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## Privacy – the new Data Breach Notification Scheme begins

The Privacy Amendment (Notifiable Data Breaches) Act 2017 which commences on 22 February 2018 establishes a Notifiable Data Breach scheme that applies to all organisations with existing personal information security obligations under the Australian Privacy Act 1988 (Privacy Act). The scheme will apply to Australian Government agencies, businesses and not-for profit organisations that have an annual turnover of more than \$3 million, private sector health service providers, credit reporting bodies, credit providers, entities that trade in personal information and tax file number (TFN) recipients.

Organisations will be obliged to notify individuals whose personal information is involved in a data breach that is likely to result in serious harm. The notification must be given to the individual and include recommendations about the steps individuals should take in response to the breach. The Office of the Australian Information Commissioner (“OAIC”) must be notified as well and has an online form to facilitate notifications.

A breach is notifiable only if it is likely to result in serious harm to any of the individuals to whom the information relates. Whether a data breach is likely to result in serious harm requires an objective assessment. The question is whether a reasonable person in the organisation’s position would determine the breach is likely to result in serious harm. That is, is it more probable than not that there will be serious harm.

‘Serious harm’ is not defined in the Privacy Act. However serious harm to an individual is likely to include serious physical, psychological, emotional, financial, or reputational harm.

There will be a notifiable data breach where:

- there is unauthorised access to or unauthorised disclosure of personal information, or a loss of personal information by an organisation;

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- there is likely to be serious harm to one or more individuals;
- the organisation has not been able to prevent the likely risk of serious harm with remedial action.

Information that if disclosed, which is likely to cause serious harm, includes:

- sensitive information such as information about an individual's health;
- documents commonly used for identity verification (including Medicare card, driver licence, and passport details);
- financial information;
- a combination of personal information (rather than a single piece of personal information).

The Privacy Act prescribes matters that should be considered when determining whether a data breach is likely to cause serious harm. The matters include:

- the kind or kinds of information lost or disclosed;
- the sensitivity of the information;
- whether the information is protected by one or more security measures;
- the likelihood that any of those security measures could be overcome;
- the persons, or the kinds of persons, who have obtained, or who could obtain, the information;
- if a security technology or methodology was used in relation to the information, and was designed to make the information unintelligible or meaningless to persons who are not authorised to obtain the information;
- the likelihood that the persons, or the kinds of persons, who have obtained, or who could obtain, the information, and have, or are likely to have, the intention of causing harm to any of the individuals to whom the information relates have obtained, or could obtain, information or knowledge required to circumvent the security technology or methodology;
- the nature of the harm.

The potential harm that will be an issue where there is a data breach includes:

- identity theft
- significant financial loss by the individual;
- threats to an individual's physical safety;
- loss of business or employment opportunities;
- damage to reputation or relationships;
- humiliation;
- workplace or social bullying or marginalisation.

Early detection of a data breach and prompt remedial action by an organisation is vital as organisations will be exempted from notifying a data breach where action is taken that prevents serious harm.

Investigation into suspected data breaches will need to become the norm. An organisation is not obliged to notify potential data breaches where it has reasonable grounds to suspect that an eligible data breach has occurred but the organisation must complete a "reasonable and expeditious" assessment into the relevant circumstances within 30 days and if the data breach is confirmed the organisation will need to implement remedial action and if serious harm cannot be prevented the breach will need to be notified.

So there we have it. The new data breach notification scheme will drive organisations to introduce additional compliance procedures around data collection, data security and investigation of suspected data breaches. Businesses need to be aware of their obligations under the National Privacy Principles and the steps that must be taken where there is a suspected data breach or a data breach that is likely to cause serious harm.

Failure to comply with the notification requirements is subject to the standard penalty regime under the Privacy Act, which allows for monetary penalties of up to \$1.8 million for companies and \$360,000 for individuals for serious or repeated breaches.

However that's not the only change when it comes to privacy for Australian businesses dealing with the EU as additional issues will need to be considered as consequence of the European Union General Data Protection Regulation (the GDPR) that contains new data protection requirements that will apply from 25 May 2018.

Australian businesses with an establishment in the EU, or that offer goods and services in the EU, or that monitor the behaviour of individuals in the EU may need to comply with the GDPR.

The GDPR and the Australia Privacy Act 1988 have many common requirements and Australian businesses may already have some of the measures in place that will be required under the GDPR. Even so, businesses dealing with the EU should begin taking steps to evaluate their information handling practices and governance structures, and seek legal advice where necessary, to implement the necessary changes well before commencement of the GDPR.

There are interesting times ahead for businesses that collect and store personal and sensitive information about individuals and insurance coverage for the civil penalties that can result from breaches of the Privacy Act will be at the forefront of the thoughts of the prudent risk manager involved in those businesses.

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## The insurance case with it all. A guide to legal issues that impact on major property damage claims

A good insurance stoush is not always easy to come by however when there is one we get the benefit of the Court's views on a myriad of issues. That is particularly the case, where there is a lot of money involved.

In *Mobis Parts Australia v XL Catlin* a battle developed between Mobis and its property damage and business damage insurers that resulted in a number of judgments in 2017. It seemed very much like a boxing match. Stevenson J in proceedings in the Supreme Court of NSW was called on to deliver a number of determinations on issues that often confront insurers dealing with large property damage and business interruption claims and other judges were called on throughout the proceedings to determine discrete issues.

Mobis are a wholly owned Australian subsidiary of Hyundai Mobis, and operate a vast warehouse at Eastern Creek in Sydney equivalent in size to several city blocks and store and distribute spare parts for Hyundai and Kia motor vehicles from that warehouse.

There was a severe storm in Sydney on 25 April 2015 and a large amount of hail accumulated on the Mobis warehouse roof and it collapsed. Approximately 3 months later, on 30 July 2015, the warehouse (and virtually all of its then contents, including a large amount of stock) was destroyed in a fire which broke out during the demolition recovery process.

Mobis had a local property damage and business interruption insurance policy with XL Catlin as part of a Global Insurance Program which included a Property Damage and Business Interruption Policy in the name of another wholly owned subsidiary of Mobis Korea, Mobis Slovakia s.r.o. which was issued as a "Master Policy" by XL, AIG Europe Ltd and UNIQA Versicherungs AG.

Mobis' primary claim was against XL under the Local Policy. Mobis only sought indemnity under the Master Policy if, contrary to its case, the Local Policy did not respond to its claim.

Mobis claimed in the order of \$62 million (less some \$14.4 million already paid to it by XL) in respect of:

- the cost of rebuilding the warehouse (some \$17.25 million);
- the replacement value of the loss or damage of contents (some \$8.5 million) and stock (the full amount of the policy sub limit of some \$27.5 million); and
- business interruption of some \$9.1 million.

The Local Policy had a limit for "storm" damage of \$72,105,000 (equivalent to EUR 50 million) as did the Master Policy.

The Master Policy also had a limit of EUR 10 million for "hail". XL contended that the agreement of the parties was that there should be a corresponding hail limit in the Local Policy but a hail limit was not specified in the terms of the Local Policy.

On 5 June 2015, shortly after the warehouse collapsed, XL agreed to make a payment to Mobis in the amount of the asserted Hail Limit (hence the payment of some \$14.4 million being the equivalent of EUR 10 million). The battle lines were drawn.

Twenty one days of hearing and 9 discrete judgements followed and we need to examine the wounded.

There were a myriad of issues:

- was the damage caused by storm or hail – an important issue if there was a hail damage sub-limit;
- should the local policy be read as incorporating a hail sub limit;
- should the local policy be rectified to incorporate a hail sub-limit
- did the building collapse as a consequence of a defect in the design of the building and if so did the exclusion for defective design come to the aid of XL Catlin,
- where XL Catlin paid a claim up to the purported hail limit did this payment prevent XL from relying on the defect exclusion during the dispute;
- who bears the onus of proving the quantum of any betterment and what happens where there is not enough evidence to calculate the value of the betterment.

So we look at how the fight played out.

### The effect of the initial admission of indemnity

We start with the fight on the undercard, the estoppel point and whether XL could rely on exclusions where it conceded it was liable to indemnify Mobis before proceedings were commenced.

The insurers appointed Costin Roe engineers to advise on the cause of the loss. The engineers determined that a build up of hail on the roof caused the roof to collapse. The engineers were also asked to comment on the structural adequacy of the building. Their first opinion was provided without reference to architectural drawings and they determined the weight of hail caused the collapse.

Lawyers acting for Mobis were pressing XL for payment complaining that delay by XL was causing prejudice to Mobis where it only had 12 months business interruption cover with the usual references that lawyers throw in about an insurer's duty of good faith.

After receiving the first report of the engineers XL advised Mobis that it accepted liability under the local

policy in respect of the loss on the basis of known facts and circumstances and payment was made on the basis that there was a hail limit and that purported limit was paid.

In September 2015 Mobis commenced proceedings seeking a declaration the local policy should respond to the entire claim. XL then raised a defence seeking to rectify the local policy so that all limitations in the Master Policy were incorporated in the local policy.

Expert reports were exchanged and not surprisingly the lawyers for Mobis explored the possibility the building was defectively designed as there was an exclusion for “faulty or defective design or materials” Ultimately expert evidence was obtained contending the design was defective and XL sought to amend its defence to rely on the defect exclusion.

The issue was whether XL was to be precluded from defending the proceedings on the basis of the faulty design exclusion clause because it had admitted liability in its letter albeit an admission “based on known facts and circumstances” and the defendant reserved its position “otherwise”.

When considering whether an amendment to plead the exclusion should be permitted Bergin CJ observed:

*“The commercial community depends upon insurers dealing with claims with promptitude. The defendant(XL) was investigating a large claim (approximately \$68 million) in urgent circumstances in which it had received a preliminary report. In complying with its obligations of the utmost good faith, the defendant admitted liability to the extent that it saw fit, reserving its position in respect of the issue that had arisen in respect of the extent of its liability, and qualifying its admission as being made on the basis of the facts and circumstances then known. As a matter of practicality for the commercial community, such qualified admissions may be seen as preferable to a declination of a claim. The insured runs the risk (in many cases not a great risk) of acting upon the qualified admission with the prospect that there may be the change in circumstance that may justify the insurer withdrawing the admission. However if the insured is in a position where it must restore the asset for the purpose of operating its business, it may be thought that some payment by the insurer to assist in that restoration, even on a qualified basis, would be preferable to no payment at all. It may enable the insured to restart its business and earn income, even if at a later time it is liable to repay some amount to the insurer. Whereas if there is a declination of the claim the insured may not be able to recommence its business operations.”*

The insurers acted quickly and sought to rely on the exclusion as soon as evidence of defect was obtained. However the challenge to the insurers reliance highlights the importance used in the insurers letter advising on coverage. If the admission of liability was not couched to be based on the facts and

circumstances known at that time the outcome may have been different. However the hedge by the insurer in the admission worked. However Stevenson J was the one ultimately called on to determine whether there was actually an actual estoppel.

Stevenson J confirmed:

*“ a legally binding contract of settlement may be created between an insurer and an insured where the insurer states that it accepts liability to indemnify the insured under the policy in question, and where the insured can be shown to have given consideration for that acceptance, constituted, for example, by a forbearance to sue the insurer, following from the insurer’s request (to be implied from its acceptance of liability) that it not do so. But each case must depend on its own facts.”*

In this case the letter from XL contained an admission but did not evidence a contract. This was an important finding for XL. Whilst Stevenson J was persuaded that a reasonable business person in the position of the parties would have understood that XL’s reference to “known facts and circumstances” was a reference to facts and circumstances relating to what actually caused the warehouse to collapse if there was a contract there could only be reliance on different facts and circumstances to challenge the admission of liability. XL’s evidence about deficiency in design came from engineers other than Costin Roe, the engineers who provided the opinions relied on by XL when it first admitted cover. The second opinion came later and was not available when XL first made its decision on cover but that was not a new fact or circumstance. Stevenson J did not accept that the receipt of that second opinion is a further “fact and circumstances” that would, assuming there was a contract of settlement, have justified XL from departing from its terms.

Mobis also argued by accepting liability under the Local Policy, and making the payment of \$14.4 million XL acted inconsistently with the maintenance of a defence based on the Faulty Design Exclusion and has thus made an unequivocal election between inconsistent rights.

Mobis accepted that the election by an insurer to accept or deny liability under a policy does not, without more, constitute an irrevocable election. Was that more which was required the payment of \$14.4 million.

Stevenson J did not see it that way and also observed:

*“In any event, in order for there to be a waiver by election, the election must be made with knowledge of the relevant facts (for example, see Moore v The National Mutual Life Association of Australasia Limited [2011] NSWSC 416 at [73] (Ball J)).”*

The knowledge that XL would have had to have had in order to make an election in this case is the (alleged) fact that the warehouse was defectively designed.”



XL did not know about the defective design when it wrote the letter.

Stevenson J concluded:

*“(the) letter neither bespeaks a settlement contract nor a waiver by election, I see no basis upon which I could conclude that XL’s reliance on the Faulty Design Exclusion amounts to conduct otherwise than in accordance with its obligation to act with utmost good faith.”*

Round 1 to XL. It could argue the defect exclusion.

#### What caused the loss

The main event was the identification of the proximate cause, or causes, of the warehouse collapse.

The local policy defined “Storm” as “storm, tempest, windstorm, hurricane, tornado, cyclone and typhoon”.

“Storm” is defined in the Australian Oxford Dictionary (online) as:

*“A violent disturbance of the atmosphere with strong winds and usually rain, thunder, lightning, or snow.”*

*The definition in the Macquarie Dictionary (online) is:*

*“1. a disturbance of the normal condition of the atmosphere, manifesting itself by winds of unusual force or direction, often accompanied by rain, snow, hail, thunder and lightning, or flying sand or dust.*

*2. a heavy fall of rain, snow, or hail, or a violent outbreak of thunder and lightning, unaccompanied by strong wind.”*

Stevenson J observed that McColl JA (with whom Mason P and McClellan CJ at CL agreed) in *Caine v Lumley General Insurance Ltd* [2008] NSWCA 4 reasoned:

*“In considering the proximate cause of loss in the insurance context, the Court has regard to the reality, predominance and efficiency of a cause, rather than proximity in time: HIH Casualty & General Insurance Ltd v Waterwell Shipping Inc (at 608) per Sheller JA (Beazley and Stein JJA agreeing); see generally Lasermax Engineering Pty Ltd v QBE Insurance (Australia) Ltd [(2005) 13 ANZ Ins Cas 61-643] [2005] NSWCA 66 (at [39]ff) per McColl JA (Ipp and Tobias JJA agreeing). The Court applies common sense standards in determining what is the proximate cause, approaching the question by reference to the understanding of ‘the man in the street, and not as either the scientist or the metaphysician, would understand it’”*

There was hail, wind and rain.

The roof hadn’t collapsed previously when there were adverse weather events with heavy rain.

The hail blocked down pipes, permitted water to pond on the roof and the weight of the hail and the water caused the support beams to deflect and allow

ponding and ultimately collapse. Further hail was falling onto and accumulating on the roof of the warehouse until a very short time before the collapse.

Not surprisingly Stevenson J concluded:

*“when considering these matters, and applying a common sense standard, the man or woman in the street would reach the conclusion that the “reality, predominance and efficiency” of the impact of the hail in the storm that occurred shows that it was the proximate cause of the collapse”.*

#### Was there a hail limit in the Local Policy

With a win in the first round and a finding hail was the proximate cause it was on to round 2.

The Local Policy did not specify a hail limit. However the Master Policy did.

Clause 1.9 of the Local Policy provided:

*“This Policy, while an independent contract, forms an integral part of the International Property Damage and Business Interruption Programme for Mobis Slovakia... [Mobis] agrees that, where permissible under applicable law:*

*...*

*b. programme aggregate limits of indemnity may operate to reduce the limit of indemnity available under this Policy in respect of any covered loss, irrespective of whether any limit of indemnity of this policy has not been or would not be exceeded by such loss.”*

The “programme aggregate limits” was only a reference to the aggregate limits of indemnity in the Master Policy. Stevenson J did not accept that the effect of this clause was to import the Hail Limit in the Master Policy into the Local Policy. It required no more than a matching of limits of liability by reference to specific perils appearing in the Local Policy to determine whether the aggregate limits of liability under the Master Policy had been exceeded. The clause could not aid XL in its argument to incorporate the hail limit. XL then turned to the principles of law known as rectification.

Stevenson J observed:

*“ the principles concerning rectification were recently restated by the High Court in Simic v New South Wales Land and Housing Corporation [2016] HCA 47; as follows:*

*“[103] Rectification is an equitable remedy, the purpose of which is to make a written instrument ‘conform to the true agreement of the parties where the writing by common mistake fails to express that agreement accurately’. For relief by rectification, it must be demonstrated that, at the time of the execution of the written instrument sought to be rectified, there was an ‘agreement’ between the parties in the sense that the parties had a ‘common*

intention', and that the written instrument was to conform to that agreement. Critically, it must also be demonstrated that the written instrument does not reflect the 'agreement' because of a common mistake. Unless those elements are established, the 'hypothesis arising from execution of the written instrument, namely, that it is the true agreement of the parties' cannot be displaced.

[104] The issue may be approached by asking — what was the actual or true common intention of the parties? There is no requirement for communication of that common intention by express statement, but it must at least be the parties' actual intentions, viewed objectively from their words or actions, and must be correspondingly held by each party." [Gageler, Nettle and Gordon JJ] [Citations omitted]

Further, each of these matters must be established by clear and convincing evidence. As Kiefel J (as the Chief Justice then was) stated in *Simic* at [41]:

"[The] intention must be proved by admissible evidence and proved to a high standard. In a passage from *Fowler v Fowler* [(1859) 4 De G & J 250 at 265; 45 ER 97 at 103], which has been cited with approval by this Court, Lord Chelmsford said that:

'a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution'."

The circumstances surrounding the negotiation of the contract of insurance and the inclusion of Mobis in the Global Insurance program consumed much of the courts time. Almost 20% of the judgment which ran to more than 1000 paragraphs are consumed by the evidence concerning the negotiation of both contracts of insurance. Despite all the evidence XL came up short in demonstrating the intention of Mobis was to include a hail sublimit. Stevenson J observed "When a contract is negotiated by a duly authorised agent, that agent's intention may be relevant for the purposes of rectification: *Metlife Insurance Ltd v Visy Board Pty Ltd* [2007] NSWSC 1481 at [32] (Brereton J citing the High Court in *Australian Gypsum Ltd v Hume Steel Ltd* (1930) 45 CLR 54; HCA 38 at 67). However the agent for Mobis that negotiated the Master Policy (with a hail limit) did not negotiate the terms of the Local Policy. The evidence adduced by XL did not establish on the balance of probabilities that Mobis intended there to be a hail limit in the Local Policy and the claim for rectification was not made out. The case highlights the difficulties for an insurer when they need to prove the intention of an insured to establish a right to rectify the contract of insurance.

Round 2 to Mobis.

### Faulty Design Exclusion

Round 3 was a hard fought round

The Local Policy had an exclusion in the following terms:

*"Damage or Business Interruption caused by or consisting of:*

*i. inherent vice, latent defect, gradual deterioration, wear and tear, frost, change in water table level, its own faulty or defective design or materials, or any gradually occurring loss or any loss which commenced prior to the inception of the Policy*

...

*but this shall not exclude subsequent Damage or Business Interruption which results from a cause not otherwise excluded".*

XL contended that the design of the warehouse was "faulty or defective".

Stevenson J noted the exclusion directs attention to "its own" faulty or defective design. A question arose as to the significance of these words.

Stevenson J concluded:

*"The answer to that question is revealed once the exclusion is read incorporating defined terms and excluding unnecessary words, thus:*

*"This Policy does not cover... [physical loss or destruction of or damage to the property covered by the Policy] or Business Interruption...caused by or consisting of...its own faulty or defective design or materials...but this shall not exclude subsequent [physical loss or destruction of or damage to the property covered by the Policy] or Business Interruption...which results from a cause not otherwise excluded."*

*This makes clear, in my opinion, that the word "its" in the expression "its own faulty or defective design" refers to the property the subject of the loss, and not to Mobis.*

*Thus, the "faulty or defective design" to which the exclusion is directed is of the "property covered by the Policy" which is the subject of the "physical loss or destruction...or damage" (that is, of the warehouse itself) and that what is excluded is a claim for the loss of that property if that loss be caused by the faulty or defective design of that property.*

*Accordingly, if it be the case that the collapse of the warehouse was caused by its faulty or defective design, Mobis's claim for damage to the warehouse itself would be excluded. But Mobis's claim for loss or damage to contents and stock would not be excluded as that loss would not have been caused by the faulty or defective design of the contents and stock.*

*As to business interruption, what is excluded is "business interruption...caused by or consisting of its own faulty or defective design". The wording is awkward as it is hard to see how "business*

interruption" could have a design, let alone one which was faulty or defective. The better reading of the exclusion is, probably, simply to ignore the words "business interruption" as it appears "clear that something has gone wrong with the language": see *Chartbrook Ltd v Persimmons Homes Ltd* [2009] 1 AC 1101 at [25] (Lord Hoffmann).

*In any event, the proviso to the exclusion makes clear that, assuming the design of the warehouse was faulty or defective, only damage to the warehouse itself is excluded."*

The proviso to the Exclusion also limited its application and the exclusion did not apply to Subsequent Damage being damage to stock and contents.

Having regard to these limitations the fight changed to focus on whether there was defective or faulty design.

Stevenson J referred to the decision in *Manufacturers' Mutual Insurance Ltd v Queensland Government Railways* (1968) 118 CLR 314 at 323 and quoting from that case observed:

*"In Manufacturers' Mutual, the High Court was concerned with the proper construction of an exclusion in an insurance policy for loss "arising from faulty design".*

*The plurality (Barwick CJ, McTiernan, Kitto and Menzies JJ) said (at 321):*

*"To design something that won't work simply because at the time of its designing insufficient is known about the problems involved and their solution to achieve a successful outcome is a common enough instance of faulty design. The distinction which is relevant is that between "faulty", ie, defective, design and design free from defect."*

*Windeyer J said (at 322):*

*"We are concerned with the word 'faulty' as descriptive of an inanimate thing. The words 'fault' and 'faulty' then have a different sense. They, again according to their derivation, connote a falling short; but not now a falling short in conduct or behaviour. They designate an objective quality of a thing. It is not up to a required standard. It is 'faulty', because it has defects, flaws or deficiencies. This use of the word 'faulty' in relation to a thing is old and quite common."*

The evidence addressed whether the design complied with Australian Standards and the Building Code of Australia and whether the product was the result of prudent design and engineering judgment even if it complied with requisite published standards. The examination called for an analysis of beam loads and wind loads.

However the evidence didn't cut the muster when it came to showing there was a departure from Standards so XL was left to argue the design of the

warehouse was, nonetheless, faulty. Dealing with that argument Stevenson J concluded:

*"The authorities(legal) to which I have referred have held that a design is faulty if it:*

- 1. does not work because at the time of designing insufficient is known about the problems involved and their solution to achieve a successful outcome (Manufacturers' Mutual at [437] above);*
- 2. is not up to a required standard (Manufacturers' Mutual at [438] above); or*
- 3. is not as adequate for the purpose for which it was designed as art or skill can make it (Chalmers Leask at [439] above).*

*Further, the appropriateness of the design must be measured against the purpose for which it was intended to be used (AXA at [441] above).*

*Manufacturers' Mutual was concerned with the design of a railway bridge, Chalmers Leask with the design of a cofferdam and AXA with a child's toy.*

*None of those cases addressed a circumstances where, as here, there were detailed standards specifying what the design must achieve.*

*The parties to the Local Policy agreed that Mobis would have no cover for the warehouse if it was damaged by reason of "its own faulty or defective design".*

*In my opinion, reasonable business people in the position of the parties would have understood the words "faulty or defective design" to refer to a design which was (to adopt the language of Windeyer J in *Manufactures' Mutual*) "not up to a required standard".*

*In this case, that standard was that required by the BCA and thus AS/NZS 1170.0, 1170.1 and 1170.2.*

*XL has failed to show that the design of the warehouse did not comply with those Standards.*

*Mr Summers expressed the opinion that the design of the warehouse was not "prudent" for various reasons.*

*Whether or not the design was or was not "prudent", it has not been shown to be "not up to [the] required standard".*

*For those reasons, my conclusion is that XL has failed to establish that the Faulty Design Exclusion has been enlivened".*

Stevenson J concluded Mobis was entitled to indemnity under the Local Policy as the design exclusion had not been made out.

Mobis had won another round. XL were on the ropes.

The 1-2 combination of XL being the Hail Limit slam and Defect exclusion counter had come up short so it was on to damages in the final round.

*Damages and betterment*

When properties are repaired it is common for improvements in design to be incorporated in repairs. This is commonly known as betterment.

When stock is damaged it is not uncommon for the damaged stock to be thrown away perhaps even where there is a salvageable value. Does the salvageable value come off the claim and what happens if that value can't be ascertained after the stock is thrown away.

These issues can often give rise to disputes in an insurance claim and in Mobis's case they were very much an issue.

The evidence revealed that the additional steel columns were installed throughout the reconstructed warehouse which resulted in the need for additional piles, pile capping and pad footings. XL submitted that the cost incurred by Mobis in carrying out this work should also be deducted from the building claim. There was no evidence which identifies the cost of this work.

It was clear there was betterment however Mobis and XL disagreed as to who had the onus to prove the cost.

Both parties relied on the decision of the Court of Appeal in *General Accident Insurance Asia Ltd v Sakr* [2001] NSWCA 402.

Stevenson J noted *Sakr*, is authority for the propositions that:

- *"an insurer has the evidentiary onus of showing that there has been betterment; and*
- *once an insurer has sustained that onus and demonstrated betterment, in order to sustain its onus to prove the loss for which it is entitled to indemnity, the insured must prove what deduction or allowance should be made for betterment"*.

Stevenson J observed that in *Sakr*, Giles JA said:

*"It is correct that the [insured] as claimants had to establish their damages, and so had to establish what the appellant had been obliged to pay or do under the policy. There had to be an appropriate reduction for wear and tear and betterment. But the basis of settlement clause did not compel a reduction: a reduction was required only if, on betterment principles, more than indemnity would be provided to the [the insured]."*

*In Sakr, Hodgson JA substantially agreed with Giles JA and stated (at [77]) that the onus was on the insured to prove their damages but stated (at [78]) that so far as concerns betterment "an evidentiary onus" was cast on the [insurer] to prove some betterment for which a reduction should be made.*

*Sperling J said (at [88] and [89]):*

*"So, what of the question of betterment where there is simply an obligation to make a payment sufficient*

*to indemnify against the loss caused by damage to property?"*

*In such a case, I would regard evidence of the cost of repair as prima facie evidence of the payment necessary and sufficient to indemnify against such a loss. An evidentiary burden then shifts to the insurer to establish that payment of the cost of repair would exceed an indemnity for the loss."*

Stevenson J concluded that the insured must establish what the insurer was obliged to pay under the policy but that there was no onus on the insured to prove the absence of betterment. XL had sustained its evidentiary onus of showing betterment and Mobis has not proved, and allowed as a deduction of its claim, the value of that betterment.

But Stevenson J concluded some allowance must be made. He noted in *Sakr*, Hodgson JA said that in such a circumstance:

*"The situation would be one where a judge would have to do his or her best on the basis of inadequate material, erring within the area of uncertainty against the party responsible for the deficiency of evidence."*

The party "responsible for the deficiency of evidence" was Mobis.

Stevenson J observed "Even doing the best I can, on the basis of the "inadequate material" before me, I can only guess what part of the amount claimed by Mobis for the reinstatement of the warehouse is referable to the extra piles, pile capping and pad footings and in those circumstances, one alternative is simply to reject Mobis's building case in its entirety on the basis that it had not proved the damage in respect of which it is entitled to indemnity.

The tide had changed for XL. Mobis was on the back foot. Mobis had not claimed a sum of \$793,000 for extra steel used in the new warehouse but more was to come off, at worst for XL, and at best the whole claim would fail.

However further submissions by Mobis including identification of a sum of \$41,000 in quotes referable to betterment resulted in Stevenson J making a best guess at the amount to deduct rather than reject the entire claim. A deduction of \$100,000 was found to be appropriate as Stevenson J noted "doing my best on the basis of the "inadequate material"".

As for the stock, Mobis' case was that all the stock in the warehouse was lost when the warehouse collapsed because, at that point, its prospects of recovery in an undamaged condition was uncertain because:

*"(a) there was a risk of further collapse, not only of the warehouse structure, but also, if salvage was attempted, of the racking on which the stock was stored (because the roof had collapsed upon the racking);*



(b) there were other factors which, due to the configuration of the warehouse and difficulties and operating conditions, made it difficult for much of the stock to be recovered; and

(c) attempting salvage itself gave rise to a significant risk of fire which, as it turns out, came to pass.”

A fire broke out whilst Mobis tried to remove stock from the damaged warehouse. There was no claim on XL in respect of the fire as Mobis was looking to others to compensate it for the damage caused by the fire.

Stevenson J however concluded “A fair reading of the evidence is that the fire was an unexpected event. It was in no sense a consequence of the storm of 25 April 2015. It was not a necessary or direct consequence of the storm or the collapse. It was an intervening cause of damage and destruction.”

Stevenson J concluded “as at the date of the collapse, it was simply too early to say to what extent Mobis would be able to recover stock from the warehouse.”

It was uncertain how much stock was destroyed in the collapse versus the fire however Mobis was pursuing the contractor that caused the fire for damage to stock in a sum exceeding \$18 million. Historic stock levels were in the order of \$27.5 million suggesting 69% of the stock was damaged by fire and that which was not damaged in the fire was arguably salvageable. However the stock that might be salvageable was thrown away.

Stevenson J noted:

*‘It is for Mobis to prove how much of its stock was damaged by the collapse. As it appears likely that Mobis has, evidently for reasons of practicality, itself destroyed stock which was not damaged in the collapse, unless Mobis proves the value of the stock so destroyed, it cannot make out the total claim that should be the subject of indemnity.’*

Whilst Mobis’ total claim for stock was in the order of \$27.5 million, Stevenson J concluded Mobis is entitled to recover something in the order of \$6.3 million less the salvage that would have been recovered if the stock was not thrown away. But there was no evidence of salvageable value. Once again the Court needed to call on the parties for more submissions as a party that fails to prove their loss will fail in their claim. Stevenson J stated he was reluctant to dismiss Mobis’ claim in its entirety because of the evidentiary shortcoming and determined the stock which was discarded by reason of damaged packaging but which was, nonetheless, itself undamaged and in saleable condition was in the order of \$125,000, a figure reflecting the actual saleable stock that had been identified as saleable by Mobis after the collapse. A lucky escape for Mobis.

Finally Mobis also had obsolete stock that was lost which would not be replaced.

Stevenson J observed that XL’s promise under the Local Policy was to indemnify Mobis based on the cost

of reinstatement for property damage. In the case of stock, the promise was to pay “the cost of replacement of...damaged Stock...by similar property as new”.

In examining the claim for obsolete stock Stevenson J concluded the Local Policy was a reinstatement policy and referred to the following authorities:

*“The general principle (which applicable) was stated in D Kelly and M Ball, Kelly and Ball Principles of Insurance Law, (2nd ed, 2001, LexisNexis) at [12.0120.25] as follows:*

*“...while an insured who has been paid on the basis of the replacement value is not normally under an obligation to expend the money on reinstatement of the property, a court may decline to assess the insured’s loss on the basis of replacement value if it believes that the insured may not intend to reinstate the insured property, or where reinstatement is impossible...”*

*The learned authors referred to the decision of the Court of Appeal in Leppard v Excess Insurance Co Ltd [1979] 2 All ER 668; 1 WLR 512. The issue in that case was whether the insured was entitled to indemnity on the basis of the costs of reinstatement or market value. The Court concluded that the insured was entitled to recover his real loss, but not exceeding the cost of replacement, and that the real loss was the market value of the insured property.*

*The Court referred to the general principle enunciated in Castellain v Preston (1883) 11 QBD 380 in which Brett LJ said (at 386):*

*“The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely that the contract of insurance...is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified but shall never be more than fully indemnified.”*

*The question was also considered by the High Court in British Traders’ Insurance Co Ltd v Monson (1964) 111 CLR 86. The issue in that case was whether the insured could recover the full insured value of property destroyed by fire or merely a loss of their interest (as lessee) of the property.*

*The plurality (Kitto, Taylor and Owen JJ) said (at 94):*

*“...no approach can be valid which fails to accept as its first step that a policy showing, as the policy here shows unmistakably, that it is intended as a policy of fire insurance must be construed as a contract for indemnification only. The celebrated judgments in Castellain v Preston...show that that is the fixed and central point to which all else in the policy is subordinate. It could not be otherwise, for as Lord Cockburn CJ said in charging the jury in Chapman v Pole [(1870) 22 LT 306 at 307], the law will not allow of gambling in the form of insurance.”*

Stevenson J went on to note in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 the majority (Brennan CJ and Dawson, Toohey and Gummow JJ) discussed reinstatement policies and said at 395:

*“Reinstatement*

*[The general principles that are involved with reinstatement policies] reflect the frequently stated proposition that a contract of insurance such as that contained in the Policy is one for the provision of an indemnity. That, in turn, and as was explained in British Traders’ Insurance Co Ltd v Monson has reflected the policy of the law not to allow gambling in the form of insurance. Nevertheless, as was pointed out in argument in the present case, the long acceptance of provisions for reinstatement has tended to diminish any requirement for precise indemnity.” [Footnote omitted]*

Later their Honours said (at 398):

*“It is suggested that in Australia it is becoming increasingly common for contracts of insurance, especially fire policies, to provide expressly for an indemnity based on the cost of reinstatement so that it is open to the parties to a policy which is not a valued one to agree in advance that, in the case of a loss, indemnification will be assessed on the basis of the current cost of replacement in a condition equal to new. In New Zealand there is recent authority which suggests that, under such a policy, where the property is damaged by fire and the insured wishes to leave it damaged and not reinstate it, recovery will be allowed on the basis of the cost of reinstatement. This is subject to the proviso that there is no further requirement in the policy that the cost of reinstatement must actually have been incurred before there arises the liability of the insurer to pay”.*

In the Local Policy there was a condition precedent to cover that Mobis was required to procure that reinstatement of damaged or destroyed Property Insured shall commence and/or proceed without unreasonable delay. The coverage clause referred to the cost “of” replacement of that stock; and not, for example, the “replacement cost” of that stock.

Stevenson J concluded the condition precedent suggests that the parties intended that the “cost of replacement” of damaged stock was the cost actually incurred by Mobis in replacing that stock.

XL’s liability to pay Mobis’s reinstatement costs (which must include the cost of replacing damaged stock) is an obligation in regards to actual incurring of those costs by Mobis. XL was not liable to indemnify Mobis for the cost of stock it has not replaced.

XL certainly landed some blows in the final round of the fight.

Conclusion

The fight is now over and only costs need to be decided.

Mobis was the winner on points and will receive additional amounts to the \$14.4million paid by XL.

For insurance fans the various judgements in *Mobis v XL Catlin* will provide a useful guide to the insurance industry on often perplexing issues in property damage and business interruption claims and will help the industry to understand:

- the reasons why care must be taken by an insurer when it makes an admission on indemnity based on preliminary expert reports whilst investigations into the cause of the loss and the possible application of exclusions are still underway;
- when concessions concerning cover can effect an insurers entitlement to rely on an exclusion at a later time;
- the approach the Courts will take when determining the proximate cause of a loss;
- the difficulties that will confront an insurer when they ask the Courts to rectify the terms of an insurance policy;
- the meaning of defective or faulty workmanship when considering an exclusion clause;
- who bears the onus of proof when it comes to establishing betterment and amounts to be deducted for betterment;
- the operation of reinstatement policies for damaged obsolete stock.

Large losses can give rise to challenging litigation for insurers and businesses after a storm event and in the case of the Mobis litigation a most interesting and useful analysis of legal issues that affect property damage claims has been the result.

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**Challenges for Labour Hirers –  
Property damage caused by  
employees lent on hire**

The NSW Court of Appeal in *Action Force Workforce Pty Limited v DHL Exel Supply Chain (Australia) Pty Limited*, has recently delivered a reminder to labour hire companies and their insurers that a labour hire employer is vicariously liable for the actions of its employees and that creates a significant risk for the labour hirer when their employee fails to exercise reasonable care whilst working for a host and causes damage to property whilst they are lent on hire. As can be seen from the case, the casual act of negligence of a labour hire employee can cost the labour hirer a lot of money and they may be solely liable for a loss.

DHL Exel is a 3PL business providing warehousing, storage and logistic facilities and entered into an agreement with Sony Australia to provide services for the warehousing and distribution of Sony products.

Action Workforce is a labour hirer and hired casual its employees to DHL.

In October 2013 an employee of Action Workforce was working at DHL's warehouse and whilst operating a forklift struck a fire sprinkler pipe causing flooding. Sony's goods located in the warehouse were damaged.

Sony's agreement with DHL provided that DHL was liable for any loss or damage to Sony's products caused by any act or omission (including a negligent act or omission or breach of contract) of DHL, its employees, agents or subcontractors.

The agreement also required Sony to take out insurance for destruction or loss of or damage to its products to their full value on an all risk basis while in the custody of DHL or its agents or subcontractors and if damage occurred Sony was required to make a claim on its insurance and not bring a claim against DHL except where the loss or damage was caused by the negligent, wilful conduct or unlawful act or omission of DHL, its employees, agents or subcontractors. It was noted that nothing in this clause was to be construed as a waiver of any subrogation rights that Sony's insurers may have to recover money from those responsible for any losses.

Sony commenced proceedings against both DHL and Action Workforce to recover its loss in connection with damage to its products. Sony's loss was in the order of \$550,000. It settled its claim against DHL for \$270,000 inclusive of interest and costs and the claim against Action Workforce for \$300,000 inclusive of interest and costs.

It is relevant to note the agreement between Sony and DHL contained a provision limiting DHL's liability for damage to products to \$250,000 per incident.

What flowed from the settlement of the claim was that Action Workforce accepted it was liable for the acts and omissions of its employee who was lent on hire.

After the settlement Action Workforce was confronted with an additional problem. In its agreement with DHL there was an indemnity provision in the following terms:

*"Supplier shall indemnify DHL in full against any liability, loss, damages, costs and expenses (including legal expenses) awarded against or incurred or paid by DHL as a result of or in connection with:*

...

*(b) any negligent act or omission of the Supplier or its employees, agents or subcontractors in connection with the performance of the services."*

After settlement of Sony's claim DHL pursued Action Workforce seeking to recoup from Action Workforce the \$270,000 it agreed to pay to Sony, together with interest and costs.

DHL's claim against Action Workforce proceeded to hearing and the trial judge determined the indemnity provision in the labour supply agreement applied and the Judge awarded an amount of some \$420,000 to be paid by Action Workforce to DHL. That sum comprised the DHL settlement sum and interest and costs.

Action Workforce was therefore \$720,000 out of pocket for a claim which had settled for \$550,000.

Not content to let matters rest, Action Workforce filed an appeal. Its arguments on appeal were that a proper interpretation of the indemnity was that it should not apply to liabilities for losses caused by the negligence of DHL and that the settlement with Sony was not a reasonable settlement where DHL had not been negligent and only Action Workforce was found negligent by the trial judge.

Unfortunately for Action Workforce the Court of Appeal dispensed with those arguments quite quickly.

The Court of Appeal confirmed there is no commercial basis for distinguishing between the liability of a corporate subcontractor for its own negligence and its vicarious liability for the negligence of its employees.

DHL was liable to Sony for the loss caused by an employee of Action Workforce pursuant to its contract with Sony and was entitled to recover through its indemnity it had obtained from Action Workforce.

The Court of Appeal confirmed the warehousing agreement with Sony made express provision for DHL to be liable for the acts or omissions of its subcontractors and thus whether or not DHL had been negligent it was liable to Sony for the negligent acts of its subcontractors. Sony could bring that claim pursuant to the exception in the insurance requirement in the Sony agreement

The Court of Appeal concluded that reading the indemnity provided by Action Workforce as excluding contributory responsibility of DHL did not conform with the language of the clause.

The Court of Appeal noted the trial judge had found the labour hire employee was negligent in the way she operated the forklift by failing to keep a proper look out and by failing to exercise reasonable care in the operation of the forklift and her negligence caused damage to Sony's property and Action Workforce was vicariously liable for her negligence. The Court of Appeal agreed with that finding.

The Court of Appeal confirmed where an indemnifier has breached a contract by denying liability the indemnified party can recover in a claim for damages the amount of a reasonable settlement and the requirement that the settlement be reasonable derives

from general principles of causation, remoteness and mitigation.

In this case the trial judge found the settlement was reasonable. The Court of Appeal agreed the settlement was reasonable and DHL had a liability to Sony by virtue of its warehousing agreement.

At the end of the day the labour hirer was a subcontractor for the purpose of the warehousing agreement.

Labour hirers need to be mindful they are exposed to potential liabilities when their employees are negligent as they are vicariously liable for the acts and omissions of their employees. Negligence on the part of an employee can give rise to a liability for a labour hire business for injuries to others as well as damage to property.

Indemnities provided by labour hire businesses strike at the heart of their potential liability of a labour hirer and the risks for their insurers.

Unless an indemnity provided by a labour hirer to its host is limited in a way to carve out liability to the extent the host causes the loss, the labour hirer will be solely liable for a loss.

In addition, where there is a carve out in an indemnity, where a loss is caused through no fault of the host and only by a casual act of negligence of a labour hire employee, the vicariously liability of the labour hirer for its employee will result in the labour hirer being solely liable for a loss.

The life of the owner of a labour hire business can be tricky.

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**The fact that a wet floor is slippery is an obvious risk but is it obvious the floor is wet**

When its wet and miserable moving about in the rain is a pain and umbrellas bring water into homes and buildings. Water introduces a hazard when it is on the floor and a potential liability claim for a business as was seen in the recent NSW Court of Appeal decision in *Sutherland Shire Council v Safar*. This case sounds a warning to all businesses that they should take steps to minimise water on the floor on rainy days otherwise they will be held liable for injuries when visitors slip on the water on the floor.

Christina Safar went to the Sutherland Entertainment Centre in order to watch her daughter perform in a dance competition. It was a rainy day. As Ms Safar was walking from the auditorium at interval, she slipped on the parquet floor adjacent to the foyer and sustained serious injuries. She sued the Sutherland Shire Council for damages alleging that the Council, as

the occupier of the premises, breached its duty to her and was negligent in several respects. Safar alleged that water that had accumulated upon the parquet floor created a danger of which the Council was, or should have been, aware and that it ought to have taken steps to eliminate or reduce the risks to entrants that existed by reason of the resultant slippery condition of the floor. There was no complaint about the physical integrity of the floor. The issue before the trial judge was what a reasonable occupier of the Centre would have done when the floor became wet.

Safar succeeded in her claim in the District Court and was ultimately awarded damages of \$288,820. The trial judge noted:

- At least some of the 200 or so persons who were entering the premises “did so with wet umbrellas, raincoats, shoes and bags that would foreseeably deposit water on the floor”.
- In the absence of appropriate hanging, storage or drying facilities for coats, umbrellas and bags, this meant it was very likely that water would drip from those items onto the parquet floor of the premises, thereby posing a significant potential slip and fall hazard to persons such as the plaintiff, who would be foreseeably walking on that floor.
- The Council failed to discharge its duty of care “by failing to take reasonable steps to make the floor safe, either by the placement of mats, or by detecting, isolating or mopping up water that had dropped onto the floor surface.
- The Council had “mats that could have been strategically placed”, “it could have arranged the placement of bins and made other arrangements for the safe storage of items of wet apparel that were likely to drip water onto the floor to render it slippery”, “the circumstances required vigilant observation and remedial action” and the Council “had personnel on hand to facilitate those steps.

The Council appealed however the Court of Appeal was unanimous in finding the Council had been negligent and dismissed the appeal.

The Court of Appeal Council breached its duty of care as occupier by not taking reasonable steps to prevent patrons bringing wet umbrellas and coats into the auditorium, or at least to minimise the instances of this occurring.

There had been a number of previous incidents in which people had slipped as a result of water or other liquid being on the auditorium’s parquet floor

Council employees appreciated that water coming into the auditorium on umbrellas or by other means gave rise to a safety risk.

The Council ought reasonably to have provided umbrella bins and ensured that these were conveniently located near the entries to the auditorium.



It was insufficient to merely provide a single bin located near the ticket office, some distance away from the auditorium entry. The bins should have been clearly marked with a request not to take wet umbrellas into the auditorium, but instead to deposit them in the bins.

As well, a coat-check facility should have been available nearby and directions to it identified by a sign.

To enforce these precautions the Council should have required an usher (or some other person) to direct, or at least request, patrons to use those facilities.

These findings sound a warning to all businesses that they need to look at the procedures they have in place to manage water on the floor when it is raining outside.

However there was a dispute in the proceeding over whether there was an obvious risk and whether Council owed a duty to provide a warning about the risk. Section 5H of the Civil Liability Act 2012 provides a defendant does not owe a duty of care to warn another person of an obvious risk.

Harrison J concluded the relevant obvious risk, of which the Council had no duty to warn, was the risk that a wet parquet floor may be slippery not whether the parquet floor is or may be wet. Macfarlan JA disagreed noting that the obvious risk was that there was water on the parquet floor, and that the parquet floor was likely to be slippery when wet. It was the combination of these two elements that created a risk to the respondent, and other patrons, of slipping and being injured. White JA did not express a view on this issue other than to note a warning sign that the floor was wet would probably not have prevented the injury.

So we are adrift at sea on the issue of what was the obvious risk in this case as there was no majority view. However it was common to 2 judgments that it was obvious a wet parquet floor was slippery.

Nevertheless, whether there was a duty to warn of a risk or not the Council still owed a duty to act in a way that minimised the water on the floor. It did not and it was liable. So does anyone know about a good umbrella bin business for sale.

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### Recreational Activities and Professional Sports

Pursuant to Section 5L of the *Civil Liability Act 2002* (NSW), a defendant has no liability for personal injuries sustained by a plaintiff as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

Section 5K of the CLA defines “dangerous recreational activity” to mean a recreational activity that involves a significant risk of physical harm.

Section 5K of the CLA also defines “recreational activity” to include any sport and any pursuit or activity engaged in at a place where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

Does it matter whether the injured plaintiff was engaged in a sport as a professional or amateur when the injury occurred?

The NSW Court of Appeal recently considered this issue in *Goode v Angland* in which Paul Goode was injured whilst riding a horse as a professional jockey in a race held at Queanbeyan Racecourse.

Goode was injured when another horse in the same race ridden by another professional jockey, Tye Angland, allegedly interfered with Goode’s horse causing Goode’s horse to fall.

Goode brought proceedings at the Supreme Court Sydney in which he claimed damages from Angland by reason of Angland’s negligence.

At first instance, Justice Ian Harrison rejected Goode’s claim and entered judgment for Angland.

Goode appealed to the NSW Court of Appeal.

The Court of Appeal unanimously dismissed the appeal (per Beazley P, Meagher & Leeming JJA).

President Beazley wrote the leading judgment with whom the other appeal judges agreed in which her Honour devoted significant reasons to an analysis of the photographic and video evidence that was tendered at the Supreme Court trial before Harrison J.

However, the pivotal issue in the case both at first instance and on appeal was whether or not the definition of “recreational activity” within the meaning of Section 5K of the CLA, in particular the references to “sport” included professional sportspersons who are injured whilst engaged in a sporting activity, or amateur sportspersons who participate without reward.

The president considered the context of these definitions with the related provisions in Sections 5M and 5N of the CLA. Her Honour made the following observations:

*“[Previous] authorities might be seen to support the proposition that ‘recreational activity’ ... only applies to activities that are of a recreational character. This approach is arguably consistent with the provisions of Pt 1, Div 5 more generally. Section 5M relates to circumstances where a person engages in a recreational activity in which the defendant gave a risk warning to the plaintiff. Section 5N relates to contracts for services supplied to a person in relation to recreational activities. These provisions would appear to be directed to persons taking part in ‘recreational’ activities, as that term is commonly understood, and not to professional sportspeople*



who are either in employment or otherwise engage in the sport professionally for reward.

*It also seems incongruous that an activity undertaken as one's profession, trade or livelihood would be subject to the same legislative exclusion as an activity undertaken for enjoyment, relaxation or leisure, or for that matter, physical fitness or the acquisition of skill."*

Despite these stated misgivings, her Honour agreed with the interpretation of Section 5K by Justice Leeming and therefore agreed the appeal should be dismissed.

Justice Meagher similarly adopted the reasons given by Leeming JA.

Justice Leeming stated that although Section 5L of the CLA is a defence, it is preferable for Courts to determine that issue first given it operates as a complete defence to a plaintiff's claim if successful.

As to the question of "professional" v "amateur" for the purpose of the definition in Section 5K of the CLA, his Honour observed that there may well be scenarios in which a combination of sportspeople are participating in the same event, some of which are professional and others are not. His Honour gave as an example a marathon race or an undergraduate rugby player participating in a game amongst professionals.

Leeming JA stated that it would be arbitrary if someone could be found liable for injuries negligently inflicted upon one but not another based solely on whether or not they were a professional participant. On this issue his Honour noted that:

*"Constructions which yield improbable and capricious results are to be avoided on settled principles of statutory construction."*

His Honour went onto say:

*"Further, the distinction between professional and non-professional is scarcely a crisp one. It is easy to contemplate competitors who receive some remuneration, and hope as their careers progress to be able to support themselves from their sport, but whose participation is predominantly for recreational purposes, and who would not be regarded as professional. Boxing may be one example, there are many others."*

His Honour held that these factors weighed against the interpretation for which Goode contended.

Justice Leeming also rejected the contrary reasoning provided by Tasmanian Supreme Court Justice Wood in *Dodge v Snell* (2011) in which Wood J held (in relation to a similar definition appearing in the Tasmanian statute) that professional horseracing was not a recreational activity.

Leeming JA held that Wood J's reliance on the ordinary meaning of "recreational" was not appropriate given the elaborate definition contained in Section 5K

of the CLA which contains three limbs, each of which starts with "any".

Nor do dictionary definitions of "recreational", according to Justice Leeming, add anything to the legal analysis.

Finally, his Honour also observed from the second reading speech of the bill introducing the CLA into parliament contained no distinction between professional and amateur sports in the context of dangerous recreational activities.

Accordingly, the appeal was unanimously dismissed.

In the Court's earlier decision of *Fallas v Mourlas*, Ipp JA made comments in *obiter dicta* in which his Honour suggested that professional cricket and boxing would arguably be recreational activities. However, the construction of the definition in Section 5K of the CLA was not in issue in that case.

This is the first occasion on which the NSW Court of Appeal has decided whether a defendant can be found to have no liability for negligently inflicting injury upon a professional sportsperson who participates in a dangerous recreational activity for reward.

This could have significant implications across all forms of professional sports especially contact sports which involve significant risks of physical injury.

Fellow professional sportspeople who negligently inflict injury upon another competitor during the same sporting event will have a complete defence under Section 5L of the CLA.

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## CONSTRUCTION ROUNDUP



### The administration of construction projects

In our November newsletter, we discussed the factors that should be taken into account when preparing contractual documentation for construction projects. In this article, we focus on the areas that lead to the majority of disputes arising from the administration of the project.

As an initial point, it is very important that the persons who are going to administer the project on behalf of each of the parties take the time to read and fully understand the contracts. Since these documents prescribe the parties' respective rights and obligations, it is imperative that the processes and paperwork that will be required to preserve these rights be put into place at the beginning of the project.

For instance, under many building contracts the contractor will not be entitled to any extension of time for completion and/or delay costs unless it has previously issued a notice of the likely delay within a strict period of time. In such cases, it would be prudent for the contractor to put in place a process to ensure that all potential delays are able to be quickly notified to the superintendent and/or principal.

Similarly, the personnel on site should be made aware if the contractor will not be entitled to an adjustment of the contract price for a variation to the scope of work if the superintendent has not issued a direction in this regard before the relevant work is carried out. It would therefore be wise for the contractor's project manager or contract administrator to set up a process to identify all such changes to the work and communicate them to the superintendent within a timeframe that does not affect the contractor's programme for carrying out the work.

The superintendent should also have a good appreciation of his role under the contract. As an agent of the principal, the superintendent will supervise the contractor's work and provide directions where required. However, an over-zealous superintendent may interfere with the freedom given to a contractor to design the project, and may lead to the principal unintentionally assuming responsibility for the design. Similarly, a superintendent that does not provide timely and proactive assistance and directions to the contractor may not be acting in the best interests of the overall project.

When assessing claims submitted by the contractor for payment, variations, extensions of time etc, the superintendent undertakes a different role – ie the role of certifier. While it is tempting for the superintendent to assess claims on the basis of what is in the best interests of the principal, it is extremely important that the superintendent understands that the role of certifier needs to be unbiased and must be exercised in an honest and impartial manner: *Perini Corporation v. Commonwealth of Australia* [1969] 2 NSWLR 530; *Walton Construction Pty Limited v. Illawarra Hotel Company Pty Limited* [2011] NSWSC 1188. Further, the superintendent may be required by his or her role to make assessments and issue directions that are in favour of the contractor even if the contractor has not formally submitted a claim in this regard: *Peninsula Balmain Pty Limited v. Abigroup Contractors Pty Limited* [2002] NSWCA 211.

It is also extremely important for all parties to understand the contractual processes and timeframes for claiming (and assessing) the payments to be made to the contractor, as well as the requirements of statutory regimes such as that prescribed by the *Building and Construction Industry Security of Payment Act 1999 (NSW)*. Many contracts now oblige the contractor to include with its payment claims various items of supporting information, and a head contractor will be required under the Act to include a

statement verifying that all subcontractors and suppliers have been paid for their work. A failure to comply with these requirements may mean that the claim submitted by the contractor for payment will not be valid and the contractor may not be able to maintain its cash flow.

As the project nears completion, the contractor should consider the requirements of the contract for claiming that practical completion has been achieved and the release of retention moneys or the return of other forms of security. This is particularly important given that the contractor will relinquish the risk of the project (and the requirement to carry insurance) once practical completion has been certified.

Upon completion of the work (and while defect rectification is underway), it is often helpful to hold a wrap up meeting of all the interested parties to discuss any unresolved claims. If an agreement on the final contract price can be reached at such a meeting, the loose ends of the project can be quickly and efficiently addressed. It is surprisingly common that contractors wait until the contract is at an end before submitting an unexpected claim for a large amount of additional payment as part of their final payment claim – this tactic is however unlikely to lead to an early payment and is more likely to lead to a dispute arising.

Gillis Delaney Lawyers have specialist construction lawyers who can provide advice and assistance on issues that arise during the course of a project. Often a well-worded letter from our client will be sufficient to preserve its rights and prevent the escalation of the issue down the track into a full dispute.

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## EMPLOYMENT ROUNDUP



### Work Health & Safety penalties on the rise in NSW

Three recent decisions of Judge Russell in the District Court of NSW sound warnings to persons conducting businesses in NSW that penalties for breaches of work health and safety legislation may well be on the rise.

In the first case of *SafeWork NSW v Morris, McMahon & Co Pty Limited*, the Court delivered a penalty of \$180,000 after a 25% reduction for an early plea of guilty where the maximum penalty for the offence was \$1.5 million and the incident resulted in the amputation of three fingers of a hand where machinery had guards which were not operating at the time a workers hand was caught in a press.

Morris, McMahon & Co operated a business that manufactured metal packaging including a full range of cans, drums and pails. A worker had been lent on hire to the business by Astar Personnel. The worker was injured when an electric/pneumatic clutch activated power press with a lockable electrical isolation switch, an emergency stop switch and a start/stop switch was operated in a way which permitted the machinery to be used without the interlocking guard systems working.

At the time of the incident the worker had only been working at the business for under seven weeks and had used a press machine for nozzle clenching by himself twice before. He was operating the press alone when he was injured.

Whilst the business' procedures required personnel using the machinery to be informed, trained, instructed and supervised in relation to the machine guarding and safe operations, the worker was not aware of the safe operating procedures.

Prior to the incident machines were required to be tagged out and locked out for resetting and the machine in question had been reset however the guarding had not been restored.

Whilst Morris, McMahon had a good corporate character and employed a large number of employees, its safety record was not unblemished and there had been previous incidents involving press machines.

After the incident positive steps had been taken to guard against the risk of an incident of this type ever happening again. The early guilty plea attracted a 25% discount on the penalty. Russel J noted that:

- the risk of a worker operating a press being struck, crushed or otherwise injured was obvious, identifiable and foreseeable and was a known risk;
- there were simple remedial steps that could have been taken to completely avoid the risk;
- the risk coming home was quite high;
- injuries were caused;
- policies and procedures in place meant the business must have foreseen the risk manifesting and the business failed to train or make known to the worker procedures in relation to the safe operation of the machine;
- the business did not ensure the press was in an appropriate condition to be used by employees and it failed to ensure when the machine was reset a person signed off on the machine for its safe use;
- there was a human error on the part of the setter who failed to appropriately reset the guards on the machine and the business should not have relied 100% on a setter to do the job properly.

The Court determined this was a mid range offence and the appropriate penalty was \$240,000 before discount.

The next decision of Russel J resulted in a penalty of \$90,000 after a discount of 25%. Erect Safe Scaffolding (NSW) Pty Limited was prosecuted for a breach of the work health and safety legislation for failing to ensure workers were licensed and competent to operate a forklift prior to allocating work to them and ensuring where forklifts were operated with a load which restricted views there was a spotter or other appropriate traffic management controls in place. Once again there was a maximum penalty of \$1.5 million.

A labour hire employee employed by Pantel Contracting (NSW) Pty Limited was lent on hire to Erect Safe Scaffolding and he was operating a forklift for Erect Safe at a Lend Lease site at Barangaroo South. Michael Rice, a Lend Lease construction worker, was injured when the labour hire employee was driving a forklift back and forth shifting dismantled scaffolding components from one location to another when he was struck by the forklift whilst bending over spray painting the words "Keep Clear" on the ground. Rice was wearing a high visibility vest, a hard hat, steel capped boots, eye protection and one glove at the time of the accident.

The Court noted workers on the site were placed at risk of death or serious injury if struck by a moving forklift which was an obvious identifiable and foreseeable risk. It was noted Rice could have easily been killed. It was noted the risk was known to Erect Scaffolding and identified in legislation.

Russell J concluded no steps were taken to ensure that workers who operated forklifts had a valid high risk work licence or that they were competent to use a forklift. The Court concluded Erect Scaffolding did not ensure workers were instructed not to operate a forklift with a load which restricted their view without a spotter or other appropriate traffic management means.

The Court noted the culpability of the offence was in the high end of the low range. It was noted Erect Safe had 28 direct employees and depending on work, engaged between 160 and 230 labour hire workers. The appropriate penalty was determined to be \$120,000 before discount and with a 25% discount, a fine of \$90,000 was imposed.

Finally, in *SafeWork NSW v City Projects Pty Limited*, a business that undertook office fit out services was fined \$150,000 following an incident at its warehouse facility. City Projects only employed seven workers.

There was a delivery of large glass sheets at the premises and due to there being insufficient room at a building site a shipping container arrived and the glass could not be unloaded due to the positioning of pallets on which the crates were sitting in the container. The container was sent away and unpacked elsewhere.

The 10 glass crates which were in the container were re-delivered on a truck to the City Projects warehouse and the usual method of unloading trucks was adopted which involved unloading the truck by manual handling or by using a stacker forklift.

A worker suffered a significant leg injury when a crate of plate of glass fell onto a worker near the forklift whilst it was being operated. The operator of the forklift was not licenced to do so. Glass had not been delivered to the warehouse before.

The Court found City Projects employee had no information, training or instruction on how to unload trucks other than by manual handling and were not trained in the safe unloading, handling and transportation of glass and failed to undertake a risk assessment at any time prior to the glass packages being delivered and unloaded. It was noted there were simple inexpensive steps which could have been put in place to eliminate or control the risk including making other arrangements for the delivery, conducting a risk assessment as to how the glass, implementing a forklift checklist for use at the premises and implementing forklift driver training and licensing courses and devising and implementing a traffic management plan at the premises.

It was noted City Projects was of good character and the steps it took after the incident demonstrated this. It was unlikely to reoffend and had taken positive steps to guard against the risk of a similar incident ever happening again. It was noted the offence was at the high end of the mid range and an appropriate penalty was \$200,000 which after a discount of 25% for an early plea of guilty resulted in a fine of \$150,000.

In these three cases the relative culpability of the offences and fines were as follows:

High end of the mid range of culpability - \$200,000 before discount;

Mid range of culpability - \$240,000 before discount;

High end of the low range - \$120,000 before discount.

Other examples of penalties imposed by Russell J include:

- SafeWork NSW v Travis Brown – Low range culpability - \$80,000 before discount;
- SafeWork NSW v Billyard Homes Pty Limited – Low range culpability - \$80,000 before discount;
- SafeWork NSW v Auschem (NSW) – High end of the low range of culpability - \$80,000 before discount;
- SafeWork NSW v CTN Construction Pty Limited – Mid range culpability however penalty moderated due to financial hardship - \$100,000 before discount;

- SafeWork NSW v Hydro Clean (Griffith) Pty Limited – Mid range culpability - \$160,000 before discount.

As can be seen, those prosecuted for breaches of the work health and safety legislation, even those whose offences whose culpability is relatively low are finding that they now face significant penalties.

The penalties have been increasing over recent times a trend we expect to continue.

The starting penalty for a low culpability offence seems to have moved up to \$80,000 before discount and mid range offences will now attract penalties of \$200,000 and more before discount. An early guilty plea which is likely to render a 25% discount on penalty can result in significant savings on fines at this level.

It appears the quantum of fines imposed for breaches of the work health and safety legislation are on the rise. With a maximum penalty of \$1.5 million for offences involving a serious risk of harm it seems likely that the fines will to rise higher levels over time.

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## WORKERS COMPENSATION ROUNDUP



### Workers Compensation Payments, Negligent Employers & Recovery of Compensation Payments

In NSW Section 151Z of the *Workers Compensation Act 1987* (the “Act”) establishes a regime for the recovery of workers compensation payments from third parties where the negligence of those third parties has caused an injury to a worker and the employer has not been negligent.

Where the employer was not negligent the employer will be entitled to recover from a negligent third party all compensation payments made provided those payments are less than the damages that would be payable by the third party to the worker if the worker had sued the third party for damages for the injuries. If the workers compensation paid is greater than the damages that would be recoverable from the third party then the employer cannot recoup the payments in excess of the damages payable.

This form of recovery claim is brought under Section 151Z(1)(d) of the *Workers Compensation Act 1987*.

It is important to note Section 151Z(1)(d) only permits an employer that is not negligent to pursue recovery of workers compensation payments.

Recovery of compensation is also available where the employer is negligent however not under section 151Z(1)(d) and recovery of entitlements is more restricted.

Section 151Z(2) of the Act will permit recovery by the employer of compensation where the employer is not sued by the worker or where the worker does not accept a judgment against the employer however that section does not permit an employer that is sued by the worker to seek recovery, the employer must look to other rights as was seen in a recent decision of the NSW Court of Appeal in *South West Helicopters Pty Limited v Stephenson*.

In that case the Court of Appeal was called on to consider the operation of Section 151Z(2) of the Act which is the provision that regulates recovery where a worker takes or is entitled to take proceedings against both the employer and a third party in respect of their negligent acts or omissions. Section 151Z(2) provides:

*“If, in respect of an injury to a worker for which compensation is payable under this Act:*

- (a) the worker takes or is entitled to take proceedings independently of this Act to recover damages from a person other than the worker’s employer, and*
- (b) the worker also takes or is entitled to take proceedings independently of this Act to recover damages from that employer,*

...

- (e) if the worker does not take proceedings against the employer or does not accept satisfaction of the judgment against the employer, sub-section (1) applies as if the worker had not been entitled to recover damages from that employer, except that:*

- (i) if the compensation paid by that employer exceeds the amount of the contribution that could be recovered from that employer as a joint tortfeasor or otherwise – the indemnity referred to in sub-section (1)(d) is for the amount of the excess only; and*

- (ii) if the compensation paid by that employer does not exceed the amount of that contribution – sub-section (1)(d) does not apply and the employer has, to the extent of the compensation so paid, a defence to an action for such a contribution.”*

For many years employers have argued Section 151Z(2) permitted employers to bring claims to recoup compensation payments even where the worker had commenced proceedings against the employer to recover work injury damages. However the decision in *South West Helicopters* clarifies that this approach is not correct and Section 151Z(2)(e) is only satisfied where the worker does not take proceedings or does not accept a judgment against the employer and

section 151Z(2) cannot be used to ground a recovery claim unless the conditions of section 151Z(2)(e) are satisfied .

The decision at first blush seems to introduce an impediment to the recovery of workers compensation payments by employers who are negligent where the employer is sued by the worker. However, that is not necessarily the case provided the compensation payments do not exceed the damages the worker is entitled to recover from a negligent third party.

The reason for this is that a worker is not entitled to keep both damages and compensation otherwise they would receive double compensation and other sections of the Act including section 151A and Section 151Z(1)(a) provide that where damages are recovered from a third party the worker is liable to repay out of those damages the amount of compensation paid as they cannot keep both the compensation and the damages.

The role of Section 151Z of the Act is best understood by examining the various claims available to a worker after they are injured.

An injured worker can

- claim workers compensation benefits only;
- claim workers compensation benefits and Work Injury Damages from the employer;
- claim workers compensation benefits and Damages from a negligent third party;
- claim workers compensation benefits and Damages from a negligent third party and Work Injury Damages from the employer.

The claims pursued by the worker will determine the strategy that must be adopted by the employer to recover workers compensation payments paid from a third party.

We first look at the situation where the worker is injured by a negligent third party and the employer is not negligent.

Section 151Z(1)(d) provides if the worker recovers compensation from the employer, the employer is entitled to an indemnity in respect of the compensation payments from the negligent third party who caused the worker’s injuries and the employer is entitled to bring a recovery claim against the third party.

A recovery claim under Section 151Z(1)(d) is only available if the employer is not negligent.

A recovery claim can be brought whether or not the worker commences proceedings against the negligent third party.

An employer in a Section 151Z(1)(d) recovery claim can also recoup interest on the compensation payments made and the legal costs of the recovery claim.



However an employer does not need to bring a recovery claim if the worker is suing a negligent third party for damages.

If the worker recovers damages from a negligent party before making a claim for compensation under the Act they are not entitled to any workers compensation payments and there is nothing to recover.

If the worker has first received compensation and then damages from a negligent third party and there is no recovery claim commenced by the employer, the worker must repay to the employer out of the damages the workers compensation payments paid (up to the amount of damages recovered).

The employer who is not negligent will recoup compensation paid from the negligent third party provided the compensation paid by the employer is less than the damages payable or the amount that would be assessed as payable to the worker by the third party. Compensation paid in excess of the damages payable will not be recouped.

We next look at the situation where the worker is injured and a third party and the employer is negligent.

There are a number of approaches available to a worker in this situation. The worker may:

- recover compensation under the Act and not pursue work injury damages or damages from the negligent third party (“Scenario 2”);
- recover compensation under the Act and pursue a damages claim against the negligent third party and not pursue a claim for work injury damages (“Scenario 3”);
- recover compensation under the Act and pursue work injury damages from the employer (“Scenario 1”);
- recover compensation under the Act and pursue damages from a negligent third party and during the proceedings for that claim join the employer in the proceedings and also seek work injury damages (“Scenario 4”);
- recover compensation under the Act and bring proceedings for work injury damages from the employer and damages from a negligent third party (“Scenario 5”).

In the above scenarios, Section 151Z(2) of the Act will only permit an employer to recover compensation payments where proceedings are not taken against the employer or judgment against an employer is not accepted and that will only apply to Scenario 1 and Scenario 2.

In the other scenarios recovery of workers compensation payments will be governed by a claim for contribution from a negligent third party by a cross claim under Section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* which permits a negligent party to seek contribution from another

negligent third party. Section 5 provides that where there is more than one action in respect to damages brought by a person and in each action a negligent party is liable contribution can be recovered by one negligent party from the other.

To understand the significance of this we look at how each of the five scenarios can play out.

Where there is no action against taken against the employer (Scenarios 1 & 2) Section 151Z(2)(e) provides that:

- where the worker does not take proceedings against the employer; and
- compensation is paid by the employer; and
- that compensation exceeds the amount payable by the employer for work injury damages,

the employer is entitled to an indemnity from the third party for the compensation payments in excess of the work injury damages payable.

That is, where the negligent third party is sued or could be sued, the employer can bring proceedings under Section 151Z(2)(e) against the negligent third party to recover the compensation payments paid which are in excess of the employers liability for work injury damages. The amount which can be recovered will be limited to the damages payable or the amount that would be assessed as payable to the worker by the negligent third party.

If the third party is sued by the worker and the worker does not sue the employer for work injury damages the third party may seek contribution from the employer under Section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* and the employer will have a defence to that claim for contribution to the extent of the payments it has made and will only be liable to contribute an amount which reflects the difference between the compensation paid and an assessment of the employer’s liability for work injury damages.

If the compensation paid by the employer is greater than its liability for work injury damages it can pursue a recovery claim against the negligent third party to recover the excess payments whether or not the worker sues the negligent third party and if the third party is sued by the worker the employer can wait to collect the compensation out of damages awarded to the worker as a consequence of section 151A and Section 151Z(1)(a) of the Act.

Effectively an employer can recover the amounts of compensation in excess of the employer’s liability for work injury damages however the recovery will be capped by the damages payable or notionally assessed as payable by the negligent third party.

Section 151Z(2) provides an effective mechanism to recoup compensation payments made in excess of the employer’s liability for work injury damages where there is no work injury damages claim pursued.

Next we look at Scenario 3 where the worker seeks workers compensation payments and then only work injury damages. In that case Section 151Z(2) cannot come to the aid of the employer to ground a recovery. However an employer is entitled to seek contribution from a negligent third party under Section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946*. The contribution that is recovered will be limited to amounts in excess of the liability for work injury damages.

For example if the apportionment of liability was 20% to the employer and 80% to the negligent third party then the worker will secure an award against the employer for the full amount of work injury damages which will be paid by the employer and the employer will be able to recoup 80% of that payment from the negligent third party and any additional compensation payments paid in excess of the work injury damages up to the amount the negligent third party would be liable to pay as damages. A recovery claim of this nature is often not necessary as the worker will usually at some stage in their claim decide to pursue the negligent third party to recoup damages assessed under the Civil Liability Act which will be more than the work injury damages. It can however occur if weekly payments are much lower than the balance of the payments and the negligent third party would have a low percentage of liability.

That leaves Scenarios 4 and 5 where both the employer and negligent third party are sued by the worker.

Where actions are taken by the worker against both the employer and the third party the employer must look to pursue contribution claim under Section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946*. This will be the case whether proceedings are commenced against both at the outset or proceedings are first commenced against the negligent third party and then the employer. The damages that will ultimately be awarded will reflect an apportionment of liability between the employer and the negligent third party. Sections 151A and Section 151Z(1)(a) of the Act will ensure the worker does not receive double compensation and the contribution cross claim ensures responsibility for damages is apportioned between the employer and the negligent third party. In the example we looked at for scenario 3 the same result is achieved. The ultimate apportionment will result in the following:

- employer liability is 20% of the assessed work injury damages;
- negligent third party liability is 80% of damages assessed under the Civil Liability Act;
- if the employer has paid compensation in excess of 20% of work injury damage an amount will be deducted from the damages payable by the negligent third party to reimburse the employer all compensation payments in excess of the employer's 20% of work injury damages;

- however if the workers compensation payments exceed the damages payable by the negligent third party the amount recouped will be capped at the damages amount.

At the end of the day the employer will have to pay its liability for work injury damages, compensation paid in excess of that liability will be recouped from civil liability damages payable by the third party however if the compensation in excess of the work injury damages exceeds the civil liability damages there will be a shortfall in the recovery of the excess payments.

Unfortunately it is complicated.

We also observe it is not unusual to see a worker proceed with a claim for damages against a negligent third party then join the employer to include a claim for work injury damages. If the worker has first pursued the negligent third party the employer may well have commenced proceedings to recover compensation under section 151Z(2)(e) as there were no proceedings on foot against the employer however once there are proceedings against the employer the claim must be reframed and brought as a claim for contribution under Section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946*. From the time the employer is joined as a party in the proceedings it will no longer have a right to maintain a recovery under Section 151Z(2).

As can be seen the application of Section 151Z of the Act presents challenges.

Consequent to the decision of *South West Helicopters* employers must note:

- Section 151Z(1)(d) only provides an effective tool for recovery of compensation payments paid where the employer is not negligent;
- Section 151Z(2) provides a tool for recovery of workers compensation payments paid in excess of an employer's liability for work injury damages however the recovery will be capped by the damages payable by the third party;
- once proceedings are commenced against an employer, Section 151Z(2) can no longer be used to recover workers compensation payments from a third party;
- if recovery proceedings have been commenced under Section 151Z(2) by an employer as proceedings had not been commenced by the worker against the employer, if and when the worker joins the employer in the proceedings the claim brought by the employer will need to be re-cast and framed as a claim for contribution under Section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* rather than a claim under Section 151Z(2);
- where an employer and a negligent third party are sued by a worker damages are assessed under the Civil Liability Act and the Workers

Compensation Act and the employers ultimate liability will be limited to an apportioned percentage of the work injury damages and it will recoup compensation payments made in excess of that liability but only up to the amount of any damages payable by the negligent third party;

- negligent employers can only recoup compensation payments in excess of the employer's liability for work injury damages.

The interaction between the different damages regimes in the Civil Liability Act and the Workers

Compensation Act that arise consequent to section 151Z recovery claims and contribution claims under Section 5 of the *Law Reform (Miscellaneous Provisions) Act 1946* will continue to present challenges and employers with recovery actions on foot now need to revisit those actions to ensure their claims have been appropriately framed in light of the decision of the Court of Appeal in *South West Helicopters*.

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