GD News

Gillis Delaney Lawyers

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What Duty Does A Stockbroker Owe?

The Full Court of the Federal Court of Australia has recently handed down its decision in *Eric Preston Pty Limited v Euroz Securities Limited* which has confirmed that the general scope of the retainer of a stockbroker is not one which incorporates an obligation to provide advice.

Eric Preston Pty Limited ("Preston") conducted very substantial share trading activities using a margin lending facility to finance its trading. Preston's margin lender was Leveraged Equities Limited ("Leveraged Equities"), a company associated with Adelaide Bank. Preston carried out its share trading activities through a stockbroker Euroz Securities Limited ("Euroz"). The Leveraged Equities facility was a standard margin lending agreement. It approved the purchase of shares with funds advanced by Leveraged Equities and the shares were held as security for the advances. Legal title in the shares was transferred to Leveraged Equities but the beneficial ownership remained with Preston.

In May 2007, Preston terminated the Leveraged Equities facility and entered into a new facility conducted by Opes Prime Broking Limited ("Opes Prime"). The Opes Prime facility was not a standard margin lending agreement. Rather it was a securities lending agreement under which Preston transferred the legal and beneficial ownership of the shares to Opes Prime in return for the funds advanced pursuant to the facility. The effect of the Opes Prime facility was therefore that Preston was exposed to the risk of insolvency of Opes Prime. The risk was one that arose because Opes Prime pooled the shares transferred to it under similar facilities and used those shares as security for loans made by Banks which financed the Opes Prime business. The demise of Opes Prime is well known.

Preston sought to recover its losses from Euroz. Preston claimed that an executive director of Euroz, Caldow, introduced Drummond a principal of Preston to the Opes Prime facility and told Drummond that the Opes Prime facility was the same as the Leveraged Equities facility. Preston argued that had Preston been told that it would be no more than an unsecured creditor of Opes Prime in the event of a collapse of Opes Prime and would be at risk of losing its portfolio in the event of the insolvency of Opes Prime, Preston would have remained with the Leveraged Equity.

The trial judge found that Caldow did not make the statement that Drummond alleged and preferred the evidence of Caldow. The trial judge also found that even if the risks associated with the Opes Prime facility had been conveyed to Preston it would still have terminated the Leveraged Equities facility and entered into the Opes Prime facility. The finding was based on Drummond's creditability and a number of subjective facts including emails concerning an investment in Sundance Energy which Leveraged Equities were not prepared to fund but Opes Prime were. In addition some weeks before the collapse of Opes Prime, Caldow and Drummond had identified fundamental differences in the facilities of Opes Prime and Leveraged Equities. Preston had the opportunity to re-finance with Leveraged Equities or National Australia Bank but did not pursue refinancing and continued to trade using the Opes Prime facility.

An appeal to the Full Court followed.

Preston argued that it retained Euroz to be its stockbroker and financial advisor. It argued there

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were certain implied terms in the retainer including a term that Euroz would advise Preston as to the true nature of the financial products that Preston would acquire and/or use on the advice of Euroz. Preston also argued that a similar duty arose in tort. Preston relied on expert evidence as to the nature of the advice that a reasonable and prudent stockbroker would give to a client, contemplating entry into a margin lending agreement.

So how does a stockbroker's retainer work?

The Full Court noted the correct approach to this question is found in the decision of Lush J in Option Investments (Aust) Pty Limited v Martin. Quoting that decision, the Full Court noted:

> *"The duty of a stockbroker is to execute the client's orders. Stockbrokers are not bound at law to give advice, but if they do so, they must of course provide the advice in a competent and honest way. The duties of a stockbroker at general law may be added to or varied by special agreement or by the circumstances of the case."*

The Full Court noted that in the absence of some evidentiary basis for inferring the voluntary undertaking by the stockbroker of the duty to advice, there is no duty to do so. The Full Court noted:

> *"Absent an evidentiary basis for inferring a voluntary undertaking by the stockbroker of a duty to advise, there is no duty to do so. Importantly, any duty to advise does not arise from the relationship alone but may arise from the circumstances of a particular case. The circumstances may consist of an express undertaking or facts and circumstances which give rise to an implied obligation to advise a client. In the present case there was no express undertaking . . . . Moreover, any facts and circumstances upon which Preston relied to give rise to an implied duty were insufficient to do so."*

The Full Court noted that what Preston argued was that there was a duty to provide advice in a matter which does not ordinarily relate to the nature or subject matters of orders which a broker is required to undertake for its client. Preston did not argue that the broker failed to advise about the wisdom of a particular stock or share rather it was a duty to advise in relation to a financial product which Preston was using. Preston failed in its argument that Euroz owed a duty of care to advise in relation to the nature of the financial product that Preston intended to use to fund the acquisition of shares. Preston's challenge to the finding that Euroz represented that the Opes Prime and Leveraged Equities facility were the same also failed. The Full Court found the trial judge did not fall into error when determining the facts.

This is one of many cases which have arisen as a consequence of the Opes Prime collapse. As is often the case, investors will look to recoup losses from whoever they can when a loss arises consequent to an investment. In this case, the Full Court confirmed that a stockbroker is not under a general duty to provide advice unless they agree to do so or the circumstances of the relationship imply the imposition of such a duty.

Section 54 Of The Insurance Contracts Act And Exclusion Clauses

Section 54 of the *Insurance Contracts Act* provides that an insurer is not entitled to refuse a claim either in whole or in part by reason of some act or omission of the insured or some other person which occurs after the contract of insurance was entered into unless that act or omission could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract. The insurer's liability in respect of a claim is however reduced by the amount that fairly represents the extent to which the insurer's interest was prejudiced as a result of that act or omission.

If an insured proves that no part of the loss that gave rise to the claim was caused by the act or omission the insurer may not refuse to pay the claim by reason only of the act.

This remedial provision provides significant benefits to insureds. However an act of an insured which results in the engagement of an exclusion clause in the policy will not attract the benefit of section 54 of the Insurance Contracts Act as was seen in the decision of the Queensland Court of Appeal in *Rae Johnson v Triple C Furniture and Electrical Pty Limited and Rural and General Insurance Limited.*

Triple C Furniture and Electrical Pty Limited ("Triple C") owned a Cessna 206 aircraft which crashed on takeoff. The pilot, Peter Johnson, was killed instantly and two passengers, one of whom was the pilot's wife were seriously injured. The pilot's wife, Rae Johnson, commenced proceedings claiming damages for personal injury alleging that Triple C was vicariously liable for the actions of its employee, the pilot, whose negligence in handling the aircraft on takeoff was the cause of her injuries.

Johnson succeeded at a trial obtaining an award of damages of $846,030. There was overwhelming evidence that the pilot was grossly careless in his control of the aircraft.

Triple C had effected a policy of aviation insurance with Rural and General Insurance Limited. Rural and General declined to indemnify Triple C under the policy claiming the circumstances of the crash fell within one of its exclusions. Rural and General were joined in the proceedings and Triple C disputed the applicability of the policy exclusion and argued that section 54 of the Insurance Contracts Act operated to overcome the exclusion, if it would otherwise apply, so as to bring the loss within the ambit of the policy.

The policy contained an exclusion that provided that the policy did not apply whilst the aircraft, with the knowledge of the insured or the insured's agent was used for any illegal purpose or if the aircraft was operated in breach of Communications. issued from time to time.

"Communications" were defined as recommendations, regulations, orders or bi-laws which would be regarded as an appropriate authority by aviators … in relation to air worthiness, air navigation and the legal operation of the aircraft."

Regulation 5.81 of the *Civil Aviation Regulation 1988* provides that a private pilot must not fly an aeroplane as pilot in command if the pilot has not within the period of two years immediately before the day of the proposed flight, satisfactorily completed an aeroplane flight review. The review was required to be retained in the pilot's personal log book.
It was common ground at the trial that the pilot had not successfully undertaken the flight review in the two year preceding the crash.

Whilst the case involved toing and froing about the existence of another log book and the accuracy of the log book ultimately the Court concluded that the pilot had not undergone the flight review. The Court Appeal concluded that the pilot flew the aircraft without having in the two years immediately beforehand satisfactorily completing an aeroplane flight review. Accordingly the Court determined that the exclusion clause was engaged and that Rural and General were entitled to have the claim against it dismissed unless section 54 operated to prevent that result.

For section 54 to be engaged there may be some act or omission of the insured or some other person by reason which the insurer may refuse to pay a claim. It is necessary to identify the act which would allow an insurer to refuse the claim. The act in this case was an omission namely the pilot did not satisfactorily complete an aeroplane flight review within two years of the flight the subject of the claim. It was argued but for that omission the pilot would not be in breach of regulation 5.81, the aircraft would not have been operated in breach of Regulations and the policy exclusion would not apply.

The Court of Appeal noted that the pilot's conduct was not an omission. The Court noted when considering what is an omission the word:

> *"carries with it an implication or connotation that the thing omitted, the thing not done, was something which was within the power of the omitted have done. An omission may be deliberate or inadvertent but whatever its cause one cannot, I think be said to omit to do something which is beyond one's capacity to do. The candidate for an examination who fails is not ordinarily only described as having omitted to pass. An athlete beaten in a contest does not omit to win."*

It was noted that the aeroplane flight review was not a formality, it required a thorough investigation of a pilot's theoretical knowledge and practical skills by a duly qualified and experienced examiner. Whether the pilot satisfactorily completes a review depends upon the instructor's assessment of the pilot's performance. The pilot did not omit to comply with the regulation rather the circumstances were that he did not satisfactorily complete a flight review. Accordingly there was not an omission as envisaged by section 54 of the *Insurance Contracts Act*.

Accordingly the Court determined section 54 did not apply to the facts of the particular case.

The Court of Appeal went on to conclude that section 54 takes as its starting point the existence of a claim in a contract and then the act or omission which the insurer relies on to refuse to pay the claim. It has been noted that section 54 does not permit or require the reformulation of the claim which the insured has made, it operates to prevent the insurer relying on certain acts or omissions to pay a particular claim.

In this case the claim made was for indemnity against a liability to pay damages to Johnson as compensation for her personal injury. The policy did not offer indemnity in circumstances where the aircraft was flown by a pilot who had not satisfactorily

completed a flight review within two years prior to the loss.

The Court of Appeal noted that for the purposes of applying section 54 one looks to see whether some act or omission entitles an insurer to refuse to pay the claim made. If the claim was for indemnity in respect of a loss which the policy did not cover, section 54 does not apply.

The Court of Appeal noted:

> *"The act or omission, assuming one is identified cannot operate to reformulate the claim or, in this case, convert the claim from one in respect of the loss caused by the pilot who had not completed the flight review into a loss caused by a pilot who had completed a flight review."*

The Court of Appeal noted that section 54 operates where there is a claim made on the insurer to which the policy responds but with respect to which an act or omission by the insured or some other person has the effect that the insurer may refuse to pay the claim.

Section 54 directs attention to the reason found in the refusal to pay the claim. The Court of Appeal noted

> *"the act or omission which founds the refusal cannot change the event or circumstances in respect of which the insured claims … indemnity from the insured to have."*

The Court of Appeal concluded that if they were wrong in regards to the application of section 54 to the relevant exclusion clause, in this case, there was ample evidence that a successfully completed aeroplane flight review could have addressed the pilot's demonstrated shortcomings of the pilot and improved his skills and the failure to undergo the review could reasonably be regarded as causing or contributing to the crash.

The Court of Appeal noted a flight review is a defence against pilot error which might cause an aircraft to crash. Its function is to ensure pilots have an appropriate level of skill and apply that skill to the task of flying. It is noted that the pilot in this case had a tendency to rush and overlook basic safety requirements. According to the Queensland Court of Appeal, these are the sorts of attitudes which a flight review is meant to identify and correct. The Court of Appeal concluded the act of not undergoing the flight review could reasonably be regarded as being capable of contributing to the loss.

At the end of the day the Court of Appeal concluded that section 54 had no application to the acts of the pilots in failing to undertake the air flight but hedged their bet by concluding the failure to undertake the review was a contributing factor to the loss.

According to the Queensland Court of Appeal, section 54 cannot be engaged as a remedial provision to prevent an insurer from refusing a claim relying on an act or omission that is the proximate cause of the loss and which falls within the terms of an exclusion. This makes perfectly good sense as the proximate cause of a loss is the effective cause of the loss. According to the Queensland Court of Appeal, if there is no valid claim under a policy, section 54 has no application. Section 54 of the Insurance Contracts Act continues to be a source of disputes for insurers.

Double Insurance -No Need For The Same Insured To Be Found Liable

Where a person arranges two policies of insurance covering the same liability, the principles of double insurance will apply and those insurers must bear the costs of the claim on a pro-rata basis. If one insurer pays a claim this gives rise to an entitlement to seek contribution from the other. Double insurance would apply if an employer has a workers compensation policy and CTP policy for a vehicle owned by the employer and a worker is injured by the negligent driving of the vehicle by another employee and both the CTP and workers compensation policy respond to the claim. The two insurers would be liable for the claim on an equal basis.

In NSW the Motor Accidents Compensation Act and Workers Compensation Act have evolved in a way which limits the circumstances where both the CTP policy and the workers compensation policy can apply to a claim although some circumstances will still trigger claims under both policies.

However the question arises as to whether or not double insurance will apply where the two policies are liable to respond to a claim but the policies are issued to different insureds.

The NSW Court of Appeal in *Zurich Australia Limited Insurance v GIO General Insurance Limited* has confirmed that the principles of double insurance will apply where both policies cover the same liability even though there are different insureds. To understand the decision it is necessary to understand the facts of the case.

The Wood family ran bus and coach services through two companies, Caringbah Bus Services Pty Limited ("Caringbah") and Tiger Tours (Management) Pty Limited ("Tiger"). Caringbah operated school and timetable services using buses and Tiger operated coach services using coaches with a "Tiger" livery. Caringbah attended to registration of all buses and coaches including the Tiger coaches and all vehicles were registered in Caringbah's name. Ian McClellan was employed by Tiger as a driver. He drove a Tiger coach used for coach services but at times he drove a Caringbah bus or a Tiger coach used for Caringbah bus services.

McClellan was driving a Tiger coach for a golfing party when he lifted the heavy bottom hinge door of a trailer towed by a Tiger coach. He sued Caringbah in the District Court for damages under the Motor Accidents Compensation Act alleging his injuries were caused by the fault of Carringbah in the use or operation of the vehicle by a defect in the vehicle. Liability was admitted and damages were agreed at $352,000.00.

Caringbah argued that the damages should be reduced by virtue of Section 151Z(2)(c) and (d) of the *Workers Compensation Act 1987* which provide that where an employer is negligent any damages award must be reduced to reflect the employer's contribution.

McClellan conceded that he was not entitled to sue his employer for damages by virtue of the threshold in the *Workers Compensation Act 1987* which provides damages are not recoverable from an employer unless a 15% whole person impairment threshold is satisfied. Accordingly, if the damages were reduced for the employer's negligence they would be reduced proportionately to the extent that the employer contributed to the damage. If the employer was 50% liable the damages would be reduced by 50%.

The *Workers Compensation Act 1987* provides that the damages regime in the *Workers Compensation Act 1987* will not apply to a *Motor Accidents Compensation Act* claim made against an employer. The Courts have determined that an action for motor accidents damages cannot be brought as an action for breach of an employer's duty of care. Accordingly, the Court had to determine whether or not Tiger was an owner of the coach and potentially liable for a motor accident, or rather whether or not Tiger's actions amounted to a breach of the employer's duty of care. Unsurprisingly McClellan argued that Tiger was an owner of the coach as well as Caringbah. The trial judge held that Caringbah and Tiger were both owners of the coach and that Tiger was exercising possession of the coach at the time and Caringbah was entitled to immediate possession of it, and so each fell within the definition of owner in the Motor Accidents Compensation Act. As the accident was a motor accident the damages regime to assess the employers liability if it had been sued was the Motor Accidents compensation regime. The effect of that finding was that there would be no reduction in the damages award.

Zurich was the third party insurer of the coach and it was common ground that recovery extended to the trailer. Zurich insured the owner of the coach in respect of its liability. The policy had been taken out by Caringbah.

GIO was the workers compensation insurer of Tiger. Under the statutory workers compensation policy it was liable to pay for any other amounts that Tiger became liable to pay independently of the *Workers Compensation Act 1987* for injury to its workers.

Whilst the Court determined that Tiger was also an owner McClellan had not sued Tiger.

The Court of Appeal noted that:

> *"contribution on the basis of double insurance may be claimed when an insured is entitled to indemnity from two different insurers in respect of the same liability. Payment by one insurer benefits the other, and the burden must be shared pro rata."*

Caringbah had been held liable and was entitled to be indemnified by Zurich. Caringbah was not entitled to indemnity from GIO in respect of its liability to McClellan. However, if Tiger had been sued by McClellan it would have been liable to Mclellan for damages under the Motor Accidents Compensation Act and the Zurich policy would respond to Tigers liability. Hence, Zurich sought to invoke an extension of the principle of contribution on the basis of double insurance relying on a previous case of *AMP Workers Compensation Services (NSW) Limited v QBE Insurance* which determined that double insurance

applied in a situation where an employee was injured by the negligent driving of another employee for whose negligence the employer was vicariously liable. In that case, the employer's third party insurance was with QBE, they covered the employer's liability as owner and the driver's liability as driver. The employer also held a workers compensation insurance policy with AMP, which extended to the employer's common law liability to its workers but did not cover the negligent employee's acts. Notwithstanding that the employee only was sued the Court held that the principles of double insurance applied to the claim.

The trial judge in *Zurich Australia Limited Insurance v GIO General Insurance Limited* determined that double insurance did not apply as it was necessary to look at the liabilities that were actually crystallised. A liability for Tiger had not crystallised. An appeal followed and the Court of Appeal disagreed.

Giles JA noted:

> *"With respect, his Honour was not correct in his understanding of the MMI case. It did not lay down that regard was to be had to burdens actually borne rather than what might have been the case if the injured party had made a different choice, or that "questions of double insurance are to be answered by reference to actually crystallised liabilities, not liabilities that might have come into existence if the victim of the casualty had taken some course other than that in fact taken" . On the contrary, in the AMP case regard was had to what might have been if Mitchell had made a different choice, and in the MMI case Handley JA pointed out that it had been held in the AMP case that the fact that the liability had crystallised by a settlement which placed the whole burden on one of the insurers did not defeat that insurer's right to contribution. The un-crystallised liability of the employer in the AMP case was sufficient for double insurance, where the failure in crystallisation was due to Mitchell's choice to sue Graupner (the employee)rather than the employer although the employer had a joint liability with that of Graupner.*

In this case there was double insurance because Zurich was liable for claims against both Caringbah and Tiger and Tiger was also entitled to indemnity from GIO in relation to McLellan's claim if Mclellan had decided to claim against Tiger. The Court of Appeal also noted that GIO concurred to the admission of liability and the agreement on the assessment of damages.

To determine whether or not the principles of double insurance apply it is necessary to look to the liability at the time that the accident arises. The choice made by a plaintiff to sue one or other party will not affect the application of double insurance. If there is a liability and a policy will respond to that liability the fact that the actual insured that is covered by two policies is not sued, is not an insurmountable impediment to a claim for double insurance. It does not matter that a liability is crystallised as a liability of a different party as ther time to determine the application of double insurance is the time arises.

"Other Insurance" Clauses - Parent Companies Arranging Insurance For Subsidiaries

Section 45 of the *Insurance Contracts Act* provides that an "other insurance" clause in an insurance policy which seeks to limit an insurer's liability under one insurance policy where coverage is provided by another insurance policy arranged by the insured is void. Other insurance clauses are void to the extent that they limit an insured from recouping benefits under two policies of insurance.

Last year, the High Court had cause to consider the application of other insurance clauses where one policy is arranged by a party and that party is a beneficiary under a different policy of insurance but did not arrange that policy. The High Court concluded that Section 45 of the Insurance Contracts Act had no application to a policy taken out by an insured where the "other insurance" was not effected by the insured.

In that case, Speno Rail had arranged insurance with Zurich Insurance. The policy which was arranged was endorsed to include Hamersley Mines as an insured under the policy. Zurich agreed to indemnify Hamersley Mines in relation to a damages claim for an injury to an employee of Speno Rail.

Zurich sought contribution pursuant to the principles of double insurance from Hamersley's insurer. That claim was resisted based on the terms of the "other insurance" clause found in Hamersley's policy. The High Court upheld the application of that clause and determined that Section 45 of the Insurance Contracts Act did not apply to an "other insurance" clause in in the policy effected by Hamersley as the Speno policy was not effected by Hamersley and Hamersley were simply a beneficiary under the policy.

So what happens where a policy of insurance is arranged by a parent company for a subsidiary in its group? Will the insurance arranged for the subsidiary company be seen to be effected by the parent company and not the subsidiary with the

end result that Section 45 of the Insurance Contracts Act will have no role to play in relation to the policy under which the subsidiary is a beneficiary. The simple answer is no, as was seen in the recent Queensland Supreme Court decision in *Nicholas v Wesfarmers Curragh Pty Limited*

Nicholas had brought a personal injuries claim against his employer G&S Engineering and the operator of the mine he worked in, Wesfarmers Curragh Pty Ltd (Curragh). Curragh was a wholly owned subsidiary of Wesfarmers.

Wesfarmers arranged insurance with QBE 386. The policy included Wesfarmers' subsidiaries as insureds under the policy. G& S arranged insurance with Brit Insurance. The definition of insured under the Brit policy included "principals".

The Brit policy included an "other insurance" clause that sought to limit the policy's response for claims where other insurance responded. The other insurance clause stated:

> *"where allowable by law, this policy is excess over and above any other valid and collectable insurance and shall not respond to any loss until such time as the limit of liability under such other primary and valid insurance has been totally exhausted."*

Curragh sought indemnity under the G&S insurance policy on the basis it was a principal and it was entitled to indemnity under the policy. G&S's insurer declined the claim on the basis of the other insurance clause in its policy.

The Court ultimately determined that the other insurance clause was void by reason of the operation of Section 45 of the Insurance Contracts Act and the Brit policy was liable to respond to the claim.

The Court noted that Curragh was the named insured on the QBE 386 policy. Pursuant to a "Principals liability" extension in the Brit policy Curragh sought indemnity in relation to a claim made against it. Brit argued that the QBE 386 policy was not entered into by Curragh but by its parent company, Wesfarmers for the benefit of Curragh and as the QBE 386 policy was not entered into by Curragh Section 45 did not apply to make the "other insurance" clause void.

The Court ultimately concluded that Wesfarmers had entered into the contract of insurance with QBE 386 as the agent of Curragh with the same legal effect as though Curragh had contracted directly with QBE 386.

The Court rejected Brit's argument that Section 45 had no application to the circumstances and declared that Brit's "other insurance clause" was void by virtue of the operation of Section 45. Accordingly, both the Brit and the QBE386 policy responded to the claim. The end result was that the principles of double insurance applied and each insurer shared in the cost of the claim.

Section 45 of the Insurance Contracts Act does not invalidate an "other insurance" clause in one contract of insurance unless the other contract of insurance was entered into by the same insured.

Further if a company arranges insurance for its subsidiaries it will be seen as the agent of the subsidiary and the contract of insurance will be one where the contracting parties for the purpose of the subsidiaries' insurance will be the insurer and the subsidiary.

Noting An Interest On A Policy. What Does It All Mean?

Often insurance brokers are asked by their clients to note the interest of a party on the insurance they arrange for their clients. But what does noting an interest really mean? As was seen in the Federal Court decision of Justice Middleton in Secured Funding Pty Limited v Insurance Australia Limited, a notation of interest does not mean that the party whose interest is noted is an insured under the policy.

Philp was the sole registered proprietor of a property. Secured Funding entered into a written loan agreement with Philp and Parker and a mortgage over Philp's property secured the loan. The terms of the mortgage required Philp to effect and maintain insurance cover in respect of the property and provided that Secured Funding was entitled to the benefits of any insurance policy arranged by Philps and Parker to the extent of its interest as mortgagee. Philps and Parker were required to take out insurance for the property noting Secured Funding's interest.

A policy of insurance was arranged by Philp with IAG. The renewal of the policy noted the "insured" was Parker and Philp and

the "credit providers first mortgagee / "interested party" as including Secured Funding".

The policy contained an exclusion clause, which excluded liability for "loss or damage as a result of fire started with the intention of causing damage by you or someone who lives in your home or has entered your home or site, with your consent or the consent of a person who lives in your home". "You" was defined as "the insured and if more than one person is named as the insured, we will treat a statement, act, omission or claim by anyone of those people as a statement, act, omission or claim by all of those people".

Philp with the intention of causing damage deliberately set fire to the property and the property was extensively damaged. The Court held that the exclusion clause was engaged. The Court noted the exclusion was not dependant on whether or not the claimant was the named insured or Secured Funding. The terms of the policy did not include a cross liability clause which would have provided that each co-insured is a separate and distinct insured and the acts of one insured would not affect the rights of another insured.

There is a vast difference between having a party covered under a policy as a named insured with the policy containing a cross-liabilities clause as against having a party's interest noted.

Generally noting a person's interests in an insurance policy is not enough to confer any rights on the person at common law or under the Insurance Contracts Act except to the extent that Section 48 of the Insurance Contracts Act permits a third party beneficiary to recover benefits under the policy. The noting of an interest effectively does no more than put the insurer on notice that another party has an interest in the insured property. Generally, a policy will not respond to the losses of a noted party but an insurer will be obliged to take into account the interests noted when settling the claim.

At the end of the day, when negotiating the terms of commercial agreements care needs to be taken in determining whether or not an appropriate term to incorporate in an agreement is one which requires an interest to be noted on a policy rather than require a party to be a named insured under the policy. In addition, if a party is to have its interest noted on a policy or become a named insured it is important to ensure there is a cross liability clause otherwise the act of one insured may impact on the rights of another to indemnity under the policy.

In this case, the exclusion clause was engaged as a consequence of the owner's conduct and Secured Funding had no entitlement under the policy.

Does The Settlement Of A Cross Claim Impact On The Plaintiff's Rights?

In New South Wales a settlement between a plaintiff and a defendant binds other potential defendant's rights against the defendant that has settled. *In James Hardie & Co Pty Limited v Seltsam Pty Limited* the Court determined that where a claim against one defendant was dismissed the immediate consequence of section 5 of *the Law Reform Miscellaneous Provisions Act 1946 (NSW)* ("LRMP Act") was that the party was not liable to the plaintiff and as a result it could not be liable to any other defendant including any defendant against whom a judgment would have been entered in favour of the plaintiff.
On the other hand, if a plaintiff has a claim against two defendants and settles one but discontinues the other, the party who has benefitted from the discontinuance will still be liable for a claim for contribution from the defendant against whom judgment was obtained.

The settlement of a claim by a plaintiff against a defendant therefore effects the rights of contribution between tortfeasors. So can a settlement between defendants affect the rights of a plaintiff?

The NSW Court of Appeal in *Bowcliff Pty Limited v QBE Insurance (Aust) Limited* has concluded that it does not.

Orchard sued Bowcliff to recover damages for personal injuries sustained in an assault outside the Bridge Hotel Rozelle. Bowcliff conducted the business of that Hotel. Bowcliff issued a cross claim against Australian Corporate Protection Pty Limited ("ACP)" and ACP cross claimed against DSSS Cousins Pty Limited, a security subcontractor. After DSSS went into liquidation ACP amended its cross claim to substitute QBE as a cross defendant. Following a mediation, consent judgments were entered on the cross claims and there was a verdict and judgment for ACP and a verdict and judgment for QBE.

Orchard's claim continued to trial and on the third day of the trial evidence emerged which caused Orchard to apply to join QBE as a defendant and Bowcliff to apply to join it as a cross defendant. Bowcliff had not previously cross claimed against the security contractor's subcontractor. The trial judge dismissed both applications to join QBE and ACP by virtue of the consent

judgments that were obtained on the cross claims. The trial judge found that QBE was a tortfeasor who had been sued in ACP's amended cross claim and held not liable by the consent judgment and on that basis the Court was bound by the principles in *James Hardie & Co Pty Limited v Seltsam Pty Limited* and determined that ACP and QBE could no longer be sued either by Orchard or Bowcliff for contribution.

An appeal followed and the NSW Court of Appeal disagreed.

The Court of Appeal confirmed that section 5(1)(c) of the LRMP Act makes a final judgment in favour of the defendant against the plaintiff binding on other tortfeasors liable for the same damage although they were not parties to the judgment. The Court of Appeal held that the consent judgment in favour of QBE in the cross claim by ACP did not bring QBE within the category of persons who have relevantly been sued and held not liable for the purpose of section 5 of the LRMP Act. What was required to attract the operation of section 5(1)(c) is a consent judgment at the suit of the plaintiff. It is only the settlement of a claim by a plaintiff against a defendant that finalises that defendant's liability and impacts on any claim for contribution brought by another tortfeasor against that defendant.

The Court of Appeal also considered section 22 of the Civil Procedure Act ("CP Act") which relevantly provides

> *"a person against whom a defendant makes a claim for relief under this section:*
> *(b) if not already a party to the proceedings:*
> *(i) becomes a party to the first proceedings, and*
> *(ii) unless the court otherwise orders is bound by any judgment (including a judgment by consent or by default) or decision (including the decision by consent) not any claim for relief in the proceedings (including a claim for relief in any cross claim in the proceedings)."*

This subsection makes a judgment between a plaintiff and the defendant binding on cross defendants however the Court of Appeal noted that it does not make a judgment under cross claims binding on a plaintiff. The Court noted section 22 "operates downwards for and against the plaintiff and cross defendants and sideways between cross defendants but not upwards against the plaintiff". At the end of the day the plaintiff who had not consented to a judgment as between ACP and QBE was not effected by any issue estoppels and section 22 did not prevent the plaintiff from joining QBE. The Court of Appeal also noted that section 22 did not effect Bowcliff's rights as it was already a defendant in the proceedings at the time of the settlement and section 22(3) makes it clear that the subsection only applies against a cross defendant who is not already a party.

The trial judge's determination was set aside and Orchard and Bowcliff were permitted to join QBE as a defendant. Section 5 of the LRMP Act and section 22 of the CP Act do not provide that a plaintiff will be bound by any judgment obtained or agreed between parties in cross claims.

Whilst the settlement by a plaintiff against a defendant will effect rights of contribution between tortfeasors, any settlement between defendants will not effect the plaintiff's rights against those defendants.

OH&S Roundup

Fatality Leads To $200,000 Fine

The NSW Industrial Relations Commission has recently imposed fines of $200,000 on Wollondilly Mobile Engineering Pty Limited as a consequence of a fatality on a worksite. Wollondilly Mobile Engineering was an engineering company which was conducting maintenance work for Penrose Pine Products. It was extending a platform/walkway and handrails on a shavings bin. The work included welding and the operation of angle grinders. The work was carried out by a qualified boilermaker and a second year apprentice.

The qualified boilermaker operated an electrically powered angle grinder to remove the existing handrail and then operated an electric arc welder on top of the shavings bin for approximately one hour. At about this time the two employees smelt smoke, a water fire extinguisher was used to spray initially underneath gaps in the roof of the shavings bin and then along the roof as the smoke increased. The boilermaker instructed the apprentice to descend and get help from an employee of Penrose Pine and open the shavings bin.

When the Penrose Pine employee came to the shavings bin he climbed to a lower platform operated hydraulic controls to open the shavings bin and flames engulfed the shavings bin. The boilermaker who had begun to descend with the welding unit

was surrounded by flames and he jumped from the upper platform to the ground, a distance of nine metres and received fatal head injuries. The Penrose Pine employee received burn injuries and was unable to return to his normal duties for three months.

Wollondilly Mobile was charged with breaches of the Occupational Health and Safety Act for failing to ensure the health and safety at work of its employees and of others. The court noted that the fact that an offence involved a great risk of death to another person or persons was an aggravating factor to take into account. The court noted there was an obvious and foreseeable risk, where hot work involving the use of a spark producing electric angle grinder and electrical arc welder were used in the vicinity of a quantity of timber shavings. The emptying of the shavings bin was an obvious step that should have been undertaken.

Wollondilly Mobile did not appear as it had been placed in liquidation. Interestingly the court determined the most culpable entity responsible for the incident was Wollondilly Mobile although Penrose Pine did play a role. Whilst there were two offences that arose out of the same facts, the principles of totality applied to moderate down the fine. At the end of the day a penalty of $200,000 was imposed on Wollondilly Mobile Engineering for the two offences.

Head Contractor Liable For Failure To Adequately Supervise

Kell & Rigby (ACT) Pty Ltd ("Kell & Rigby") recently received a fine of $110,000 for breaches of the OH&S Act after a contractor's employee fell from a roof. Essentially WorkCover alleged Kell & Rigby had failed to ensure the contractual obligations relating to the installation of roof guard rails was undertaken by a plumbing company and failed to ensure that people working at height did not undertake the work unless suitably erected scaffolding was in place.

Kell & Rigby were principal contractors constructing an Aldi Supermarket Store and engaged plumbing contractors to install the roof system. The plumbing contractors employee fell from a roof when he was not wearing a harness although scaffolding was erected around the perimeter walls. The scaffolding initially caught him as he fell. However, he ultimately fell from the edge of the roof onto the scaffolding and onto the ground floor concrete slab below.

The court noted the scaffolding was erected to be used by the roofer. Kell & Rigby's failure was alleged to be the failure to ensure that the roofer erected roof guard rail and failed to provide suitably erected scaffolding. The scaffolding was erected significantly below the roof edge and on the day of the accident a section of it had been removed.

Kell & Rigby relied on the certification of the scaffolding by the scaffolders. The court noted that Kell & Rigby's supervisors failed to recognise that by placing the scaffold platform lower than the roof edge with no handrails there was an exposed and open access between the roof and the concrete floor to the building below.

The Court noted there was a pre-existing safe system documented although it was not being adhered to. The Court noted:

> *"it is not in the preparation of materials that safe work methods are implemented but in the rigorous insistence on their performance through induction, training and especially supervision. While I accept there was a safe system planned by the defendant, it was not implemented on site. The incident reflects in a clear failure of supervision on site. The photographs reveal with dramatic effect the exposure to the risk of falling through the chasm and it is difficult to understand how experienced site supervisors did not recognise that risk. The Court reiterates that not only is there a need for rigorous supervision but experienced supervisors must also be given regular re-education on basic site safety standards."*

The Court highlighted the significance of supervision and made the following comments:

> *"Supervision on site is a key element in ensuring safe working. No supervisor should alter defined site safe work procedures without considering the occupational safety effect of that variation to the safe work method. This incident exposes the serious obligations carried by site supervisors on behalf of their employer. There is, in the construction industry, expected site-related difficulties but when there is a variation required to a safe work method that variation must be risk assessed and tested against safety requirements."*

The Court determined that:

> *"As to the level of criminality, this defendant, as the head contractor on site, failed to identify an obvious risk; it permitted a sub-contractor to not erect a contractually required roof edge guard rail; it accepted a certification from the scaffolder when the risk was obvious; it supervised roofers' work when there were no safety features on the scaffold*

(hand rail) and no roof guard rail erected; it required work on the roof although there was no scaffolding on one corner. There was a major failure to supervise on this site."

The Court determined that the plumbing contractor and Kell & Rigby contributed equally to the risk. Kell & Rigby were fined $110,000 for the breach of the OH&S Act.

Failure In Traffic Management Leads To $180,000 Fine

The RTA was recently fined a sum of $180,000 for an offence under the OH&S Act arising out of a failure on the part of the RTA to ensure that it had an appropriate traffic management plan at its place of work.

The RTA was carrying out road widening at a site and had engaged subcontractors to drive Prime Movers with attached trailers for the loading of excavation materials. There was a dedicated exclusion zone beside the median strip. The Prime Movers would leave the construction site through the dedicated exclusion zone. The RTA required that on the work site there was a spotter that provided safety clearance for truck movement. On this site there was no spotter nor was there any dedicated site communication system between the RTA and the truck drivers. A truck struck a labourer when driving off the site.

The RTA had numerous documents directed to safe working for this type of road work site. There was a project specific site plan and within that a risk assessment was conducted and safe work method statements were developed for particular tasks. There was also a significant generic module of a safe working system for traffic control on RTA's worksites. Subcontractors were required to comply with the standards and the paper system which clearly identified that the blocked off carriageway or nominated confined working areas were no go zones for persons and there must be a spotter and an established communication procedure for all workers.

The Court noted the work method chosen despite the general modules failed to identify the risk of movement of heavy vehicles if there were labourers on foot on site. The court noted that the most dangerous task, the moving around on site of heavy vehicles was conducted without any of the acknowledged safety precautions being followed at the worksite. Whilst there was a UHF radio system on site to be used in communications the evidence revealed that it was not used.

The RTA has now developed improved procedures which require each subcontractor to provide spotters and RTA sites will have site marshals on sites controlled by the RTA. It was noted that on sites there are multiple subcontractors and many spotters, flagmen and site marshals and it will be necessary to ensure there is no confusion as to who is in control of traffic movement.

The Court noted the offence was a most serious one and fined the RTA $180,000.

Workers Compensation Roundup

Worker or Independent Contractor?

The Workers Compensation Act in NSW contains an extended definition of worker which allows contractors who are not employees to claim workers compensation benefits. The extension of the definition is found in the "deemed worker" provisions in the Act which state:

"(1) Where a contract:
(a) to perform any work exceeding $10 in value (not being work incidental to a trade or business regularly carried on by the contractor in the contractor's own name, or under a business or firm name), or
(b) Repealed
is made with the contractor, who neither sublets the contract nor employs any worker, the contractor is, for the purposes of this Act, taken to be a worker employed by the person who made the contract with the contractor."

Contractors that work for a business will have two bites at the cherry when they seek to bring themselves within the definition of worker in the Act. First they argue they are employees and not independent contractors and if that argument fails they turn to the deemed worker provisions.

There are a multitude of indicators that the court considers when determining whether or not there is an employment

relationship. It is a matter of balancing the indicators, some of which will point one way and some the other. The issues considered include:

- Was the agreement to carry out work in writing and if so, on what terms?
- Could the contractor employ other people to perform work, and did they do so.?
- Was the contractor engaged at stated hours on usual days?
- Did the contractor provide a fixed quotation or was the work done on an hourly rate and did the payment to the contractor include a charge for materials?
- Was the contractor obliged to remedy any defects at his own expense?
- Did the contractor deal direct with the client requesting the work or only with a Principal?
- Was sick pay, holiday pay or superannuation paid?
- Were PPS payments deducted from money earnt and was GST paid on invoices of the contractor?
- What was disclosed on the Contractor's tax returns?
- Did the contractor supply his own tools?
- Did the contractor provide materials and invoice for material?
- Could the contractor engage subcontractors or delegate the work?
- Did Principal have the capacity to direct the contractor how to do the work and when to do the work?
- Were uniforms supplied?
- Did the contractor advertise for work in local papers, using flyers, the yellow pages, white pages or by any other means?
- Did the contractor have business cards?
- Did the contractor perform work for anyone else in each year? If so, for who and what percentage of time each week was worked for Principal?
- Did the contractor have a genuine and practical entitlement to work for others?
- Could the contractor choose when to do the work?
- Did Principal have the right to suspend or dismiss the contractor?
- Does the contractor create goodwill or saleable assets in the course of his work?
- Did Principal present the contractor to the world as an emanation of its business?
- Did the worker spend a significant portion of his remuneration on business expenses?
- Did the contractor hold himself out as an independent contractor to the world at large ?

Lack of "control" over the manner and time that work is carried out, the contractor's capacity to delegate and a responsibility for remedying defects at the contractors own cost is generally sufficient to establish an employment relationship. However a contractor who does not delegate work to others as he neither sublets the work nor employs any worker can look to the deemed worker provisions if the indicators do not point to an employment relationship.

The NSW Court of Appeal recently considered this scenario in *Djuric v Kia Ceilings Pty Limited.*

Deputy President Candy of the Workers Compensation Commission determined in the matter of *Djuric v Kia Ceilings Pty Limited (2010)* a number of factors will lead to an alleged worker being determined to be an independent contractor. The Deputy President concluded the factors pointing to a finding that the contractor was an independent contractor included deriving considerable financial advantage from the way the contractor was able to make deductions from income for taxation purposes, the ability to employ other workers to assist in the tasks to be carried out, freedom to work hours of choice and the necessity to remedy defects and losses at his own cost. The Deputy President however concluded that Djurik was not carrying on a trade or business regularly carried on by the contractor in the contractor's own name, or under a business or firm name and therefore did not come within the deemed worker provisions. The Deputy President noted matters which indicated that he was not were the provision of accommodation at Bathurst the use of Kia's tools, the fixed rate of payment and the provision of clothing.

Djurik appealed to the Court of Appeal.

There was no dispute in the Appeal that under the general law Djurik was an independent contractor. The issue was whether he was a deemed worker.

The contractor's history of work was relevant. Handley J noted:

> *"The appellant's (Djurik's) earnings as a contractor during the period from 7 March 2003 until he ceased work in July 2007, the expenses claimed as taxation deductions and his taxation assessments were clearly relevant in determining whether he carried on a trade or business and whether the contract work was incidental to that trade or business. The appellant's (Djurik's) assertion in these returns that he was carrying on a business is particularly relevant. Its relevance could not be restricted to the date when the appellant (Djurik) sustained his injury. A business is an activity carried on over time which involves repetition and continuity."*

Handley J also cited a number of cases that give support to the view that the history of the contractors activities are very relevant. Handley J referred to the following passages from the High Court's decision in *Fairway Estates Pty Ltd v* FCT *and Hope v Council of the City* of Bathurst:

> *"... it has been usually said that to carry on the activity as a business, repetition and continuity is necessary,"*
>
> *"It is the words 'carrying on' which imply the repetition of acts ... and activities which possess something of a permanent character ... I accept, then, that 'business' ... has the ordinary or popular meaning which it would be given ... It denotes ... activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis."*

Djurik had worked for Kia under a contract for gyprocking work at Bathurst Hospital from 26 April 2007 to 9 July 2007. He had previously worked for Kia for six months in 2006 before working for another business until he commenced the job at Bathurst Hospital. Djurik's earnings as a contractor for a number of years prior to the injury (including expenses claimed as taxation deductions) were relevant in determining whether he carried on a trade or business and whether the contract work was incidental to that trade and business. Kia could not simply assert that at the date of the injury that these previous activities were irrelevant.

The Court of Appeal noted Deputy President Candy did take into account these factors when he determined the deemed worker issue and did not fall into error in determining that Djurik was not a deemed worker.

It is not the job of the Court of Appeal to reconsider the facts rather the Court of Appeal needs to determine whether there was an error of law although some findings of fact can result in an error of law as Handley J noted :

> *"An ultimate finding of fact even in the absence of a misdirection may reveal error of law if the primary facts found are necessarily within or outside a statutory description and a contrary decision has been made."*

The Court of Appeal noted there was evidence pointing both ways when the Deputy President considered whether Djuik's work was incidental to a trade or business regularly carried on by Djurik in the Djurik's own name, or under a business or firm name. The Court of Appeal determined in such a situation the decision is one of fact for the tribunal of fact and an error of law is only disclosed in an extreme case and this was not a case of that kind.

Of course all determinations with regards to deemed worker/independent contractor are a balancing act and need to be determined on their own facts. However factors that tend to suggest an independent contractor relationship do not necessarily demonstrate that a contractor is carrying on a trade or business under his own name or a business name. Contractors must walk the tight rope at their own risk when they decide to argue they are deemed workers and abandon an argument they are employees at common law. Is it truly their business or trade?

Top Up Lump Sum Payments In Disease Cases

Under the *Workers Compensation Act 1987* in NSW, an injury includes diseases of gradual onset. A difficulty can arise in determining whether or not an injury which is a disease of gradual onset is aggravated, accelerated or exacerbated by employment subsequent to the initial diagnosis of the condition.

Diseases of gradual onset can give rise to lump sum impairment claims. If those impairment claims were made prior to 2002, they were assessed under the Table of Disabilities in the Workers Compensation Act 1987. After 2002 the lump sum

impairments are assessed on the basis of whole person impairment.

It is not uncommon to find that a claim for lump compensation has been made before 2002, and no incapacity followed the injury.

This can have a significant impact on claims for additional compensation where there is a deterioration, as the deemed date of injury for a injury in a disease case is the date of the worker's death or incapacity, or if there was no death or incapacity, the time the claim for compensation was made. If there is a deterioration of the injury without contribution from any subsequent employment, the claim will be seen as a claim from the original injury but if subsequent employment aggravated, accelerated or exacerbated the injury, there will be a new injury and a new date of injury.

Accordingly, where an injury occurred before 2002 and there was lump sum compensation paid to a worker and the worker did not suffer incapacity, when he brings a claim for top up compensation at a later time, the deemed date of injury for the top up claim, will be the date the top up claim was made and the liability will be sheeted home to the last employer that aggravated, accelerated or exacerbated the injury. This was confirmed in the recent decision of President Roche in *White v Sylvania Lighting Australasia Pty Limited.*

In that case, White had contracted a disease of gradual onset as a consequence of the nature and conditions of his employment. In 2001 he had received lump sum compensation under the Table of Disabilities. He was not incapacitated as a result of the disease at that time.

In 2010 he made a further claim for lump sum compensation as a result of deterioration. He sought an additional payment under the Table of Disabilities.

The Deputy President rejected the claim and dismissed the proceedings. The worker was not entitled to lump sum benefits under the Table of Disabilities. His claim for top up compensation was a new claim as there was an aggravation of the injury from subsequent employment, with the deemed date of injury being the date that the claim was made. As the claim was made after 2002, the claim came to be assessed under the whole person impairment provisions, not under the Table of Disabilities. White had not framed his claim pursuant to whole person impairment. Accordingly, his claim under the Table of Disabilities failed. However, White will not be precluded from bringing a claim under the whole person impairment provisions.

White no doubt will now re-cast his claim to seek a lump sum payment under the Table of Maims.

The case serves as a reminder that in claims for compensation for an injury, where the injury is a disease of gradual onset, the deemed date of injury is the date of incapacity or death, or if there is no incapacity, the date the claim for compensation is made. The claim for top up compensation will therefore be a new claim where subsequent employment has aggravated, accelerated or exacerbated the injury, even if that employment is with the same employer and the deemed date of injury will be the earlier of the date of incapacity or the date of the claim provided.

Where there are lump sum compensation claims arising from diseases of gradual onset, it is always necessary to carefully examine any aggravation, acceleration or exacerbation of the injury caused by any subsequent employment.

Fair Work Australia Endorses Obligations On Employees In Relation To Safety Requirements Of The Employer

The Full Bench of Fair Work Australia on 2 March 2011 in Parmalat Food Products Pty Limited v Wililo considered important questions about the respective rights and obligations of employees and employers in relation to safety in the workplace. The Full Bench noted employers have important statutory obligations to maintain a safe place of work. Those obligations have a high profile in New South Wales. Establishing and enforcing safety rules are important obligations as a breach of such rules can lead to serious consequences.

Parmalat Food Products Pty limited ('Parmalat') established to the satisfaction of Commissioner Cargill in the original hearing that Wililo had breached Parmalat's safety rules and as such Wililo's conduct amounted to serious misconduct. The Full Bench commented:

> *"Clearly, disciplinary action was necessary and appropriate because a failure to do so sends a message to the workforce that safety breaches can occur with impunity. The application of the unfair dismissal provisions to this case is a matter of general importance and, in our view, clearly attracts the public interest".*

Wililo commenced employment with a predecessor of Parmalat in May 2008. Ultimately, Wililo and other employees came to be employed by Parmalat in July 2009.
Wililo was a licensed forklift operator. He worked the night shift at Parmalat's manufacturing and distribution centre at Lidcombe.

Just prior to his employment by Parmalat in July 2009, Wililo was provided with a number of documents including a safety booklet. Wililo signed the final page of the safety booklet as an acknowledgement that he had read and understood the booklet, he would be working in a safe manner and adhering to the safety policies and practices of Parmalat. He acknowledged that this was a condition of his employment. He also undertook to immediately report any safety issues or incidents that occurred at work.

The evidence disclosed that Wililo had been counselled on several occasions. He received a first written warning for the use of inappropriate language and/or behaviour in February 2009. However, he had also received a special award in appreciation of his work over the Easter long weekend in 2010.
During the night shift on 7 May 2010, Wililo came to place his arms, head and shoulders underneath an elevated load on a forklift in the Lidcombe distribution centre. An initial investigation took place. This was followed by a formal investigation due to the seriousness of the alleged breach by Wililo. The formal investigation concluded Wililo's behaviour was deemed to be "*grossly negligent and dangerous*".

It was determined by Parmalat that Wililo, during the investigation, gave inconsistent answers when questioned about the incident.

The company determined that Wililo had engaged in a very unsafe act. His answers given in the investigation were also unsatisfactory. A determination was made to terminate Wililo's employment effective immediately on 31 May 2010.
Wilio files an application before Fair Work Australia claiming his termination was unfair, harsh or unreasonable.
Commissioner Cargill determined that Wililo's actions in raising the tynes of the forklift while they were not properly engaged and placing his hands and part of his arm under an elevated load amounted to a "valid reason for his termination". The Commissioner was satisfied Wililo's actions amounted to serious misconduct within the definition set out in Regulation 1.07 of the Fair Work Regulations.

Regulation 1.07 provides that serious misconduct has its ordinary meaning. It includes both the following:

1. *wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;*
2. *conduct that causes serious and imminent risk to:*
   a. *the health and safety of a person; or*
   b. *the reputation, viability or profitability of an employer's business.*

Conduct that is serious misconduct includes each of the following:

1. *the employee, in the course of the employee's employment, engaged in:*
   a. *theft; or*
   b. *fraud; or*
   c. *assault;*
2. *the employee was intoxicated at work;*
3. *the employee refused to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.*

The Commissioner considered that procedural fairness had been followed in that Wililo was notified of the reasons for his dismissal, he was given the opportunity to respond to those reasons, he availed himself of that opportunity and responded both orally and in writing. Wililo also had a support person with him at each of the interviews.

However, the Commissioner found as a relevant matter Wililo's actions were not wilful or negligent but rather the result of carelessness and a failure to properly appreciate the consequences. The Commissioner also noted that whilst Parmalat had a

commendable focus on safety, it did not have anything "akin to a zero tolerance policy". The Commissioner found that it appeared in Wililo's case, the employer's judgement was clouded by the belief that Wililo was lying. The Commissioner considered this was not the case. Consequently, the Commissioner concluded, on the balance, that the termination of Wililo's employment was harsh.

Parmalat appealed the Commissioner's decision on the basis that the Commissioner erred in considering the dismissal harsh, as a determination of harshness did not outweigh a finding of a valid reason for termination for serious misconduct.

The Full Bench determined that the decision of the Commissioner did not disclose a clear line of reasoning leading to the decision reached. The existence of a valid reason for termination is a very important consideration in any unfair dismissal case. The absence of a valid reason for termination almost invariably leads to the termination being determined as unfair. Consequently, the finding of a valid reason for termination was considered a very important fact in the determination of the fairness of a termination. Having found a valid reason for termination because of serious misconduct, the Full Bench considered it would only be a significant mitigating factor that could provide a reason that termination would be harsh in those circumstances.

The Full Bench considered the service and disciplinary record of Wililo was not a mitigating factor as his service was short and his disciplinary record was poor. Wililo's conduct was found to be serious misconduct. It did involve deliberate acts. The Full Bench considered the classifying of the employee's actions as careless does not derogate from the seriousness of his actions or the possible consequences. The Full Bench did not believe there was a sufficient basis to find the employer could not rely on its safety standards because of alleged actions in relation to safety breaches by other employees.

The Full Bench stated it considered the employer was entitled to take the action it did in this case to enforce its safety rules. This approach to its safety standards resulted in the termination not being harsh. The Full Bench noted that it was somewhat anomalous that an employee found guilty of serious misconduct for breaching safety rules and, hence dismissed for a valid reason and after due process, could be considered to be harshly terminated in the absence of discernible and significant mitigating factor.

The Full Bench found there was a valid reason for termination on the basis Wililo's actions amounted to serious misconduct. Wililo was given adequate opportunity to respond to the allegations against him. The Full Bench considered there were no mitigating factors which should have led to a lesser penalty than dismissal being adopted. It considered the Tribunal should not place itself in the shoes of the employer and determine what it would have done in the circumstances. The Full Bench is required to consider whether the employer's action in terminating Wililo's employment was harsh, unjust or unreasonable in the circumstances. The Full Bench concluded it was not.
The decision of the Full Bench highlights the importance placed by Fair Work Australia on compliance by employees of an employers' safety procedures and policies. This is because employers have statutory obligations to provide a safe work environment for their employees. Whilst it may be argued that Wililo in this case only placed himself at risk by putting parts of his body under an unstable elevated load, no doubt there are other employees who may have suffered psychological injuries if they had witnessed a serious injury to Wililo. The duty of employers is to all employees in the workplace not to expose them to a risk of injury. This includes Wilio and his fellow employees.

The decision confirms that once there is a valid reason for termination, there is a significant hurdle for dismissed employees to prove there are sufficient mitigating circumstances for the employment not to be terminated. Whilst there was some evidence in the case that safety breaches of other employees were not dealt with in the same manner as Wililo's breachwhich resulted in his termination, the Court was satisfied that there was serious misconduct and the treatment of other employees with safety breaches was not a mitigating factor in determining whether the termination of Wililo's employment was harsh.

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