wall might cause it to be at risk of collapsing, Visy failed to carry out a risk assessment in relation to the potential for collapse. Despite being aware of the risk of placing materials against the wall, it failed to provide the necessary training, instruction and supervision to ensure that it did not occur. The measures available to avoid the risk were simple and straightforward - avoid stockpiling the material any higher than the concrete reinforcement barrier or to ensure the wall was capable of sustaining the weight of the material placed above and beyond the concrete reinforcement barrier.

It was noted that the company had carried out an overhaul of its policies and practices relating to OH&S and had an obvious commitment to workplace safety and the risk of re-offending was not great. However, as the company operated multiple sites and despite its commitment to safety it failed to maintain a safe system of work at this facility. In those circumstances the company was fined \$140,000 after discounting the penalty by 20% for the early plea of guilty.

## **Transport Contractors Face Significant Risks**

The NSW Industrial Relations Commission has recently delivered a judgment in *Inspector Patton - v - Western Freight Management Pty Limited* which is sure to cause the alarm bells to ring for transport operators.

Western Freight Management Pty Limited ("WFM") contracted to supply prime movers and drivers to haul freight between depots operated by Star Track Express ("STE") road freight distribution company. Two employee drivers of WFM attended at an STE depot to collect trailers that they were scheduled to haul to other depots. The layout of the dock required a driver to reverse their trailer towards the loading dock to enable STE employees to load the trailers. Once the trailer was loaded the driver would move forward, away from the dock, in order to have sufficient room to close the trailer doors. To exit the depot he then had to reverse the trailer in a jack-knife manoeuvre in order to create sufficient swing room around and exit the depot without hitting a garden bed located near the southern gate of the depot. As one of the employees reversed his trailer towards the loading dock, the other employee was caught between the rear of the trailer and the dock and as a result of crush injuries was fatally injured. The employer was charged with a contravention of Section 8 of the Occupational Health & Safety Act. The claim was vigorously defended with the employer firstly arguing that the Industrial Relations Commission had no jurisdiction to deal with the offence although that argument was quickly dismissed.

The Court noted that it was essential for the prosecutor to establish that the defendant was an employer, that it employed employees at its place of work and that it failed to ensure the safety and health of its employees whilst they were at work and that there was a causal relationship between the facts causing the risk to safety and the employer's acts or omissions. The STE depot was held to be the place of work of the employees.

The evidence established that a driver of a prime mover with a trailer attached was unable to see the area located immediately behind the trailer and this presented an obvious risk when reversing. It was noted that the arrangements of a transport company such as WFM are akin to that of a labour hire company and it is noted that labour hire companies owe a special obligation to ensure their employees safety. Here WFM's employees were at a workplace in which they were under the direct management and control of STE, not WFM. Nevertheless, there was no reason why the special obligation placed on labour hire employers to ensure their employees safety should not apply to WFM in respect to its employees at the STE depot.

The Court held that WFM failed to ensure that a safe system of work in relation to traffic and pedestrian management was provided and/or maintained and that WFM had failed to conduct risk assessments in respect of traffic and pedestrian management at the STE premises. The Court also found that WFM failed to ensure there was sufficient space for its employees to safely exit the depot via the southern gate without the impact of the garden bed and accordingly, the offence had been made out.

Despite WFM arguing that it should not be convicted as it established the available defences that it was not practical to comply with the provisions of the Act or the commission of the offence was due to causes over which the employer had no control, and against the happening of which it was impracticable for WFM to make provision, the defences were not upheld.

Despite STE being in control of the premises, the Court noted that WFM could have brought to the attention of STE any concerns in relation to pedestrian management and as STE had, in the past, modified the loading docks at the request of WFM, it was apparent there was some degree of control of the depot by WFM.

The Court noted it was within WFM's control to raise with STE any risks to the safety of WFM employees because WFM had not conducted a proper risk assessment and had not assessed the risks to its employees. So it was not so much a refusal by STE to address WFM's concerns that caused the risk because those concerns were not, in any effective way, brought to STE's attention. Had the risks been brought to STE's attention and WFM had done all that was reasonable and practicable to have STE implement appropriate safety measures but STE had refused or failed to do so, it may have been that a defence was available. But then again, it may not have been if WFM had continued to allow its employees to be exposed to the risk of their safety.

At the end of the day WFM were convicted and a fine will be determined at a later stage.

The case highlights the significant need for transport operators to be well aware of the premises that they regularly visit and to ensure that adequate risk assessments are conducted for those premises and any defects reported to the controller of premises to ensure pedestrian management is not a problem.

## **Termination Of Workers Compensation Benefits -Job Seeking Obligations Under Section 52A**

In New South Wales Section 52A of the Workers Compensation Act allows for payments of weekly compensation in respect of partial incapacity for work to be ceased after 2 years if the worker is not suitably employed, has unreasonably rejected suitable employment or has sought suitable employment but failed to attain suitable employment primarily due to the state of the labour market. So what are the job seeking obligations for a worker?

Deputy President Moore of the Workers Compensation Commission recently examined the operation of Section 52A in *Frost -v- JEJP Vineyard Contractors Pty Limited (2008)*. In this matter, the worker had reached his 104 weeks of partial incapacity benefits and the insurer sought to terminate ongoing benefits using Section 52A. The worker had undergone rehabilitation including retraining through Responsible Service of Alcohol and Responsible Service of Gambling courses. The insurer contended that as the worker had failed to complete job search diaries, applied for jobs as a butcher and courier driver when he had previously lost his license and applied for jobs the insurer considered medically unsuitable the worker had breached Section 52A.

Ultimately the insurer failed in their Section 52A argument. The insurer had continually required the worker to apply for bar jobs at various licensed premises near his home. Despite the worker's treating doctor and a subsequent rehabilitation report (not provided to the worker) determining that bar work was not suitable given his foot injury, the worker had continued to seek work as a bar person. The insurer failed to indicate to the worker that he ought to seek employment in other suitable fields including work as a telephone sales representative or enquiry clerk.

The expression "seeking suitable employment" was examined. Deputy President Moore reiterated the decision of *Houston -v- Houston & Sons Pty Limited (1999)* where it was determined that action taken by the worker to look for suitable employment was over a period of time. That time period was sufficiently elastic so the worker was not required after successive failures and rejections to continue to present himself daily to employers, suffering humiliation and facing increasing rejection. Provided the worker stayed sufficiently close to the labour market as to find work as and when it becomes available, he would be seeking suitable employment. Given there were limited positions available and the worker had sought employment as per the communication he received from the insurer, his claim for benefits was not terminated under Section 52A.

The decision is a timely reminder that given the onus is on the insurer to show that injured workers are not seeking suitable employment, unambiguous communication is required before Section 52A can be applied. In this regard, all evidence regarding the jobs suitable for a worker must be communicated to that worker and job seeking obligations only enforced in relation to that employment. Although it was not crucial to his decision, the Deputy President commented that had the suitable types of jobs been explained to the worker, then he may have had difficulty in establishing he was indeed seeking suitable employment. However, expecting a worker to be penalised for job seeking when his obligations are not clearly set out should not result in a penalty for that behaviour. Despite Section 52A being available to insurers for nearly 10 years, the successful application of its provisions in ceasing weekly compensation benefits remains illusive.

Insurers must clearly set out in the Injury Management Plan the types of jobs for which the worker must seek when complying with his job seeking obligations. All evidence regarding rehabilitation options must be provided to the worker so that he is clearly aware of the types of jobs he is required to seek. The insurer must also take into account other restrictions the worker may face in job seeking such as the non-possession of a drivers license and the inability to access public transport.

## **No Contractual Damages For Humiliation Of Employee After Wrongfully Dismissed**

The Court of Appeal of New South Wales has recently determined that where an employee was unfairly dismissed he had no entitlement to contractual damages for the humiliation he suffered as a result of being unfairly dismissed.

Russell had been employed as a Director of Music at St Mary's Cathedral since 1976. One of his duties was to manage the male choir. Approximately 60% of the male choir were students of St Mary's Cathedral School. In 1999, Russell was arrested and charged with three counts of sexual misconduct following information received by Police from a former member of the choir. At a committal hearing for the charges in March 2000, all charges against Russell were dismissed. He subsequently resumed employment at the Cathedral.

The New South Wales Ombudsman conducted an internal investigation and in January 2003 Russell's employment was terminated.

Russell commenced proceedings in the New South Wales Industrial Relations Commission claiming his dismissal had been unfair. It was found by the Commission that Russell's termination was harsh, unreasonable and unjust. The Commission ordered Russell be reinstated to his former position with the Cathedral with full pay from the date of his dismissal.

Russell's termination by the Cathedral had attracted significant media attention. Russell claimed he had suffered humiliation, stress and anxiety throughout the period of the investigation prior to his reinstatement. He commenced proceedings against the Cathedral claiming contractual damages for the wrongful termination of employment.

Russell was initially successful and there was a finding he was entitled to compensation. However, the compensation did not extend to the costs associated with injury to Russell's reputation, anxiety or stress.

The matter ultimately proceeded to the Court of Appeal which held the Cathedral had not breached any implied term of good faith, mutual trust and confidence with regard to Russell's contract of employment. The Court also stated that recovery of damages was precluded for breach of a term of good faith, mutual trust and confidence.

The decision in *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Anor* does provide employers with protection from a claim for contractual damages for humiliation, stress and anxiety following the wrongful or unfair termination of an employee. However, employers should always be careful in making any statements or publications which may contain defamatory material which would provide a dismissed employee with a right to sue for defamation.

## **Discrimination Against Job Applicant With Disclosed Back Injury**

Employers must be careful when considering job applicants, that they do not discriminate against applicants who have a disability within the meaning of the discrimination legislation. In the matter of *Tarr v Torrens Transit Services (North) Pty Limited*, the South Australian District Court Administrative and Disciplinary Division found Torrens Transit had discriminated against Tarr on the basis he had a pre-existing back injury.

Tarr had been working as a casual bus driver. His employer lost their contract to provide bus services on a number of routes. Tarr applied to the new operator (Torrens Transit) for a position as a bus driver. On the job application form he was required to fill out, he disclosed he had sustained certain injuries between 1994 and 2003. Those injuries included back, neck and knee injuries. One of those injuries required Tarr to take time off work.

Torrens Transit conducted a pre-employment functional assessment. Tarr met all the physical requirements for the position of a bus driver. However, it was noted his lack of back fitness presented some risk factors.

Torrens Transit advised Tarr that he had failed to meet the requirements in relation to back fitness and considered he had an inability to meet the inherent requirements of the position of a bus driver. Consequently Torrens Transit did not offer him the position. Tarr commenced proceedings claiming there was a distinction between having a 'risk factor' and an inability to perform the inherent requirements of the job. Torrens Transit defended the application on the basis the *Equal Opportunity Act* provided that discrimination was permissible where a person suffering an impairment would not be able to perform the job adequately or without risk to himself or others. A further exception relied on by Torrens Transit provided that discrimination was permitted where the physical impairment would prevent the person from responding adequately to situations of emergency that could reasonably be anticipated in the position.

The District Court found that Tarr's pre-existing back injuries and his other injuries did not present a risk to himself or others in the performance of his job. The Court considered his pre-existing back injuries did not inhibit his capacity to respond to emergency situations that reasonably arose in the position.

The Court ordered that Torrens Transit pay Tarr \$2,000 for compensation for injury to his feelings and \$1,834 compensation for actual loss.

## **Employee Restrained From Working With Competitor After Breaching Fixed Term Contract**

Fixed term contracts provide employers and employees with certainty as to what happens at the end of the fixed term. Whilst it may be accepted practice that the term of the contract is extended or renewed, those variations are still usually within the bounds of an extension to the termination date of the arrangements.

In the matter of Tullett Prebon (Australia) Pty Limited v Purcell, the Supreme Court of New South Wales recently restrained Purcell from working with a competitor when Purcell wrongly terminated his fixed term contract.

Tullett Prebon employed Purcell as a broker in the money market working in interest rate swaps. He commenced employment in the markets in 1985. Under a new contract made in July 2007 between Purcell and Tullett Prebon, his employment had been fixed for an initial term of 2 years expiring in July 2009. The terms of the contract included a restraint on Purcell from taking up employment with one of its competitors for a period of 6 months following his employment with Tullett Prebon. The contract also restrained Purcell from soliciting clients or employees of Tullett Prebon throughout the 3 month period following his employment.

In April 2008, some 10 months into his fixed term 2 year contract, Purcell resigned his employment with Tullett Prebon. He took up employment with a competitor.

Tullett Prebon sought an injunction restraining Purcell from contravening express and implied restraints in his employment contract. They also sought to prevent Purcell from working with the competitor until the expiration of the term of his contract with Tullett Prebon in July 2009.

Tullett Prebon provided evidence there were numerous commercially sensitive matters (known to Purcell) that it had a valid interest in protecting including brokerage revenues, rates, business volumes and the identity of clients.

His Honour, Mr Justice Brereton, found the fixed term contract remained on foot. Whilst Purcell's resignation repudiated the fixed term contract, Tullett Prebon had elected not to accept that repudiation. Consequently the contract remained on foot even though Purcell was no longer employed.

His Honour found the restraints contained within the fixed term contract were both necessary and reasonable as Tullett Prebon had a valid interest in protecting its commercially sensitive information. His Honour also found the restraints during the course of the contract and the 3 month post-employment restraint against soliciting clients and employees were reasonable.

His Honour imposed injunctions which restrained Purcell from working with the competitor for 6 months from the time of his resignation. He also imposed the injunction on Purcell from soliciting Tullett Prebon's clients or employees over the same period.

A fixed term is just that, a fixed term, unless provisions in an employment contract prescribe a basis for early termination and restraint clauses and non compete clauses can play a role in a fixed term contract.

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*Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.*

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