GD News

Gillis Delaney Lawyers

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Renovating? Architects that provide cost estimates may have cause for concern!

Have you thought about renovating your home? Are you worried about building cost estimates that you have received from an architect? Have you started renovations and the costs have blown out? What has the architect said about the blow out? Sounds familiar doesn't it. Who hasn't started a renovation to find out that the costs are more than 50% above the original cost estimate?

When an architect is engaged by a homeowner, the homeowner will usually have a budget for building works. The architect will usually prepare schematics for the renovations and provide an initial cost estimate for the building works. It is not uncommon for the architect's estimate to be higher than you hope as building costs always seem to be more than you expect. But is there any recourse against the architect if his initial cost estimate is wrong.

In determining the architect's responsibility it is always important to consider the terms of the engagement and ascertain exactly what was agreed to be done. But that is not an end to the issue. The architect owes a duty of care to their client to carry out the work in a proper fashion. If the architect has been negligent in the preparation of the cost estimate and/ or has misled and deceived the homeowner, the architect will be liable to compensate the homeowner.

The NSW Court of Appeal in *McKenzie & Anor v Miller* has delivered a judgement that gives some hope to those who have suffered as a consequence of a building cost underestimate provided by an architect.

McKenzie owned and occupied a Californian bungalow residence with a detached garage which he desired to extend to provide further accommodation. He and his wife engaged Miller, a duly qualified architect of some 40 years experience, to advise them. After various discussions and negotiations between the parties, Miller provided a set of schematic drawings which met with the McKenzie's approval. As the work involved alterations and extensions to what was an existing dwelling of some age, Miller recommended that the work be carried out pursuant to a cost plus building contract rather than a lump sum building contract. He further advised that the total estimated construction cost would be about $202,000 inclusive of GST but excluding council fees, insurance, architect's and engineer's fees. He submitted final building plans and specifications to Orange City Council which were duly approved. Miller in the meantime had introduced the appellants to some builders but recommended a Mr Dave Chase. In due course, a cost plus contract was entered into between Miller and Mr Chase.

After parts of the existing dwelling and other outbuildings were demolished, construction work commenced. Three months into the project Miller advised McKenzie that his estimated construction cost had increased to between $280,000 and $285,000 including GST but excluding fees and council charges. This caused McKenzie significant financial embarrassment as a result of which part of the proposed and approved work had to be abandoned which was costed at $33,600. The truncated work was completed. McKenzie paid $265,655.33 to the builder and $39,565 for other materials and tradesmen, a total of $305,220.33. Had the abandoned works been constructed the total payable would have increased to $338,820.33. McKenzie paid $13,245 to Miller for his professional fees.

Inside

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The contract used by Miller was in the form of the short form *Client/Architect Agreement* issued by the Royal Australian Institute of Architects.

McKenzie commenced proceedings against Miller claiming damages for breach of contract, negligence and breach of the Fair Trading Act 1987 (NSW).

The Court of Appeal found that Miller was in breach of the obligation imposed upon him by the first sentence of clause B1.01 of the Agreement that provided:

> *"The Architect shall perform the services referred to in this Agreement. In the performance of those services, the Architect shall exercise reasonable skill and care in conformity with the normal standards of the practice of architecture."*

The Court of Appeal noted that Miller failed to carry out his responsibility to review his original cost estimate prior to the contract with the builder being entered into and after the Council had approved the plans and specifications in accordance with clause A3 of the Agreement which stated:

> *"A3 Contract Documentation Stage*
>
> *Preparation of documents sufficient for the calling of tenders and lodging Building Application including, as appropriate, co-ordination and integration of consultants' work and reviewing opinions of probable construction cost and project time program."*

The Court of Appeal held Miller in failing to review his original cost estimate did not exercise reasonable skill and care in conformity with the normal standards of practice of architecture and was thus in breach of the agreement as well as his general duty of care owed to McKenzie as an architect.

Not only did the Court of Appeal regard the architect's performance as deficient, it also concluded that the homeowners were misled and deceived. Justice Tobias in his judgment found concluded that

> *"By his estimate of construction costs of $202,000 contained in his letter of 21 August 2001, the architect represented that unless and until that estimate was changed, the works would cost in or around that amount. Furthermore, that representation was a continuing one and applied to the works depicted in the plans and specifications approved by the Council in September 2001 upon which McKenzie relied in entering into the building contract and thereby committing themselves to the project. By the time Miller informed them of the true position with respect to the cost, the project had generally passed the point of no return. In my opinion, that representation was both misleading and deceptive as a consequence whereof there was breach of s.42(1) of the Fair Trading Act."*

The architect was faced with an old home and problems were likely to arise during the construction work which could lead to cost escalations. So what should the architect have done?

Once again Tobias in his judgement gave a clear indication of the architect's responsibilities by finding:

> *"In failing to provide an opinion of the probable construction cost of the project based upon the approved plans and specifications, Miller was in breach of his common law duty of care. The fact that the building contract was a cost plus contract and that, as Miller submitted, could be brought to a halt at any time or items deleted did not, in my opinion, relieve Miller of his duty as an architect to keep McKenzie updated from time to time as to how they were travelling in terms of the overall construction cost of the project. His duty of care in that respect was, I would consider, a fortiori in the case of a cost plus contract - particularly in the present case where, as Miller conceded .. there were so many unknowns which were likely to increase the cost of the project as it progressed and for which, it is clear, he made no proper allowance in his 21 August 2001 estimate. Of itself, that was a breach of the Miller's duty of care.*

There was a clear breach by the architect to provide his opinion as to the probable construction cost of the project after the Council had approved the plans and specifications and before the building contract was entered into.

The Court of Appeal also found that the architect's estimate of construction costs was made at a time when the final design and documentation had reached a point when it was ready to be submitted to the Council "the following week". In these circumstances, the estimate was more than an opinion held by the Miller about the costs, it conveyed a representation that the estimate related to the plans and specifications which were about to be submitted to the Council and that could be relied upon

by McKenzie for fixing the budget for the proposed work.

The Court of Appeal concluded Miller had been negligent and had misled and deceived the homeowners and were liable to pay damages however the case was referred to the District Court to assess damages. Those damages may not be as large as the homeowners hope.

Miller claimed that he suffered financial and other forms of hardship, as a result of the construction costs substantially exceeding budget. On the other hand, Miller received the additional value of the house, resulting from the renovations and that must be taken into account in the assessment of damages. But what if the renovated premises were now "over-capitalised", in the sense that the additional costs were not fully reflected in the additional value of the premises? The amount of damages will no doubt be the subject of a heated dispute.

A win for the homeowner, yes! But only after a lengthy court battle that involved a hearing in the District Court, another hearing in the Court of Appeal and now one more hearing in the District Court to go. No doubt the legal costs of both parties exceed the blow out in construction costs.

Architects are liable to take care when preparing their cost estimates and revising the estimates at appropriate times. This is particularly important where a cost plus building contract is involved. They owe a general duty of care to their client and are liable for any misrepresentations that they may make which are relied on by their clients. This case does not mean that an architect is liable to compensate a homeowner simply because the cost estimate was not accurate. Each situation will involve a unique set of facts which will need to be considered however homeowners have rights and remedies available to them when an architect departs from the normal standards of the practice of architecture.

Is A Council Liable For Its Actions In A Subdivision Approval?

You buy a block of land from a developer, build a home and one day there is a landslide caused by water flowing onto the land from drainage systems running through the land. Your home is damaged. Is anyone to blame and what about the approval authority for the sub-division? Did the Council that approved the sub-division owe you a duty to take care to ensure that the conditions of the subdivision properly protected all future purchasers of the sub-divided land from a landslide or is that simply unrealistic? Will the Local Council be liable to compensate a landowner of subdivided land for careless decisions or actions made by the Council in the course of the Council's conduct of a subdivision application? The answer for now appears to be no!

The NSW Court of Appeal in Becker v Sutherland Shire Council has decided that the Sutherland Shire Council has no liability to Becker in respect of its decisions concerning the original sub-division of the land which she argued had imposed inadequate conditions. Becker also argued the Council had been negligent in failing to inspect pipes laid in an easement as part of the sub-division approval. The Council approved the subdivision of the land of which Becker's land and the site of the stormwater pipe were part. The conditions of approval included that any fill be satisfactorily consolidated and that there be piping of necessary drainage easements and vesting of easement rights in the Council. The plans for the pipeline were approved and the works as executed drawings were sighted and signed off, although the works were carried out by or on behalf of the developer. Upon registration of the deposited plan, an easement for the pipeline vested in the Council. Becker also failed in this argument.

Becker's claim arose out of a slippage which occurred in fill material on the southern side of her house property at Lilli Pilli. She claimed a mandatory order that the Council repair and stabilise the defective drainage system and also damages. She succeeded in her claim in the District Court with the Trial Judge finding the Council had been negligent. The Council appealed. Becker in the appeal also argued that the Trial Judge should have found that the Council was in breach of its duty of care in failing to inspect the stormwater pipe line during its construction, or by failing to institute a system of inspection repair and maintenance, or in not inspecting, repairing and maintaining the pipeline caused water to flow from the pipeline and caused the landslide and damage to Becker's property; and that the Trial Judge was in error in failing to find liability in nuisance.

Becker's land was part of a subdivision. Christian Enterprises Limited owned the land for some years and developed the subdivision after it obtained subdivision approval from the Council. Becker bought the land from the developer in 1980 and built her house in 1982.

The application for and consideration of the subdivision extended over some years commencing in 1973 and ending with Council Clerk's Certificate of 30 June 1977, which showed satisfaction with fulfillment of the Council's conditions for the subdivision, followed by registration of the Deposited Plan on 7 September 1977. The land subdivided had a frontage to

Turriell Point Road and formed part of the block between Tamba Place on the east and Little Turriell Bay Road on the west. This was a consolidation of several earlier lots, and five buildings on those lots were demolished while the subdivision was being considered. The subdivision created Myuna Place, which was dedicated as a public road and passed into the ownership of the Council upon registration of the Deposited Plan. The Plan also created eight residential lots including Lots 6, 7 and 8, the southern-most part of the subdivision and bounded on the south by Little Turriell Bay, part of the tidal water of Port Hacking. Lots 9 and 10, narrow strips of land on either side of Myuna Place, passed to the Council as public reserve.

The land Becker purchased was subject to an easement for drainage 1.83m wide which ran the full length of its western boundary from Myuna Place to Little Turriell Bay. The easement was created on registration, and during the approval process the Council had no rights or interest in the easement or the pipeline that was installed in the easement. The pipe is part of a system which collects water from a drainage line and pits which run the full length of Myuna Place as far as its intersection with Turriell Point Road. Later works installed five PVC inlet pipes which led water from other sources on Lot 8 into the pipeline; these are unlikely to have contributed much to the flow of water in the pipeline, and they were not part of the pipeline as designed and constructed. The pipe also provided drainage for the road.

The land in Myuna Place falls away steeply to the south of the houses. The Hawkesbury sandstone slope was originally overlain at most places by shallow residual soil, with some sandstone floaters included within the soil. In work associated with the subdivision, and later with construction of the houses, large quantities of fill material were deposited in the sloping rear yards, stretching almost down to the Bay. Becker's claim related to slippage in this fill material following substantial rainfall described as a one in five year event.

The landslide resulted from water under the land and roadway together with "leakage from major joint openings and holes in a pipeline running through the property with sufficient water/water pressures building up in the soil/fill, such that the whole soil mass became unstable and suddenly moved. As a part of this sudden movement the lowermost soil materials flowed downslope, whilst the upper part of the landslide mass moved downslope in a "blocky" slump-like form.

Much of the case in the District Court involved a detailed examination of expert evidence however the crux of the issue before the Court of Appeal was whether the Council owed a duty of care to Becker. Ultimately the Court of Appeal concluded that no duty was owed to Becker. Becker did not fall into the class of people to whom the Council owed a duty. As noted by Giles JA in his judgment

> *"It is not sufficient to ask if the appellant (Council) owed a duty of care to the respondent (Becker). At that level of generality, of course it did. The respondent (Becker) no doubt walked on the appellant's (Council's) roads and footpaths, and was owed a duty of care in relation to their condition …, a postulated duty of care "must be stated in reference to the kind of damage that a plaintiff has suffered and in reference to the plaintiff or a class of which the plaintiff is a member.*
>
> *The present case was not, in my opinion, one of a duty of care to avoid economic loss to the respondent (Becker). The respondent (Becker) did not buy defective land, like the defective building".*

Bryson JA in his judgment noted

> *"The evaluation of whether a relationship between a statutory authority and a class of persons imports a common law duty of care is necessarily a multi-faceted inquiry. Each of the salient features of the relationship must be considered. The focus of analysis is the relevant legislation and the positions occupied by the parties on the facts as found at trial. It ordinarily will be necessary to consider the degree and nature of control exercised by the authority over the risk of harm that eventuated; the degree of vulnerability of those who depend on the proper exercise by the authority of its powers; and the consistency or otherwise of the asserted duty of care with the terms, scope and purpose of the relevant statute. In particular categories of cases, some features will be of increased significance.*

This was a novel issue that confronted the Court of Appeal with Bryson JA also concluding:

> *"It is not possible to move readily from case law relating to local government powers to regulate construction of buildings, including dwellings, to conclusions about whether duties of care exist in the exercise of statutory power relating to opening of roads, construction of drains and subdivision of land. For building control powers the connection between the exercise of the powers and the risk of harm to the health and safety, and also to the economic interests, of persons who own or occupy buildings is much more clear and direct than for powers which impact on amenity and public utility through town planning and the provision of municipal services.... The distinction is a reflection of the nature of the subdivision power and the less direct impact of its purposes and its exercise on the interests of later*

proprietors. Decisions such as Inglewood Shire Council v Voli … and consideration in them of duties of care arising in relation to the exercise of building control powers have no real place as authority for the existence of duty of care in relation to other powers,.."

Bryson JA in his judgement went on to reason:

"There is a very large gulf between observing that the legislature has decided to intervene in some activity and enhance some aspect of human existence by conferring administrative powers to influence it, and a conclusion that the legislature has decided that the public authority which is so empowered and its funds should recompense those affected if the administrative intervention does not produce the best results or is carried out to a lower standard of competence than is available. It is one thing to confer powers to regulate an activity and quite another thing to underwrite losses caused by the process of regulation, even if the results are less than the results reasonably obtainable."

In relation to Becker's argument concerning the alleged failure by the Council to inspect the pipe at the time of installation, Bryson JA concluded

"I regard it as clear that unless there is a statutory obligation to exercise a power (in this instance, a statutory duty to make an inspection) a duty of care does not require its exercise, and there is no breach of duty if it is not exercised…..

In the present case there is no express statutory function of making an inspection or duty to do so, and there is no record or evidence that the Council's officers carried out inspections of the pipeline works which could or should have made known the aspects of the works which later became the subject of complaint – the use of bandaged joints, the absence of rock anchors. What could or should have been looked for on an inspection (if there had been one) and what would constitute an unsatisfactory result of an inspection was committed at the earlier stage when conditions were imposed on subdivision approval, and at the stage of approving plans; there would have been no point in an inspector objecting, for example, to some of the pipe joints being bandaged joints unless there had earlier been a specification that they were to be spigot and socket joints. There is really no basis at all for deciding that there was negligence at the policy stage when conditions were imposed and the plans were approved.

There is in my view nothing in the terms, scope and purpose of the statutory regime…which creates a relationship between a local government authority and a class of persons into which the respondent (Becker) falls, that is, later owners of the subdivided land who succeed the subdivider. The appellant (Council) had no control to exercise over the risk of harm which eventuated from the respondent's (Becker's) having, increasing and maintaining a deposit of fill on her land which depended for its stability on fill on the neighbouring lot; even more clearly, the appellant (Council) had no control of any kind exercisable when exercising its powers under Pt.XII (the relevant Legislation). The asserted duty of care has no place in the terms, scope and purpose of Pt.XII, which does not deal with damages and contains no provisions for paying compensation, bringing proceedings, or providing resources for paying compensation, and sets no tests for entitlement; the whole subject of entitlement to damages is entirely outside the terms, scope and purpose of Pt.XII"

The end result was that the Court Appeal concluded that the Council was not liable to Becker, a subsequent purchaser of subdivided land, for its actions in the subdivision process and acts or omissions concerning the pipe in Becker's land. Becker must now deal with any loss without recourse to the Council. Importantly a Council's statutory obligation must be exercised properly but there is no obligation to exercise a discretionary power and there is no breach of duty if it is not exercised.

Can You Be Held Liable For The Suicide Of Someone You Have Injured?

What happens to a claim for damages when an injured person takes their own life? Is the defendant liable for damages flowing as a consequence of the death of the injured person?

The question will usually turn on whether or not the suicide was a foreseeable consequence of the accident. If the suicide is a foreseeable consequence of the accident, then in NSW damages will be recoverable under the Compensation to Relatives Act.

The Court of Appeal in *Sarkis - v - Summit Broadway Pty Limited trading as Sydney City Mitsubishi* has confirmed that to establish that damages will flow from a suicide it is necessary to establish that the suicide was a foreseeable consequence of the accident. Causation must be established otherwise the defendant will not be liable for the suicide. Intervening incidents may also break the chain of causation such that the intervening incident is a cause of the suicide rather than the accident.

Sid Beer was injured in a motor vehicle accident which caused a whiplash injury. He suffered a further compensable injury when he fell down stairs whilst visiting a doctor. He suffered fractures to two bones of his right hand in the fall which also led to a medical condition known as reflex sympathetic dystrophy. Approximately 4 months after the fall he drove his van to a secluded spot on a dirt road and committed suicide. He ran hoses between the exhaust pipes and the van which he then sealed and he died from carbon monoxide poisoning. He left a suicide note stating "I've had enough. Sorry. Sid Beer." Beer's relatives brought a workers compensation claim for death benefits that was settled and the workers compensation insurer then tried to recover the payments from the motor vehicle insurer.

The Court of Appeal noted liability under the *Workers Compensation Act* for a worker's suicide depends on proof of causation. Liability under the *Compensation to Relatives Act* also requires proof that the suicide was a foreseeable consequence of the injury. The Court of Appeal noted:

> *"It may be accepted that the whiplash injury and its consequences were among the matters that affected the worker and drove him to suicide. However, this does not necessarily establish causation.* "

The Court of Appeal noted it was necessary to consider the evidence of the worker's situation between his motor vehicle accident, the fall and, evidence of the later events which affected him. The Court of Appeal noted that there was no contemporary evidence that prior to his fall the worker had symptoms of clinical depression or was contemplating suicide. His condition was improving and his doctors were hopeful that he would get back to light duties and then to normal duties. However, the fall had a significant impact and led to reflex sympathetic dystrophy. The Court concluded that "there was overwhelming evidence that the motor vehicle accident was no more than an antecedent condition not amounting to a cause of the worker's suicide but the events in December that led to his suicide were extraneous and not connected with the motor vehicle accident or its consequences".

The Court of Appeal commented that:

> *"if a plaintiff seeking to recover damages from a tortfeasor for a suicide or attempted suicide must establish that it was caused by the tort and that the damage was not too remote. Reasonable foresight does not establish legal responsibility. Causation must also be established. Reasonable foresight is not a test of causation but marks the limits beyond which a wrong doer will not be held responsible for his wrongful act. The wrongdoer is responsible for all damage of the same type or kind as that which was really foreseeable even if the particular damage, or its extent, were not reasonably foreseeable, or the damage occurred in an unexpected and unforeseeable manner."*

If evidence were available that established that the physical injury suffered in the motor vehicle accident brought on a reactive depression which then caused the victim to take his own life, then damages could be recovered.

Causation involves the application of common sense to the facts and the Court is not bound by the opinions of psychiatrists but must make up its own mind. In this case the Court determined that a common sense view of the worker's personal medical history between the motor vehicle accident and the fall gave no support to the view that the neck injury was likely to drive Beer to suicide. The Court of Appeal noted that the Court could not find as a matter of common sense that the motor vehicle accident was a cause of his suicide. The Court concluded:
"If he was suffering from clinical depression when he committed suicide it was because the events of the last few days overwhelmed him."

The motor vehicle insurer was not responsible for the suicide of the worker. His suicide was not related to the injuries sustained in the motor vehicle accident.

The worker's compensation insurer in this case that had made payments to the dependents in connection with the death of the worker was unsuccessful in recovering those payments from the motor vehicle insurer as those payments should not have been made. The motor vehicle accident was not causative of the suicide.

Is Compensation Payable for an Injury at a Social Function?

Employers should be aware that where they sponsor or authorise social or sporting events after normal working hours, they may be extending an employee's entitlement to workers compensation if an employee engaging in the activity or event suffers an injury.

Deputy President of the Workers Compensation Commission, Bill Roche, recently determined in *J P Morgan -v- Haider* whether a social function outside normal work hours was in the course of employment. The Arbitrator who initially heard the matter determined that compensation was payable after the worker was on a social club cruise and fell overboard and

drowned. The cruise had been organised by the JP Morgan Social Club and had been advertised as an end-of-financial-year function. JP Morgan had allowed the company email system to be used in advertising the event to the staff and the social club fees had been deducted using the company payroll system. It should be noted there was no direct financial sponsorship of the event by JP Morgan and no clients of the firm were in attendance. The function was held at 6.00 pm which was outside normal work hours.

Deputy President Roche reviewed the authorities relating to injury outside normal working hours. These included decisions such as *Van Haeften -v- Caltex Oil* where the Court of Appeal determined a worker injured playing football in a game as part of an annual inter oil company event was injured in the course of his employment. It was emphasised that in this type of event it had been more probable than not that the management of Caltex was aware of the annual event and was active in encouraging employee participation in the game prior to the event. The benefit to Caltex included favourable advertising and publicity.

The Deputy President placed emphasis that previous decisions such as Van Haeften highlighted employers were not merely passively authorising a particular event but actively encouraging it. The circumstances in JP Morgans' case were that JP Morgan did no more than give permission for the social club to operate. Whilst JP Morgan took steps to facilitate the operation of the club, it did not mean the activities organised by the social club were JP Morgan activities or that employees were encouraged to attend as something that is part of or incidental to their duties. The Deputy President made it clear that something done during a tea break in normal office hours is more readily seen as done in the course of employment than something done after a daily period of work has been completed. But in this case the Deputy President held JP Morgan was not liable to compensate the worker employee as they were not injured in the course of employment.

Submissions had been made by the deceased's estate that the social club charter "to increase morale and interaction and break down barriers and awareness of people and resources within JP Morgan" was of benefit to the employer and therefore brought the social club activities within the course of employment. The Deputy President noted that whilst this was a laudable goal, it did not make a purely social event an employment event. The benefit to the employer was too vague and tenuous to be sufficient to make an injury at a purely social function an injury that was sustained in the course of employment. The activities of the social club were not inextricably linked to the operations of the employer. Mere authorisation was not enough to make a particular activity one that is given the protection by the Workers Compensation Act, 1987. The Deputy President commented the harbour cruise was not a team building exercise and a social event involving drinking and dancing was unlikely to promote leadership, loyalty or team spirit.

Even though the worker's estate did not satisfy the Section 4 test of an injury arising in or out of the course of employment, the Deputy President made further comments in relation to another relevant factor, which is whether the employment was a "substantial contributing factor" as required by Section 9A of the Workers Compensation Act, 1987.

The Deputy President placed particular emphasis on the various criteria contained within Section 9A(2) of the Act which require an examination of the time and place of the injury which in this case was well outside working hours and the place of injury was well away from the deceased's place of employment. The deceased was not performing any work duties or doing anything incidental to his work duties. The Deputy President noted that what befell the deceased could have happened on any harbour cruise at about the same time of his life whether or not he was employed with JP Morgan. The Deputy President also highlighted the worker's lifestyle where, although his activities outside the workplace were a factor, the deceased had been drinking heavily on the night of the cruise and that in fact may have contributed to his death. This analysis led demonstrates the Deputy Presidents views that employment was not a substantial contributing factor.

This decision highlights that the Workers Compensation Commission is not prepared to extend compensation to injuries occurring outside the normal hours and place of employment despite tragic circumstances.

It is not simply enough for employers to authorise or provide some basic assistance to activities conducted outside of normal working hours to trigger workers compensation benefits. Workers will not enjoy the protection offered by the Workers Compensation Acts when injured in after work accidents unless there is a real link between the activity and the employer. It is clear that the employer must receive a benefit from the activity and more than simply improved morale of its employees and must take some active steps either through direct financial sponsorship or receiving some clear tangible benefit through advertising for the employment nexus to be drawn.

The very popular JP Morgan Challenge, wherein employees were actively encouraged to attend and external clients and media were involved was more likely to be an event that would be in the course of their employment. Other events, such as football matches being conducted in genuine breaks of employment, (at lunch or morning tea) would also be within an

employment context. Football matches outside normal working hours or breaks would only come within the Workers Compensation Acts if, all other things being equal, there was direct sponsorship of a team which comprised solely employees of the employer through payment of fees for the team or advertising through jerseys etc. However where an employer sponsors a team which includes non-employee's, the commission would be less likely to find the necessary employment nexus and the issue of Section 9A(2) would be a factor in determining an injury sustained by an employee, in those circumstances, was not an injury where the employees employment was a substantial contributing factor.

The risk of a compensation claim will always remain where a worker is injured in an activity that enjoys some support from the employer but compensation will only be awarded after a careful analysis of the benefits of the activity to the employer, the extent of the support and the nature of the activity and only where there is enough to link the activity to the employment.

NSW OH&S Roundup

Failure To Notify Accident Leads to Fine

The Industrial Court of NSW, in the decision in *Inspector Corbett - v - BBC Hardware Limited & Bunnings Pty Limited*, was called on to determine the appropriate penalty to impose on an occupier that fails to report an incident to WorkCover.

On 8 July 2004 at the Bunnings warehouse located at Ashfield, an employee of BBC Hardware Limited ("BBC") was using a forklift truck to place pallets of timber on the ground beneath steel racking, when he clipped the racking causing the fixture to collapse. As a result approximately 6 to 10 tonnes of pre-packed potting mix stored on the racking fell to the ground into an aisle and also fell on the forklift. BBC and Bunnings Pty Limited ("Bunnings") were both employers present at the site at the time.

Inspector Corbett commenced proceedings alleging a breach of the *Occupational Health & Safety Act* by BBC & Bunning for failing to provide a safe system of work. In addition, BBC was prosecuted pursuant to Section 86 of the *Occupational Health & Safety Act* for failing to give WorkCover notice of a serious incident at the premises, namely the collapse of steel racking and failing to do so by the quickest available means after becoming aware of the incident.

The Court concluded that there was little doubt that the collapse of the racking and spilling of 6 to 10 tonnes of potting mix represented a serious safety breach. After balancing the factors involved, the Court determined that an appropriate penalty would be $175,000.00, which would be shared equally between BBC and Bunnings. The fines were reduced in light of an early plea of guilty.

In relation to the penalty for the failure to notify, the Court noted that there appears to have been a small number of prosecutions in the Local Court with fines ranging from $1,000.00 to $5,000.00 for such an offence but the Industrial Court had not needed to determine a penalty in such a case.

The Court was unable to conclude that the failure to notify was a deliberate and intentional act of BBC. The Court also noted the failure to notify was not part of a plan to conceal the occurrence.

The Court noted the engagement of a company to address the site and also the requirement to quarantine the site until investigations had been carried out and repairs undertaken probably occupied the mind of BBC. In those circumstances the Court determined that there was an unintended oversight in the failure to notify WorkCover.

It was noted that the maximum penalty was $82,500.00 for the offence as there had been previous breaches of the *Occupational Health & Safety Act* by BBC (although those breaches had nothing to do with a failure to notify). The penalty imposed by the Court was $10,000.00. A significant penalty for a failure to advise WorkCover of the occurrence of an incident. Employers and occupiers need to heed their obligations and report incidents to WorkCover otherwise significant penalties can result.

$66,000 in Fines for Roofing Contractor

HG Nielsen & Co Pty Ltd a roof contracting company was convicted and fined $60,000 for a breach of s 8(1) of the OH&S Act and Thomas Nielsen a director of the company was also convicted and fined $6,000 following an incident on 27 April 2004 at Tempe. The company was engaged as a sub-contractor by Andrew Steward t/as ASB Constructions to perform certain roofing work on residential premises. Hugh Crawford, an employee of the company, was attempting to climb down a ladder from the second storey of the house to the first floor, when the ladder slipped and fell causing Crawford to fall approximately 3.4 metres onto the clip-lock roof below. The ladder was not tied off or footed and there was no other person holding the ladder as

Crawford was attempting to descend. Crawford sustained serious injuries including fractures to his spine, a fracture to his right collarbone, three broken ribs and a cut to his head, which required 50 stitches. The company is a family run company and has always had few employees. At the present time, the company employs six employees including Thomas Nielson and his wife as directors. The companies' failures to ensure that workers were not exposed to risks to their health and safety caused these offences to fall within the serious category of cases that come before the Court involving falls from height.

Secure Your Site Or Be Convicted For An Injury To A Trespasser

On 28 February 2004, a boy, Kyle Ralphs, fell some 2.5 metres at a building site at The Entrance, where Ocean Parade Pty Ltd was constructing a 14 storey apartment building. Ocean Parade was charged with an offence under s 8(2) of the Occupational Health and Safety Act 2000 ('the Act'). Mr Ron Sayhoun and Mr John Sayhoun were both directors of Ocean Parade and were each also charged with the same offences, by operation of s 26(1) of the Act which deems a person concerned in the management of a corporation to have committed the same offence as a corporation. Mr Ron Sayhoun was also the site foreman.

WorkCover argued that the site was adequately secured against entry to the site by non-authorised persons; and there was a risk of persons falling 2.5 metres through an open penetration on level 14 of the building under construction at the site as the open penetration was not securely covered or protected so as to prevent persons falling through.

Prior to 28 February 2004 a two (2) metre high metal fencing had been erected on the northern and western boundaries of the site which were street frontages. On the southern boundary of the site was a block of residential units known as the Atlantis Apartments and the boundary between the site and the Altantis Apartments consisted primarily of a timber paling fence, a section of which had fallen over or had been pushed over.

On level 14 of the building there was a balcony which had a circular open penetration in the floor of approximately 2 metres in diameter ('open penetration'). Below this level was a tiled floor on level 13 which was approximately 2.5 metres below level 14. Prior to 28 February 2004 the open penetration had been covered with a sheet of wire mesh which was secured to the floor however, on 28 February 2004 the wire mesh had been removed to allow other work to be performed and had not been replaced.

On 28 February 2004 at approximately 4.00pm the injured person, and 3 other youths gained access to the site via the boundary with the site and the Atlantis Apartments. They then made their way to the 14th floor of the building via the builder's elevator and stairs. There was no representative or employee of the defendant on site at the time. At approximately 4.30pm the injured person was walking backwards towards the open penetration when he fell a distance of approximately 2.5 metres through the open penetration landing on the tiled floor of the level below. Neither the injured person, nor the 3 other youths were authorised to be at the site on 28 February 2004. A general risk of injury to non-employees arose from the lack of a secure perimeter at the site and lack of a secured cover over the open penetration. A specific and manifested risk of injury to the injured person arose on 28 February 2004 when the injured person gained access to the site and fell through the open penetration.

There was no real issue that the OH&S obligations extended to trespassers such as the four boys who entered this building site in February 2004. The three boys who gave evidence each denied knocking the fence down. On their evidence, it was already down when they first saw it and that was where they entered the site. It was the prosecution case that Sayhoun had admitted to knowing that the fence was down that day. It was the defendants' case that to his knowledge, the fence had been standing earlier that day. The Court was satisfied that the boys' evidence that they did not knock down the fence should be accepted. That evidence was consistent with the dilapidated, poorly supported fence shown in the photographs. A police officer gave evidence that during his investigation he had asked Sayhoun how long the fence had been down and Sayoun had said that it had been up and down a few times over the last couple of weeks and that it was down on the day. This evidence was crucial in the rejection of Sayhoun's evidence during the hearing that he did not know the fence was down.

The Court ultimately found all offences proven and will now schedule a sentencing hearing to impose penalties on all defendants.

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