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## IN THIS EDITION




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## Not Such a Good Result For Scenic Tours Class Action

Last November in our Newsletter we discussed the outcome of the Scenic Tours class action - *Moore v Scenic Tours Pty Ltd (No 2) [2017] NSWSC 733*- where the plaintiff, a school teacher, brought a representative claim (class action) for compensation and damages, arising out of a series of European river cruises provided by the defendant (Scenic) during periods of unusual rainfall and high water levels which occurred in Europe during May and June 2013.

The case involved an innovative use of some of the consumer guarantees in the Australian Consumer Law (ACL) and 12 months on, the appeal has upheld the win for consumers in part but rejected the damages award for pain and suffering that the trial judge awarded.

Moore booked his tour 18 months prior to departure and paid for in full well before the cruise commenced. The cruise was intended to depart from Amsterdam, travel along the Rhine River, the Main River, the Main/Danube Canal and the Danube River to Budapest.

As things turned out, the plaintiff's experience was one of being shuffled around Europe, largely by coach, for a great part of the trip and changing ships on two occasions so that by the time he disembarked in Budapest, he had experienced three different Scenic ships and that far from his cruise being one where he was immersed in all-inclusive luxury, he experienced something entirely different.

The disruptions to the planned itineraries were caused by decisions made by Scenic when confronted with the flooding in Europe. Locks along the rivers were either damaged or inoperative. Ships were unable to pass under bridges crossing the rivers and some docking facilities could not be used and had been washed away.

The claims against Scenic were that, with respect to 13 cruises, it knew at the time of booking that the guests wished to experience and enjoy a luxury five-star

experience of a river cruise, in accordance with the selected itinerary which would include highlighted events and destinations. The services in fact supplied, it was claimed, did not fulfil this purpose, and did not provide the desired result.

As would be expected, Scenic defended the claims partly on the basis that its brochure, ticketing and other contractual documentation contained terms which had the effect of excluding any liability for events like those which occurred.

To outflank such reliance, the plaintiff did not sue in tort or for breach of conduct or for misleading and deceptive conduct; rather, he carefully framed his case as solely relying on a breach of one or more of the statutory guarantees provided in ss 60, 61(1) and 61(2) of the ACL.

There was no dispute that the plaintiff and group members were "consumers" within the meaning of the ACL and acquired "services" from Scenic in that capacity, so that the guarantees applied.

Section 60 of the ACL provides for a guarantee that services will be rendered with due care and skill ("the due care and skill guarantee"), which the plaintiff said was breached by Scenic in:

- failing to make any or any adequate enquiry about the nature and extent of flooding and rising river levels and thus failing to determine that it was "… inconceivable that the scheduled river cruises could proceed otherwise than without substantial disruption or delay";
- failing to cancel or delay the tours without receiving information that would lead a reasonable tour operator to conclude that it was likely that the river cruises could proceed in a way that the plaintiff and group members would substantially enjoy the benefit of travelling on the tour;
- failing prior to the embarkation of the plaintiff and some of the group members to unilaterally cancel their tours and offer them an alternative either by way of the closest available tour or departure; or
- failing to offer to passengers on those cruises the opportunity to cancel their tours, either prior to embarkation or after embarkation, when it became obvious that the tours would not be completed as programmed.

Section 61(1) of the ACL provides that where services are provided in circumstances, as here, the plaintiff and group members acquired them, and the purpose for which the services are required is made known, there is a guarantee that the services supplied would be reasonably fit for that purpose.

Section 61(2) of the ACL provides that where a desired result is made known (whether expressly or impliedly) to a provider of services prior to their acquisition, then the provider of the services guarantees that the services are such as might reasonably be expected to achieve the desired result.

The plaintiff alleged that both the purpose guarantee and the result guarantee were breached because the services provided did not satisfy either or both of the guarantees.

By reason of being a representative proceeding, this initial judgment of the Court dealt with the whole of the plaintiff's claim, and the determination of a number of questions likely to arise with respect to the claims of the group members.

In large measure, the Trial Judge found that Scenic had acted in ways which breached one or more of the ACL guarantees. It found that the plaintiff had suffered loss, and awarded him damages, equivalent to the cost of his cruise.

Moore had sought:

- compensation for "reduction in the value of services provided by [Scenic] below the price paid … by [Mr Moore] for the services", pursuant to s 267(3) of the ACL; and
- damages for "loss or damage suffered by [Mr Moore] because of the failure to comply with the [statutory] guarantee", pursuant to s 267(4) of the ACL.

In the appeal the Court of Appeal was called on to look at whether Scenic supplied services to Mr Moore and each Group Member:

- without due care and skill, in contravention of s 60 of the Australian Consumer Law (ACL) (Care Guarantee);
- such that the services were not fit for the purpose for which Mr Moore and each Group Member acquired them, in contravention of s 61(1) of the ACL (Purpose Guarantee); and
- such that the services were not of a nature and quality as could reasonably be expected to achieve the result that Mr Moore and each Group Member wished the services to achieve, in contravention of s 61(2) of the ACL (Result Guarantee).

The Trial Judge had found a breach of each of these Consumer Guarantees and further had found that Mr Moore was entitled to compensation and damages by reason of Scenic's breaches of the Consumer Guarantees in relation to Cruise 8. His Honour awarded Mr Moore $10,990 as compensation under s 267(3) of the ACL for Scenic's breach of the Care Guarantee and $2,000 as damages under s 267(4) of the ACL for Scenic's breach of the Purpose and Result Guarantees. The damages under as damages under s 267(4) were for "disappointment and distress". The primary Judge considered the amount to be "modest" and indicated that he would have assessed damages

at a higher amount had Mr Moore not limited his claim to $2,000.

The primary Judge had rejected Scenic's argument that the Court was precluded from awarding any damages to Mr Moore where s 275 of the ACL required the Court to apply s 16 of the Civil Liability Act 2002 (NSW) (Civil Liability Act) as a surrogate federal law and Section 16 of the Civil Liability Act precludes an award of damages for non-economic loss "unless the severity of non-economic loss is at least 15% of a most extreme case". The primary Judge accepted that s 16 was to be applied as a surrogate federal law but held that s 16 has no extra-territorial operation and therefore does not apply to non-economic loss sustained outside Australia.

It is relevant to note s275 applies to circumstances where there is a failure to comply with a guarantee that applies to a supply of services under the ACL and the law of a State or a Territory is the proper law of the contract. It does not apply to claims for misleading and deceptive conduct or breaches of guarantees in respect of goods so would have no work to do in such claims.

In these proceedings there was no dispute that Moore would not satisfy the threshold under s 16 of the Civil Liability Act 2002 if it applied.

First and foremost the Court of Appeal held there were breaches of each of the Guarantees however the primary Judge had erred in finding some of the grounds for breach.

The primary Judge erred in finding:

- that the services to be provided by Scenic included informing Mr Moore and other passengers before the commencement of a cruise of events that might have an adverse impact on the scheduled itinerary;
- there was a breach of the Care Guarantee by its pre-embarkation and post-embarkation acts or omissions.

Unfortunately for Moore and all Group Members the Court of Appeal determined s 16 of the Civil Liability Act 2002 did have application and in the Court of Appeal's judgement noted:

> *"Section 275 of the ACL picks up and applies s 16(1) of the Civil Liability Act as a surrogate federal law. Section 16(1), on its proper construction, precludes Mr Moore claiming damages for distress and disappointment by reason of Scenic's breaches of the Purpose and Result Guarantees. This is so notwithstanding that Scenic's breaches occurred outside Australia. It follows that the award of damages under s 267(4) in Mr Moore's favour must be set aside."*

Moore was not entitled to compensation for non-economic loss for his pain and distress. Whilst an award was available it was only available where the severity of non-economic loss is at least 15% of a most extreme case.

The Court of Appeal also held the primary Judge erred in assessing compensation for Mr Moore under s 267(3)(b) of the ACL for reduction in the value of the services provided to him by reason of Scenic's failure to comply with the Consumer Guarantees. The Court of Appeal found:

> *"The error consisted of assessing the reduction in value of the services by reference to subjective rather than objective considerations."*

The Court of Appeal remitted the question of compensation to the primary Judge for determination based on objective criteria.

The Court of Appeal determined Group Members are precluded by s 275 of the ACL and s 16 of the Civil Liability Act from claiming damages for distress and disappointment and their claims for compensation for reduced value pursuant to s 267(3)(b) of the ACL remain to be determined where a breach of the Care Guarantee has been established The claims of the other group members now fall for determination. Given the findings on the common questions, however, it is likely that those claims will settle.

The *Australian Consumer Law* is extremely powerful. The class action serves deliver a warning that despite extensive limitations on liability and exclusion clauses in contracts and specifying the scope of services in a contract those provisions will not always prevent liability.

The Court of Appeal confirmed the "services" to be provided by Scenic, for the purposes of the Consumer Guarantees, were not co-extensive with or limited by Scenic's obligations or scope of services specified under the contractual Terms and Conditions which bound passengers. The Court of Appeal observed:

> *"The Care Guarantee is plainly designed to protect consumers by ensuring that the benefits, facilities or other services with which they are to be provided will be rendered with due care and skill. Parliament has expressly stated that a term of a contract which purports to exclude, restrict or modify the application of any of the Consumer Guarantees or any liability of a person for a failure to comply with any of the Consumer Guarantees, is void. It can hardly be intended that a person who is to provide benefits or facilities to a consumer can avoid the statutory obligation to exercise due care and skill simply by entering into a skilfully worded standard form contract with the consumer which defines the services to be provided in a manner that effectively avoids any obligation to exercise due care and skill."*

The outcome in the appeal of the class action is a win for consumers but a reduction in the compensation which will be received with amounts being limited to a

reduction in the value of the services viewed objectively. 5 years on and compensation claims still outstanding - the journey of a class action can be or tortuous one.

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## Commercial Transactions in the District Court? Problem Solved

In our October 2018 edition of GD News we reported on a problem concerning the jurisdiction of the NSW District Court to hear and determine matters arising out of commercial transactions.

We summarised recent case law which suggested the jurisdiction of the District Court excludes commercial transactions pursuant to Section 44 of the *District Court Act 1973* (NSW).

This was due to the High Court decision in *Forsyth v Deputy Commissioner of Taxation* (2007), which held that subsection 44(1)(a)(i) of the *District Court Act 1973* must be interpreted based on the composition of the Supreme Court as at 1 February 1998.

These recent cases suggested the District Court has no jurisdiction to hear and determine matters if, had the action been brought in the Supreme Court, it would *not* have been referred to the Common Law Division of the Supreme Court as at 1 February 1998.

Trouble is, on 1 February 1998, matters arising out of commercial transactions were referred to the Supreme Court's Commercial Division.

Although the Commercial Division of the Supreme Court was abolished many years ago the law regarding the District Court's jurisdiction was still being interpreted based on the position back in 1998 and did not account for the current composition of the Supreme Court.

Various judges who have decided this issue in recent times have criticised the unwelcome outcome it has produced.

There has been an increase in applications to transfer matters from the District Court to the Supreme Court as a result.

Fortunately, the NSW Parliament has stepped in to fix this problem by enacting the *Justice Legislation Amendment Act (No.3) 2018* which was assented to on 28 November 2018.

Section 44 of the *District Court Act 1973* has now been amended by extending the District Court's jurisdiction to include actions arising out of a commercial transaction in which the amount claimed does not exceed the Court's jurisdictional limit of $750,000.00.

Further, the amendment ensures the District Court is to be treated as having had this jurisdiction since 2 February 1998 such that any matter determined after that date by the District Court, being a matter arising out of a commercial transaction, is to be taken to have been within the jurisdiction of the Court.

This is a welcome development to fix a problem that would have seen disputes involving commercial transactions litigated in the Supreme Court including claims where only a nominal amount was claimed.

Clearly this would have been inconsistent with parliament's intention regarding the District Court's jurisdiction.

The doubt raised by several judges in case law during the past 12 months has now been clarified and resolved by the NSW Parliament.

The jurisdiction of the District Court includes matters arising out of commercial transactions where the amount claimed does not exceed $750,000.

It should be noted Section 51(2)(b) of the *District Court Act 1973* permits the District Court to hear and dispose of matters for an amount up to $1,150,000 (exclusive of costs) being a 50% increase over and above the jurisdictional limit of the Court.

However, this extended jurisdiction may only be exercised by the District Court where the parties consent or where a defendant has failed to raise an objection at least three months before the District Court hearing commences.

For the avoidance of doubt, the objection under Section 51(2)(b) of the *District Court Act 1973* should be pleaded in a Defence if the defendant does not wish the matter to be heard by the District Court for an amount in excess of $750,000.

In that event where the objection is raised and the plaintiff wishes to claim an amount in excess of $750,000, it will be necessary to transfer the matter to the Supreme Court.

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## NSW Court of Appeal confirms NCAT is not a Court of a State which can be invested with federal jurisdiction

In our July edition of GD News we reported on the decision of the High Court in *Burns v Corbett & Ors* in which the High Court confirmed the NSW Civil and Administrative Tribunal ("NCAT") is not a "Court of a State" which can be invested with Federal jurisdiction under Section 77 of the Constitution.

It followed that NCAT had no jurisdiction to hear and determine disputes between residents of different States under Section 75(iv) of the Constitution.

We observed that whilst the High Court's decision in *Burns* was pending, the Appeal Division of NCAT delivered judgment in another case, in which it held NCAT was in fact a Court of a State and therefore had power to exercise Federal jurisdiction under the Constitution.

That decision was challenged in an appeal to a bench of five justices of the NSW Court of Appeal including the Chief Justice and the President.

In *Attorney General for NSW v Gatsby*, the Court of Appeal unanimously held that NCAT is not a Court of a State which can be invested with Federal jurisdiction under the Constitution.

The Court of Appeal was bound by the High Court's decision on this issue. However, the appeal justices made further observations in support of their conclusion.

Chief Justice Bathurst observed the equivalent Tribunal in Queensland (QCAT) was expressly designated in its establishing legislation as a "Court of Record".

A similar provision did not exist in the legislation which established NCAT.

Accordingly the Chief Justice considered QCAT could be distinguished from NCAT on this issue.

The Chief Justice also described other features which led to his Honour's conclusion that NCAT was not a Court of a State.

Justice McColl described those features in the following terms:

> *"For a body to answer the description of a Court it must satisfy minimum requirements of independence and impartiality. These requirements connote separation from the other branches of Government, at least in the sense that the State Courts must be and remain free from external influence. Those minimum requirements at least include being susceptible to removal only by the Governor on an address of both Houses of Parliament."*

Her Honour held that NCAT possessed none of these features.

Justice Basten noted that although NCAT's title as a Tribunal (and not a Court) is not necessarily determinative of the issue, it is a relevant consideration when determining whether or not it is a Court of a State for the purpose of the Constitution.

Basten JA observed that NCAT's designation as a Tribunal is a signal that the NSW Parliament was establishing a body without some characteristics conventionally associated with a Court.

Basten JA also observed that while NCAT, upon its establishment, took over the functions of a multitude of other bodies (eg. the former CTTT), none of those which were amalgamated into NCAT was described as a Court.

Beazley P and Leeming JA in separate brief judgments agreed with the observations made by the other Justices.

Accordingly, the NSW Court of Appeal has confirmed that NCAT is not a Court of a State, consistent with the earlier High Court authority propounded in *Burns*.

The result is that NCAT cannot be invested with Federal jurisdiction to determine disputes involving, for instance, claims under the *Australian Consumer Law*, the *Corporations Act 2001* (Cth) or any other relevant Federal legislation which would require NCAT to be invested with Federal jurisdiction.

This includes NCAT being precluded from hearing and determining matters involving disputes between residents of different States as this requires a Court of a State to be invested with Federal jurisdiction under the Constitution.

This will be highly relevant in residential tenancy disputes but may also be relevant in relation to building disputes where one of the parties is a resident of a State other than NSW.

However, as we observed in our July edition of GD News, Part 3A of the *Civil and Administrative Tribunal Act 2013* (NSW) ("CAT Act") was inserted in December 2017 to provide the NSW District Court and Local Court with jurisdiction to determine disputes between residents of different States, if the matter was commenced at NCAT.

This provides a mechanism for NCAT matters to be transferred to the District or Local Courts if that issue arises. Until recently, the scope of the power conferred by Part 3A of the CAT Act upon the District and Local Courts was limited to "diversity" jurisdiction involving disputes between residents of different states.

The recent enactment of the *Justice Legislation Amendment Bill (No 3) 2018* by the NSW Parliament has amended Part 3A of the CAT Act to extend the scope of the power conferred upon the District and Local Courts to hear matters involving all types of federal jurisdiction with which the District and Local Courts may be invested pursuant to Section 77(iii) of the Constitution, not just federal diversity jurisdiction.

The implications arising from the insertion of Part 3A of the CAT Act (NSW) and the recent judgments of the High Court and the NSW Court of Appeal are yet to play out but as we previously observed, this may result in an influx of applications to transfer matters from NCAT to the District Court and to a lesser extent the Local Court.

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## Manufacturer of Ladder held Liable for Injury Caused by Defect

Section 138 of the Australian Consumer Law relevantly states that a manufacturer of goods is liable to compensate an individual if the manufacturer supplies the goods in trade or commerce, the goods have a safety defect and the individual suffers an injury because of the safety defect.

The Australian Consumer Law is contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) ("CCA").

Pursuant to Section 137A of the CCA, if the loss or damage to which an action under Section 138 of the ACL relates was caused by both an act or omission of the injured individual and a safety defect of the goods to which the action relates, the amount of the loss or damage is to be reduced to such an extent (which may be to nil) as the Court thinks fit having regard to that individual's share in the responsibility for the loss or damage.

In other words, the manufacturer's liability for injury caused by a safety defect in a good which it supplied can be reduced by the contributory negligence of the injured individual.

These issues were recently considered by the NSW Court of Appeal in *Bamber v Hartman Pacific Pty Limited*.

In January 2012 William Bamber suffered a serious injury to his ankle when he fell to the ground as he was descending a ladder. Hartman was the manufacturer of the ladder and supplied it to a retailer.

In November 2011 Bamber purchased the ladder from the retailer and claimed it had not been used prior to the date of accident.

Bamber commenced proceedings against Hartman in the NSW Supreme Court alleging there was a safety defect in the manufacture of the ladder and the defect caused his injury.

Bamber claimed damages under Section 138 of the ACL for his injury.

He also pleaded a cause of action in negligence but that part of the claim was abandoned.

Bamber's claim against Hartman was limited to the claim under Section 138 of the ACL.

The matter proceeded to hearing before her Honour Justice Schmidt who found in favour of Hartman and dismissed Bamber's claim. Her Honour was satisfied Bamber had failed to discharge his onus of proof requiring him to establish the fall was the result of a defect in the ladder. In particular, the evidence failed to establish the defects in the ladder occurred during its manufacture.

Had she found in favour of Bamber, her Honour would have reduced his damages by 30% on account of his contributory negligence under s137A of the CCA.

Bamber appealed to the NSW Court of Appeal.

In a unanimous judgment (Emmett AJA, Macfarlan & Gleeson JJA agreeing) the Court allowed the appeal but maintained her Honour's finding of contributory negligence at 30%.

The Court considered the competing expert reports tendered by Bamber and Hartman in respect of whether or not the ladder contained a safety defect.

Those experts produced separate reports and a joint expert report for the Court.

Emmett AJA made the following observations:

> *"Thus, two questions appear to be raised. One question is whether the ladder had a safety defect when Hartman supplied the ladder to the retailer from whom Mr Bamber purchased it. The primary judge clearly concluded that Mr Bamber had not established that it was more likely than not that the ladder suffered from the two defects ... namely a hauling rope that was too tight and loose bolts holding on the locking mechanism. The other question is whether Mr Bamber suffered his injuries because of any defect that was present when the ladder was supplied by Hartman. That question is tied in with the question of contributory negligence."*

The Court of Appeal held there was little doubt as to the actual mechanism of the fall. It found the locking mechanism had not engaged completely but must have been only partly engaged when Bamber began to ascend the ladder.

Justice Emmett queried therefore why the mechanism did not engage fully. That question, according to his Honour, raised the extent to which Bamber's own actions, as well as any safety defects present when the ladder was supplied by Hartman to the retailer, contributed to his fall.

Emmett AJA summarised the relevant issues and confirmed it was ultimately a matter for Bamber to establish whether it was more likely than not the defects were in the ladder at the time he bought it. Further, it was not incumbent upon Hartman to demonstrate they were not.

However, the expert evidence was that they saw nothing to suggest the defects were not present at the time of purchase. Whilst this was not conclusive, Emmett AJA also observed there was no evidence as to anything that might have happened to the ladder after Bamber's accident and before it was inspected many months later by the experts.

Hartman had proffered no evidence as to the possible cause of the defects if they were not present when the ladder was supplied by Hartman to the retailer.

Accordingly, Justice Emmett stated that a judgement must be made as to which of two inferences should be drawn:

- from the evidence of the experts one might conclude the defects were present when Bamber purchased the ladder; or
- from the evidence as to the practices of Hartman in its Chinese manufacturing plant one might conclude the defects were not present when the ladder was supplied to the retailer.

Justice Emmett confirmed the task of the primary judge was to determine whether, on the balance of probabilities, the accident occurred in the manner alleged such that in the language of Section 138(1)(c) of the ACL, Bamber was an individual who suffered injuries because of the safety defect.

His Honour observed the matter was not without doubt and difficulty. However, on balance, Justice Emmett considered it more likely than not the excessive tautness of the rope loop was present when the ladder was supplied by Harman to the retailer.

It followed that Bamber succeeded in establishing there was a safety defect in the ladder when it was supplied by Harman to the retailer and the defect had a causal connection with Bamber's injury.

Emmett AJA also considered the application of Section 137A of the CCA but found no error in the approach adopted by Schmidt J in assessing contributory negligence at 30%.

Accordingly it fell to the Court of Appeal to assess the damages that were claimed by Bamber before the primary judge.

In that regard Schmidt J observed damages for non economic loss were governed by Part VIB of the CCA for proceedings taken under Section 138 of the ACL.

Schmidt J would have awarded damages for non economic loss at 30% of a most extreme case which under Section 87R of the CCA was the relatively modest sum of $79,180.

On appeal, Bamber's Counsel contended Bamber was entitled to damages for non economic loss representing 45% of a most extreme case but the Court of Appeal rejected this submission and found 30% of a most extreme case was appropriate.

Bamber's claims for past and future economic loss were disallowed by Schmidt J because of credit issues regarding Bamber's evidence. The Court of Appeal did not disturb these findings.

The result was that Bamber's damages were assessed at $105,044.9 and reduced by 30% for contributory negligence, producing a final assessment of $73,531.47.

The Court of Appeal allowed the appeal, set aside the Orders of Schmidt J and substituted a verdict in favour of Bamber for the above amount.

As that award was less than $500,000, the Court of Appeal ordered there be no order as to costs of the proceedings before Schmidt J and further ordered Hartman to pay 50% of Bamber's costs of the appeal.

This interesting decision considered the balancing exercise which a Court must conduct when determining whether a safety defect was present in goods at the time they were supplied by a manufacturer to a retailer which ultimately led to injury.

It is also a timely reminder damages for non economic loss under the ACL are substantially less than non economic loss damages otherwise awarded under the *Civil Liability Act 2002*. An assessment of 30% of a most extreme case under the *Civil Liability Act 2002* results in an award of $190,500 and under the ACL $79,180.

This should be kept in mind when considering the appropriate jurisdiction for the proceedings.

In this case the Court of Appeal confirmed Bamber ought to have commenced his proceedings in the NSW District Court instead of the Supreme Court.

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## Insurance Conundrums - Multiple Claims & Multiple Retentions

Most insurance policies will require an insured to pay an excess or a deductible in respect of each and every claim.

Some insurance policies describe the policy excess or deductible as a "retention".

In some instances the amount of the retention can be large. For multiple claims, particularly in the case of representative proceedings being brought against the insured, this can result in the insured being liable to pay multiple retentions which could result in the insured's liability to pay the retention exceeding the insurer's liability to indemnify the insured under the policy.

This very issue was recently considered by Justice Stevenson in the NSW Supreme Court decision of *Bank of Queensland Limited ("BQL") v AIG Australia Limited*.

Representative proceedings were brought against BQL by Petersen Superannuation Fund Pty Limited ("Petersen").

BQL paid $6 million to settle those proceedings.

BQL then sought indemnity under a Civil Liability Insurance Policy issued by AIG, Zurich and Catlin, pursuant to which the insurers were liable in the following proportions:

- AIG - 37.5%;
- Zurich - 37.5%;
- Catlin - 25.0%.

AIG was the lead insurer under the policy.

BQL settled its claim with Zurich.

The remaining claim by BQL was against AIG and Catlin.

The policy provided BQL must pay a retention of $2 million for "each and every Claim" and the insurers were only liable for the amount of "Loss" and "Defence Costs" arising "from a claim" in excess of the retention.

AIG and Catlin denied liability on the basis that the representative proceedings brought by Petersen against BQL constituted multiple claims and thus BQL was liable to pay multiple retentions.

It followed that BQL's liability to pay multiple retentions exceeded the total amount for which BQL sought indemnity under the policy from AIG and Catlin.

BQL commenced proceedings at the NSW Supreme Court and the matter proceeded to hearing before his Honour Justice Stevenson.

Stevenson J noted the question for determination was whether the loss for which the insurers were liable arises from a single claim as defined in the policy (in which case only one retention applied) or from multiple claims (in which case multiple retentions applied).

If the latter, then for all practical purposes, the insurers would have no liability to make any payment to BQL.

Stevenson J found in favour of AIG and Catlin and held, as there were multiple claims, BQL must bear multiple retentions.

His Honour noted the division between the parties was whether the representative proceedings constituted multiple claims made by each Group Member despite there being only one proceeding.

In the Further Amended Statement of Claim filed in the representative proceedings against BQL, Petersen stated it brought those proceedings "on its own behalf and on behalf of" the Group Members.

In his judgment, Justice Stevenson remarked:

> *"It is in the nature of representative proceedings that the unnamed represented parties, as well as the named represented party, bring the claims made in the proceedings."*

His Honour also referred to a decision of Justice McKerracher of the Federal Court in *Morgan in the matter of Bright & Hall Securities Pty Limited (in liq)* in which McKerracher J stated:

> *"It seems to me that the whole essence of the representative claim is that there are multiple claims before the Court. The character of each claim is not changed by the proceeding which embraces it. The representative proceeding is simply designed to facilitate an efficient and cost effective way to resolve multiple individual claims. Those claims, being made in a proceeding in Court, constitute proceedings.*
>
> *Although the second limb of the definition of "claim" refers to civil proceedings which are brought by a third party for recovery of compensation or damages in respect of breach of professional duty, if a person sues, amongst other things, on behalf of another in a representative proceeding, even if the group member is not named, that unnamed group member nevertheless has brought proceedings."*

Stevenson J noted the above observations focused on whether or not a suit or proceeding could constitute multiple claims. That, his Honour held, depends on the policy wording.

His Honour made a distinction between the policy wording in this case when compared with the policy under consideration by Justice McKerrecher in *Morgan* regarding whether a "suit or proceeding" in a representative proceedings constituted more than one claim.

Stevenson J considered Clause 2.2(1) of the policy which defined "claim" to mean any "suit or proceeding" brought by "any person". His Honour interpreted this clause as defining the intention of the parties that any suit or proceeding meant any <u>one</u> suit or proceeding.

Therefore, a suit or proceeding brought by any person was apt to include a suit or proceeding brought by more than one person such as the representative proceeding brought by Petersen against BQL.

Accordingly, as the definition of "claim" directed attention to the "suit or proceeding" itself, that suit or proceeding constituted only one "claim" notwithstanding the fact it was brought by multiple parties and included claims by each of those multiple parties.

Therefore, the policy wording did not of itself support a conclusion that it constituted multiple claims under the policy.

However, his Honour also considered the evidence regarding what constituted a "Claim" under the policy.

In that regard, Stevenson J accepted the submissions by AIG and Catlin that each Class Member Registration Form completed by Group Members constituted a separate claim within the meaning of the policy.

Each person completing a Class Member Registration Form was described as the "claimant".

The forms contained, under the heading "Claimant's Alleged Loss" a statement of the amount the "claimant" has "been unable to recover ..."

His Honour also observed that one form actually referred to the amount which the claimant was "claiming".

His Honour therefore concluded the representative proceedings represented multiple claims on the following basis:

- there was a claim constituted by the representative proceedings; and
- there were 192 claims constituted by each of the class member registration forms.

As multiple retentions therefore applied, BQL's claim against AIG and Catlin failed.

Each case will turn on its own facts regarding whether or not a representative proceeding constituted multiple claims under a policy and whether or not this enlivens an insured's liability to pay multiple retentions.

The policy wording is pivotal. In this case, the wording was interpreted in favour of the insurers.

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## CONSTRUCTION ROUNDUP

### Reforms to tighten up building certification

Since its introduction in 1998, the current system of private certification of building developments has been the subject of harsh public criticism.

Many have said that it is a system that is easily rorted – and consequently the public has lost faith that buildings are being properly constructed in compliance with all applicable codes and standards.

The NSW Government has therefore introduced the Building and Development Certifiers Act 2018.

The proposed legislation is intended to close a number of loopholes that were being taken advantage of by "dodgy operators".

The key introductions in the proposed legislation are as follows:

- The Code of Conduct to be followed by building certifiers is to be strengthened, including prohibiting conflicts of interest such as the certifier having a pecuniary interest in the development. This includes certifiers who would obtain some benefit from the work, or who worked on the design and/or construction of the development or is related to a person who has any of those private interests. This benefit is described as "an appreciable financial gain or loss to the registered certifier" that is not so remote that it cannot be reasonably regarded as being likely to influence the certifier's decisions with the respect to the work.
- The Secretary of the Department of Finance, Services and Innovation is to have new powers to monitor compliance with the Act, and would have the right to take disciplinary action (including the immediate suspension or cancellation of a certifier's registration). The Secretary's new powers will include the power to request and obtain information from third parties in order to be able to assess whether a certifier should obtain or retain registration.
- Certifiers who do the right thing are to have their licences extended for up to three or five years, while certifiers who issue false or misleading certificates or accept a bribe face a maximum penalty of $1.1 million and/or two years imprisonment.
- There will be new fines of up to $110,000 for corporate certifiers and $33,000 for individuals who do not have adequate insurance in place.
- Section 110 of the Home Building Act 1989 is to be amended to provide that a person who holds a contractor licence is prohibited from unduly influencing or attempting to influence the appointment of a certifier, with fines of up to $110,000 for a corporation and $33,000 for an individual. Undue influence is described as (for an example) making the appointment of a specific certifier a condition of the construction contract, or offering to change the contract price

The reforms appear to be a step in the right direction. However, the proposed legislation does not specifically address the issue of certifiers being financially dependent on developers for repeat work, and thus being more likely to be tempted to certify work as compliant with the applicable codes and standards.

And while the simultaneous amendments to the Home Building Act are intended to encourage consumers to choose their own certifier, the reality is that consumers who do not know the industry will ask their contractors for the names of certifiers, or will allow the contractors to organise the certifier's engagement.

The Bill has been passed by both Houses of Parliament and was assented to on 31 October 2018. It is to commence by proclamation – likely in the new year.

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## Progress of reform to security of payment in NSW

The NSW Government's Building and Construction Industry Security of Payment Amendment Bill 2018 has been through a Second Reading in Parliament and is currently being considered by the Legislative Council.

The Bill was introduced along with proposed reforms to the Retirement Villages Act 1999, the Protection of the Environment Operations Act 1997 and various items of Fair Trading legislation. The bills for the amendment of these Acts are part of the reforms within the NSW Government's Innovation and Better Regulation portfolio which is intended to reduce red tape and ensure that the legislation remains fit for purpose.

In delivering his Second Reading speech on the Bill, Mr Scot MacDonald said that the construction industry in New South Wales employs more than 300,000 people and is a vital contributor to the State's growth. The reforms to the Act are intended to further promote cash flow and transparency in the contracting chain, and to address the major issues of late payments and the effects of insolvency to participants in the industry – particularly small businesses.

The proposed reforms in the Bill were discussed in our September newsletter. The key reforms are:

- The introduction of a statutory entitlement to a progress payment at least once a month.
- The introduction of a final reference date upon termination of a construction contract.
- The re-introduction of the requirement to identify payment claims as being made under the Act.
- The reduction of payment periods to 10 business days for head contractors and 20 business days for subcontractors.
- Subcontractors being given the right to inspect the head contractor's retention trust records.
- The Supreme Court being given the express power to sever parts of adjudication determinations that are made without jurisdiction.
- The introduction of a prohibition on companies in liquidation from making payment claims under the Act.
- NSW Fair Trading being given powers to enforce the Act and to investigate contraventions of its provisions, with an increase in the applicable penalties.

In considering the Bill, the Legislative Council has criticised the fact that a number of matters are permitted to be deferred to the regulations, including the proposed sections 35(4) and 28A.

Section 35(4) would create an offence for not complying with the Act's requirements with respect to the information that is prescribed by the regulations to be included in a construction contract.

Similarly, section 28A requires Authorised Nominating Authorities to comply with the requirements of a Code of Practice to be prescribed in the regulations (and which may be amended at any time) at the risk of committing a criminal offence.

The Legislative Council has stated it generally prefers that substantive matters (and particularly the creation of offences) be contained in the principal Act so that they may be afforded the scrutiny of the Parliament. Accordingly, the Legislative Council has referred this issue to the Parliament for further consideration.

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## Enforcement of security of payment debts and the effect of offsetting claims

It is well known that the policy behind the model legislation in Australia known as "security of payment" is to ensure that the cash flow of contractors and subcontractors on construction projects is maintained, thus reducing the risk of insolvency for participants in the industry (particularly those who are further down the contractual chain).

Accordingly, the security of payment legislation is predicated on a "pay now, argue later" approach, where a successful claimant is to be paid the amount of his progress claim on an interim basis, but may later be required to return some or all of that payment if he is found to have overcharged his client, or if his client has an offsetting claim.

The tension between the contractor's right to enforce payment of a payment claim made under the security of payment legislation and the right of his client to resist such payment on the basis of having an offsetting claim was examined recently by the Supreme Court of New South Wales in *Grandview Ausbuilder Pty Limited v. Budget Demolitions Pty Limited* [2018] NSWSC 1647.

Grandview is the builder of a residential development currently underway at Villawood known as "Maple Village". Grandview engaged Budget to carry out certain demolition and excavation work on the project for a subcontract price of approximately $2.5 million. Work under the subcontract began in July 2017, with a scheduled completion date in December 2017.

In November 2017 Budget served a payment claim under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("SOP Act"). Grandview served a payment schedule in response to that claim, but did not pay the amount it had scheduled. In December 2017, Budget served a further payment claim under the SOP Act. This time, Grandview did

not serve a payment schedule within the time allowed by the SOP Act.

Meanwhile, the date for completion of the subcontract work passed and the works were still incomplete. Grandview closed the site for the Christmas and New Year break and when Budget resumed work on 3 January 2018 Grandview instructed them to stop work and leave the site.

On 31 January 2018 Budget formally gave notice of its intention to suspend works (as it was entitled to under the SOP Act) due to Grandview's failure to pay the amount scheduled in response to the November payment claim. On the same day, it issued a statutory demand for the amount of the November and December payment claims.

Grandview made an application to court to set aside the statutory demand pursuant to section 459G of the *Corporations Act 2001* (Cth). Section 459H of that Act provides that where such an application is made and the court is satisfied that there is a genuine dispute about the existence of the debt forming the basis of the statutory demand, or where the debtor has an offsetting claim, the court must calculate the proportion of the substantiated debt that is subject to the offsetting amount, and make orders accordingly.

Grandview could not dispute that the effect of the SOP Act was that it was indebted to Budget for the combined amount of the two payment claims. However, Grandview contended that it had the benefit of three distinct offsetting claims, two of which it said were for liquidated damages pursuant to the terms of the subcontract.

Parker J commented that Budget had a "strong case" that its liability to pay liquidated damages ceased before 31 January, since Grandview had actively taken steps to exclude it from the site on 4 January. In this regard, his Honour noted that for the purpose of deciding whether the statutory demand should be set aside the court was only concerned with whether Grandview's claim was genuine and sustainable. If it was, then the strength of the claim and the likelihood of it being sustained at a hearing were immaterial.

In Parker J's view, Grandview had a potentially viable claim for delay damages for every calendar day from 13 December to 31 January inclusive. Therefore, Grandview had established that it had an offsetting claim in the sum of $220,000 for the purposes of section 459H(1)(b) of the Corporations Act.

The second alleged offsetting claim was for liquidated damages for allegedly failing to meet milestone dates. However, the contract did not specify any rate of damages per day, and this had not been addressed in Grandview's evidence. Parker J held that pursuant to the principle of *Graywinter Properties Pty Limited v. Gas & Fuel Corp Superannuation Fund* (1996) 70 FCR 452 Grandview was not permitted to introduce a new ground that was not supported in its filed documentation, and accordingly, Grandview's claim to be entitled to liquidated damages for Budget's failure to meet the milestone dates failed in its entirety.

Grandview's third alleged offsetting claim was for the cost to complete Budget's subcontract work. However, the question arose whether any offsetting claim could have arisen at the time of the issuing of the statutory demand since Grandview had not yet terminated the subcontract and therefore its cause of action was at that stage simply "hypothetical".

Parker J noted that it seemed strange that a company facing a demand for an undisputed debt could avoid the presumption of insolvency by asserting that in the future it expected to have an offsetting claim, and being fortunate enough for the claim to accrue before the hearing of its application to set aside the statutory demand.

In *Pravenkav* the Court of Appeal had considered an earlier decision of the Federal Court in *Equuscorp Pty Limited v. Perpetual Trustees WA Limited* (1997) ACSR 675 in which the court had held that the amount of the offsetting claim had to be considered as at the time the court was determining the application under section 459G. This, the court had said, arose from the plain language used by the section, defining an "offsetting claim" as a genuine claim that the company has against the creditor. Moreover, the section assumed that the court may vary the amount in the demand, to take into account variations in the debt that may have occurred since the service of the statutory demand (for example by payments made on account of the debt in the meantime).

However, in the current case Parker J stated that he did not need to decide the matter, since he did not think that Grandview had a maintainable claim in any event. His Honour noted that the claim put forward by Grandview was for its cost to complete the work (assessed at approximately $1.1 million) which was based on the amount of the payments already paid to Budget ($1.2 million) but did not take into account the subcontract price agreed between the parties. Parker J pointed out that this was misconceived, since Grandview's entitlement was for the amount of damages that would put it into the position in which it would have been if the subcontract had been completed in accordance with its terms. If the subcontract price of $2.5 million was deducted from the sum of $1.1 million and $1.2 million, the result was actually a negative, and therefore nothing was recoverable by Grandview. On that basis, the alleged offsetting claim failed in its entirety.

Therefore, out of its three potential cross-claims Grandview had successfully established the existence of only one, which section 459H required to be taken into account against the debt. However, Parker J noted that Grandview had not yet commenced any proceedings to vindicate the offsetting claims that it had asserted despite eight months having passed

since the statutory demand had been issued. In his Honour's view, this was an unsatisfactory situation, which his Honour considered was a clear case of a creditor being stultified.

His Honour stated:

> *"In my view, a company facing a statutory demand which it contests on the ground of an offsetting claim should be expected to take immediate action to bring that claim forward for determination in the proper forum. If the company does not do so, it is at risk of the Court concluding that the asserted offsetting claim is not genuine … The Court may also exercise its discretion to refuse to set aside the statutory demand even if an offsetting claim is established, or exercise its power under s.459M to impose conditions on the grant of relief."*

Parker J thus ordered that the amount of the statutory demand be reduced by $220,000, but only if Grandview undertook to commence proceedings as quickly as reasonably practicable to assert its offsetting claim (along with any claim arising out of the subcontract), to pay the sum of $220,000 into court, and thereafter to prosecute its claims with all due dispatch.

While this judgment provides an interesting examination of the law applicable to setting aside statutory demands in the context of claims under building contracts, it also raises the question of why Budget chose to issue a statutory demand (an option ordinarily used for general commercial debts) as the means of enforcing the debt owed to it by Grandview pursuant to the provisions of the SOP Act.

On the facts of the case as set out in the court's judgment, Budget would have been entitled to commence proceedings in court to enforce the unpaid November and December payment claims, and pursuant to section 16(4) of the SOP Act Grandview would not have been entitled to bring any cross claim against Budget, or raise any defence to those proceedings – which have been likely to have led to an entirely different outcome.

Similarly, Budget had the option of applying for adjudication of its payment claims and in the absence of any payment schedule having been issued by Grandview in response to the December payment claim (either earlier or after the appropriate notice had been provided by Budget), Grandview would not have been entitled to provide any substantive response to that claim.

The reports by the parties' experts also showed a lack of familiarity with the workings of construction contracts. Grandview's expert's calculation of liquidated damages was clearly not supported by the terms of the subcontract, and neither expert appeared to have understood how damages following the termination of a building contract should be calculated. Further (and interestingly), none of the parties' advisers appears to have identified that the payment of liquidated damages is not a taxable supply that attracts a liability for GST.

At Gillis Delaney we have expert construction lawyers who have in depth knowledge and expertise with respect to the making and enforcement of payment claims under the SOP Act, and who can provide advice on the strategy to follow in order to obtain the best outcome for our clients.

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## EMPLOYMENT ROUNDUP

### Overtime – how much is reasonable?

The *Fair Work Act 2009* (Cth) (*the FW Act*) provides in section 50 that *"[a] person must not contravene a term of an enterprise agreement"*.

Many Enterprise Agreements include a clause to the following effect:

> *"The employer may require an employee to work reasonable overtime and the employee shall work such overtime as required."*

Can utilisation of such a clause involve a breach of section 50?

In the recent case of *Construction, Forestry, Maritime, Mining and Energy Union v Hay Point Services Pty Ltd* [2018] FCAFC 182, the Full Court of the Federal Court of Australia had to consider this question.

The employer implemented a new roster, the effect of which was to require employees to work 455 hours of overtime per year or 8.7 hours of overtime per week. The CFMMEU alleged that by doing so, the employer contravened a clause of the Enterprise Agreement, and thus, section 50 of the FW Act.

The judge who first heard the claim dismissed the union's application on the basis of a threshold question raised by the employer. Her Honour found that the relevant clause was not a provision which can be "contravened" by the employer for the purposes of s 50 of the FW Act, because her Honour found that the clause did not impose any obligation on the employer.

Her Honour observed the use of the verb "*may*" in the relevant clause in relation to the employer and contrasted that with the use of the verb "*shall*" in relation to an employee. Her Honour felt that it was plain that the word "*may*" meant no more than "*has permission to*" and that the clause merely granted an

entitlement to the employer without imposing any obligation upon it.

The judge said:

> *Finally, cl 34.1 does not provide that [the employer] "may not" require an employee to work overtime unless that overtime is reasonable. … It does not follow from the existence of a mere entitlement to require employees to work reasonable overtime that there is a prohibition on requiring employees to work overtime that is at variance with the relevant standard. Those two points do not logically nor necessarily correlate.*

On appeal, the union was successful in convincing the Full Court that such reasoning was erroneous.

The Full Court approached the question of interpretation of the Enterprise Agreement by looking at the ordinary meaning of the words, read as a whole and in context, and understood in the light of its industrial context and purpose.

They observed that the words are not to be interpreted in a vacuum divorced from industrial realities; rather, industrial agreements are made for various industries in the light of the customs and working conditions of each, and they are frequently couched in terms intelligible to the parties but without careful attention to form.

They approved of the statement that interpretation of an industrial instrument

> *"…should not be a strict one but one that contributes to a sensible industrial outcome such as should be attributed to the parties who negotiated and executed the Agreement".*

The Full Court accepted that the word "*may*" is permissive, and agreed with the primary judge that the clause provides the employer with an entitlement and that it is a clause which is beneficial to it. However, they disagreed that the clause did not contain an obligation or restriction that was incapable of being breached by the employer.

The Full Court was of the view that focussing on the word "may" as having a permissive and entitling character failed to appreciate that, when read as a whole, the clause also has restrictive and protective elements. The clause did not solely provide for an entitlement to the employer, but is also protective of the interests of employees.

The limitation in the clause which qualifies its permissive character is provided by the word "*reasonable*". That restriction is not beneficial to the employer. It imposes a negative or restrictive stipulation that only reasonable overtime may be required by the employer.

A failure by the employer to comply with that stipulation will constitute a contravention of the clause and, in turn, a contravention of s 50 of the FW Act.

The reasonable overtime clause must be construed in context and, in particular, in the context of other provisions of the Agreement which deal with the hours of work that the employer may require an employee to perform. The Agreement provided for maximum hours of work for full-time employees of 35 hours per week (which may be averaged over a five week shift cycle). The overtime clause simply recorded the permission granted to the employer to require additional hours of work beyond the limitations otherwise imposed by the Agreement.

However, the capacity to require additional work by way of overtime is restricted. That is the work of the word "*reasonable*". Its purpose is to qualify the capacity of the employer to require employees to perform additional hours of work.

The Full Court also took the view that the clause was intended to be effective and produce a sensible industrial outcome. In that respect, and consistently with the purpose of the FW Act, the purpose of the clause must be recognised to include the purpose of protecting employees from being compelled to perform unreasonable overtime.

For all those reasons, the Full Court concluded that the relevant clause was a term that may be contravened by the employer within the meaning of s 50 of the FW Act. The question of whether an extra 8.7 hours overtime a week was reasonable was left for later determination.

So, most employers will have a right to require reasonable overtime under their Enterprise Agreements. But requiring more than is reasonable can constitute a breach of the FW Act and exposure to civil penalties. Determining how much overtime to require needs careful consideration.

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## WORKERS COMPENSATION ROUNDUP

### Relevance of Symptoms in Disease Injury Claims in NSW

An "injury" is defined in Section 4 of the Workers Compensation 1987 Act as "personal injury arising out of or in the course of employment" and includes "disease" injuries that are contracted in, or aggravated etc in the course of employment, but only if employment was the main contributing factor to contracting the disease or aggravation etc.

The application of these provisions and the discharge of the burden of proof required to establish an employer's liability for disease injuries has been the

subject of discussion in a recent determination of the Court of Appeal in *Taylor v J&D Stephens Pty Ltd* [2018] NSWCA 267.

The worker was employed as a shearer until 2015. In June 2015 he suffered a crush injury to his right arm.

Independent medical examination ("IME") of the worker revealed in addition to the specific injury to the right arm he suffered injuries to both upper extremities, his neck, back and both lower as a result of the "nature and conditions of his employ".

There was no controversy that there was no contemporaneous reference in the evidence from the treating doctors of injuries or symptoms experienced in the body parts the worker alleged in his nature and conditions/disease claim.

The worker's statement described the heavy and arduous nature of his work as a shearer with pressure on the various body parts. The worker stated as a result of the nature and conditions of his employment he suffered pain and discomfort in the various parts of his body.

The IME obtained by the insurer commented the worker's employment as a shearer was quite a physically demanding occupation. He advised he would need to re-examine the worker to provide an opinion as to whether any of the conditions or injuries of which the worker complained were related to the nature and conditions of his employment. This aspect of the employer's case was not advanced with any additional medical evidence.

The insurer disputed liability on the basis the whole person impairment of the worker's right forearm resulting from the specific injury did not reach the threshold required by Section 66(1). It also asserted there was no injury within the meaning of Section 4 to the various body parts alleged and it was disputed the worker suffered a disease or the aggravation, etc of a disease with respect to those body parts.

In proceedings before the Workers Compensation Commission the worker sought whole person impairment arising from the nature and conditions of his employment as a shearer or alternately as a disease or aggravation thereof pursuant to Section 4(b) of the 1987 Act.

The dispute proceeded to arbitration. Whilst the arbitrator accepted the work over many years as a shearer involved heavy repetitive work at a fast pace which was physically demanding and involved prolonged and repetitive use of the upper limbs, she rejected the claim on the basis there was no evidence the worker suffered an injury. No reasons were given as to why she rejected the worker's IME's opinion which was unchallenged by evidence to the contrary. Similarly she did not refer to the authorities the worker's Counsel had relied upon to the effect that shearing was notoriously stressful and degenerative disease of the back was an occupational disease for shearers.

The arbitrator held the worker had not discharged his burden of proof because of a lack of contemporaneous complaints about the affected body parts, despite repeated consultations with his general practitioner and inconsistency in his history. It is apparent the arbitrator rejected the claim not because he failed to establish the injury was caused by the nature and conditions of his employment, but because he did not establish he suffered an injury.

On appeal before a Deputy President the challenge to the arbitrator's decision was dismissed on the basis the proper test to determine a disease injury was not raised or argued before the arbitrator.

An appeal was lodged with the Court of Appeal. The lead decision was delivered by Her Honour Simpson AJA.

After examining the relevant provisions of the workers compensation legislation including the definition of a "disease injury" in Section 4 of the 1987 Act Her Honour noted there were three components to a claim for disease injury –

- the existence of a "disease";
- that the disease was contracted in the course of employment; and
- employment was the main contributing factor to the contraction of the disease.

The arbitrator's reasoning indicated it was the absence of any record of complaints by the worker of symptoms in any of the relevant body parts that resulted in the arbitrator's rejection of the worker's claim as she was not satisfied he had proved he suffered injury as distinct from being satisfied of "an employment related cause of the injury".

Her Honour determined the Deputy President did not address the substance of the issue raised in the worker's appeal, that is, whether a complaint of symptoms is necessary before disease injury can be established. In failing to deal with that argument the Deputy President denied the worker procedural fairness. Therefore the Court of Appeal determined it appropriate to remit the matter to an arbitrator for redetermination.

Her Honour McColl AP provided additional observations to the reasons of Simpson AJA. She referred to a number of appellate decisions where it was held it is sufficient for a worker to establish "injury" in disease cases if he had suffered "a disturbance of the normal physiological state which may produce physical incapacity and suffering". The insurer's counsel did not contest the proposition put by the worker's counsel it was not necessary that the worker complained of the injury.

Her Honour observed decisions in the Compensation Court had highlighted that shearing is notoriously stressful to a worker's back such that one could almost categorise degenerative disease of the back as an occupational disease for shearers. Therefore experienced workers compensation judges had no difficulty in finding a worker was entitled to compensation on evidence similar to that presented by the worker. She agreed with submissions from the worker's Counsel that proceedings before the Workers Compensation Commission, which is a specialist Tribunal, proceed on the basis it is well familiar with fundamental principles related to its area of speciality. Nonetheless it was incumbent on Counsel to draw the arbitrator's attention to the critical decisions rather than assume familiarity with what might be accepted to be established principle.

Likewise His Honour Payne JA agreed there had been an error in point of law such that the matter must be remitted to the Commission. He agreed there was error in point of law by the Presidential Member in declining to allow the issue as to whether contemporaneous complaint of symptoms was a necessary element of the test to find "injury" within the meaning of Section 4 of the *Workers Compensation Act 1987* to be raised by the worker.

Whilst the ultimate determination of the issue as to whether complaint of symptoms is necessary to establish "injury" where the disease provisions of Section 4 are relied upon has been remitted to the Commission for further determination, the decisions by the appellate judges appears to suggest that as long as the worker can establish the three components to a claim for disease injury referred to by Her Honour Justice Simpson AJA it is not necessary to establish contemporaneous complaint of symptoms to the body parts alleged in a nature and conditions/disease claim, particularly in circumstances where the insurer does not lead contrary evidence or does not put forward a contrary proposition in submissions.

We await the further determination of the Commission with interest.

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## The Perils of Section 318 of the WIM Act

In New South Wales there are a number of pre-requisites that must be satisfied to bring a claim for damages against an employer.

Firstly, a claim for lump sum compensation must be made and a 15% whole person impairment established as part of that claim. A Notice of Claim for work injury damages must then be served and two months after provision of particulars (or earlier if there has been a response from the insurer), a Pre Filing Statement can be served. After the Pre Filing Defence is served a mediation will be held in the Workers Compensation Commission unless liability is wholly denied. It is only if the matter does not resolve at that point that Court proceedings can be commenced.

The system is designed to be front end loaded and Section 318 of the *Workplace Injury Management and Workers Compensation Act* 1998 provides that if proceedings are commenced then the Statement of Claim filed must not be materially different from the Pre Filing Statement.

What happens if proceedings are commenced and the Statement of Claim filed is materially different from the Pre Filing Statement?

This issue was recently considered by the NSW Supreme Court in the decision of *Scott Richard Hall v Mars Australia Pty Limited & Anor*.

Scott Hall was injured in an accident on 6 November 2009 whilst participating in a team building exercise arranged by his employer, Mars Australia. The team building exercise was taking place at Treetops Adventure Park. The operator of Treetops Adventure Park was also a defendant to the proceedings.

There was a dispute as to precisely how the accident occurred. Hall injured his back whilst above ground and moving from tree to tree. The particular exercise involved planks of wood. Whether the planks were being carried or stepped on was part of the dispute.

The worker's injury claim form was initially lodged on 27 November 2009. On 4 August 2013 Hall came to a lumbar fusion which was paid for by the employer's workers compensation insurer. He was assessed as having sustained 20% whole person impairment on 27 May 2015. The Pre Filing Statement was served on 17 July 2015.

However the difficulty for Hall in this case was that the Statement of Claim that was ultimately filed in the Supreme Court differed from the Pre Filing Statement that had been served prior to commencement of proceedings.

The matter ultimately came before Justice Davies of the Supreme Court in relation to this issue and also a limitation issue as proceedings had been commenced more than three years after the date of accident.

Hall argued that the difference between the Pre Filing Statement and Statement of Claim was immaterial and so did not fall foul of Section 318.

Hall argued that given the histories contained in the various medical reports and the actual knowledge of Mars Australia that Hall lost his footing, Mars was well aware of the accident description.

His Honour Justice Davies however disagreed.

His Honour stated:

*"In my opinion, the Statement of Claim is materially different from the Proposed Statement of Claim that formed part of the Pre Filing Statement. The essential difference is the description of the cause of the injury to the back. Paragraph 5 of the Pre Filing Statement said that the requirement to lift the plank of wood and twist the plaintiff's body in the direction of where the planks were to be transported caused him to suffer the loss and damage. That was reinforced by paragraph 7(a) which defined the risk of injury as the requirement to lift, twist and transport the planks of wood. In the filed Statement of Claim, paragraph 4 repeated that the requirement was to lift, twist and transport the wood, but then asserted it was the loss of his footing which caused him to suffer the loss and damage. If there was any doubt, paragraph 6(a) defined the risk as the risk of falling rather than the risk from a requirement to lift, twist and transport.*

*It is clear from the Statement of Claim that the alleged mechanism of the injury was the fall rather than the twist from the requirement to lift and transport the wood. The accident described in the filed Statement of Claim would require a different investigation from that described in the Proposed Statement of Claim. The actual mechanism of the injury is likely to be different because injury from a fall would result either from an impact or a severe jarring if the fall was broken in some way, perhaps by a harness as appears to be asserted in some documents.*

*No one reading the Pre Filing Statement, the claim documents or the medical reports could have understood that the plaintiff was injured as a result of a fall. The first time a fall is asserted is in the Statement of Claim."*

Justice Davies noted that it was accepted by the parties that if his Honour determined the Statement of Claim was materially different from the proposed claim in the Pre Filing Statement then the proceedings against the employer should be dismissed. This is therefore what occurred.

The work injury damages system is designed to be front end loaded so parties have the best opportunity to resolve the matter prior to Court proceedings being commenced. Both claimants and defendants must ensure that section 318 is complied otherwise there will be consequences.

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## A Total Knee Replacement is an "Artificial Aid"

The 2012 Amendments to the Workers Compensation Act 1987 introduced a cap on payments of compensation for medical and related expenses under Section 60. For all but seriously injured workers compensation for treatment, service or assistance given or provided end twelve months after a claim for compensation in respect of the injury, unless weekly payments of compensation had been paid in which case the entitlement comes to an end twelve months after the worker ceases to be entitled to weekly payments of compensation.

In 2015 amendments were introduced which exempted the provision of crutches, artificial members, eyes or teeth and other artificial aids or spectacles (including hearing aids and hearing aid batteries) as well as modification of a worker's home or vehicle and secondary surgery from this restriction.

In our April 2018 Newsletter we discussed the interpretation of "artificial aids" in the context of the appellate determination of Deputy President Snell in *Pacific National Pty Limited v Baldacchino* [2018] NSWWCCPD 12.

In that decision the Deputy President confirmed the decision at first instance by an arbitrator that the worker was entitled to an order under Section 60(5) that the insurer pay for the provision of a total knee replacement on the basis it was an "artificial aid". The Deputy President rejected the employer's argument that the "artificial aids" referred to in Section 59A(6)(a) were restricted to "aids that are external, visible and externally accessible to an injured worker's body". He noted that artificial teeth, eyes and even hearing aids could be partially internal and partially external and they were clearly not excluded from the section. A total knee replacement replaces a part of a leg, except that it happens below the flesh.

The employer appealed.

The Court of Appeal has now confirmed the decision of the primary decision maker and the Deputy President in *Pacific National Pty Limited v Baldacchino* [2018] NSWCA 281.

Before the Court of Appeal the employer argued that on no proper interpretation of an expression like "artificial aid" could two or three pieces of plastic surgically inserted in a knee to replace lengths of human bone that were excised (that is, a total knee replacement) come within Section 59A(6)(a) of the *Workers Compensation Act 1987*. It was further argued that if compensation was payable in respect of the cost of the materials to be used in the knee replacement operation, the cost of the surgery was nevertheless not covered.

The Court of Appeal's decision was delivered by Macfarlan JA who accepted that "artificial aids" must work to ameliorate the effect of a person's disability and may comprise a single object or a composite of objects operating together. A knee replacement has these characteristics and its provision cannot occur without a surgical operation. Therefore, the cost of the operation was held to fall within the statutory provision.

The Court of Appeal rejected the employer's submission the artificial aid must be "complete in itself". Many artificial aids involve a process of connection of articles to the body in a manner comparable to that involved in knee replacement.

The Court of Appeal cautioned that each case must be decided on its own facts. Therefore its finding that surgery was within Section 59A(6)(a) should not be taken to adopting a general rule that the cost of surgery is always a cost of the provision of artificial aids. There may be cases where the insertion of material into a person's body is only an incidental part of major surgery.

Therefore as a consequence of the Court of Appeal's decision it is now settled the term "artificial aids" in Section 59A(6)(a) extends to the cost of provision of items designed to ease a worker's disability.

If the provision of the artificial aid requires surgery, the cost of that surgery will likely fall within the ambit of the sub-section unless it is only an incidental part of major surgery.

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