GD News

Gillis Delaney Lawyers

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

Post Leighton v Fox - Principal's Liability On A Construction Site

The use of independent contractors is prevalent throughout the construction industry. It is common for head contractors to utilise a wide range of specialist subcontractors to provide services during a construction project. Where a person is injured during the course of a construction project there may be a myriad of contractors that may have had an involvement in the incident which caused the injury. It is not uncommon in litigation to see all contractors and the head contractor involved in a personal injury claim and the Courts will be called on to apportion liability between the various defendants.

The recent High Court decision of *Leighton v Fox* has confirmed that a head contractor is not responsible for the safe work method of an independent contractor called on to provide services involving specialist skills however that is not to say that the head contractor will have no liability for an accident on a construction site involving an employee of an independent contractor. It is important to consider the inter-relationship of all of the parties as in some situation the head contractor may have an overall responsibility to co-ordinate the works and negligence on the part of the head contractor in co-ordinating the works will sheet home liability to the head contractor. In addition the head contractors actions in themselves may have contributed to the incident and some liability will rest with the head contractor.

In *Granger v Jigsaw and Pacific* the NSW Court of Appeal has recently handed down one of the first decisions following on from *Leighton v Fox* where the Court was called on to assess the head contractor's liability for an accident on a construction site.

Whilst in *Granger's* case the Court of Appeal ultimately found that the head contractor had no liability, the judgment of the Court makes it clear that Leighton v Fox will not be the panacea for head contractors and absolve head contractors from liability to independent contractors and their employees who are injured during construction projects.

Mr Barahona, was injured when he fell from a ladder at a construction site while attempting to work on a steel beam just below the ceiling of the first floor of the building. Mr Barahona brought proceedings against the principal contractor for the construction site, Jigsaw Property Group Pty Limited (Jigsaw), the principal contractor for the construction site, his employer, Pacific Steel Constructions Pty Limited (Pacific) and the employer of the site foreman.

The primary judge found that Jigsaw and Pacific each breached their duty of care that it owed to Mr Barahona with 80% of the responsibility being attributed to Jigsaw and the remainder to Pacific. The primary judge found that Mr Barahona was contributorily negligent, which was assessed at 15%. The claim against the employer of the site foreman was dismissed.

Jigsaw had subcontracted the steel works to Pacific, whose business included the supply and installation of structural steel components, including roof structures. Mr Barahona was employed by Pacific as a boilermaker/welder. He was a tradesman of some 30 years experience. Mr Barahona was injured when he fell from a ladder which was not tied off at the top. There were no witnesses to his fall.

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The Court of Appeal noted:

> *"Leighton v Fox is a recent affirmation that Jigsaw did not owe to independent contractors engaged to work at the Strathfield Library site a duty of care of the kind owed to its employees. The Court (French CJ and Gummow, Hayne, Heydon and Bell JJ) said that, although the distinction in this respect between independent contractors and employees has been criticised, "the concept of distinguishing between independent contractors and employees is one too deeply rooted to be pulled out""*

Mr Barahona was not himself an independent contractor vis à vis Jigsaw. The Court of Appeal found that:

> *"as an employee of Pacific, he was owed by Jigsaw no greater duty of care than was owed by it to a worker providing his labour as an independent contractor; and that is so even though Mr Barahona did not have meaningful choice in working at the Strathfield Library site otherwise than as an employee of Pacific, doing work which could readily enough have been done by a Jigsaw employee."*

The basic principle that flows from Leighton v Fox and other cases is that the principal has no duty to retain control of the system of work if it is reasonable to engage the services of an independent contractor who is competent to control the system of work without supervision, and the activity has been organised and has been placed in the hands of the independent contractor.

The Court of Appeal however noted there may however be some circumstances which may make it necessary for the principal to retain and exercise a supervisory role, as a matter distinct from prescribing the respective areas of responsibility if confusion about those areas involves a risk of injury. Examples of the circumstances referred to by the Court of Appeal included situations where:

> *"Rockdale Beef Pty Limited v Carey -the configuration of the principal's work site brought the safety risk; Erect Safe Scaffolding (Australia) Pty Ltd v Sutton protruding scaffolding was permitted to exist on site and there was also a failure in coordination of activities); Tolhurst v Cleary Bros (Bombo) Pty Ltd -the principal created the conditions in which there was a risk in the system of work and retained control over it; Bostik Australia Pty Ltd v Liddiard -the principal exercised overall control over the activities on the premises, part of a more extensive collection of relevant matters the configuration of the principal's work site brought the safety risk."*

So it is not as simple as saying delegate the work to an independent contractor and the principal is off the hook. The liability of the Principal will turn on the activities it has undertaken and the responsibilities it has assumed or must assume by virtue of what needs to be co-ordinated.

The Court of Appeal in this case when considering the applicable law noted that the case of *Sydney Water Corporation v Abramovic* essayed a statement of criteria which may give rise to a duty owed to a worker who is an employee of an independent contractor. The criteria specified in that case were:

> *" the principal may also owe a duty to a worker who is an employee of an independent contractor. The legal question is to identify the criteria which must be satisfied to give rise to such a duty of care. The cases suggest that satisfaction of one of the following criteria may give rise to such a duty:*
>
> *(a) the principal directs the manner of performance of the work;*
> *(b) the work requires the coordination of the activities of different contractors;*
> *(c) the principal has or ought to have knowledge of the risk and the employer does not and cannot reasonably be expected to have such knowledge;*
> *(d) the principal has the means to alleviate the risk and the employer cannot reasonably be expected to do so;*
> *(e) although the employer has or should have the relevant knowledge and can be expected reasonably to take steps to alleviate the risk, it does not, to the knowledge of the principal, do so."*

Whilst the above criteria will be useful in helping to identify circumstances where a Principal may be found to have a liability for an accident on a construction site, satisfaction of the criteria is not a prerequisite to liability. It will always be a question of what was the duty owed and what was a reasonable response to the risk. Crucial to that consideration will be the role actually assumed by the Principal. The greater the Principal's involvement in directing or controlling the independent contractor the greater the risk that the Principal will be found to have owed a duty.

In Barahona's situation the Court of Appeal held that Jigsaw did not owe him a duty of care noting:

> *"There is no question in the present case of Jigsaw owing a duty of care to Mr Barahona because of a need for*

direction and co-ordination of activities on the site. Mr Barahona was to undertake the discrete task of raising the first floor beam to floor level. So far as the evidence showed this was in no way related to other activities being conducted on the site. This was a task for which Pacific as his employer and Mr Barahona himself were fully competent – it was not suggested to the contrary. According to the above principles, what circumstances, then, may have made it necessary for Jigsaw to retain and exercise a supervisory power over the system of work followed by Mr Barahona in performing the work? ……

The circumstances were, essentially, that Mr Barahona was employed by a specialist contractor on site; as now considered in more detail, he was told he was to follow the instructions and was under the supervision of the site foreman, Mr Barber; on the day of the accident he was required to perform a task to which he was directed by Mr Barber; and that task was within the scope of Pacific's contracted works on site…….

Pacific was Mr Barahona's employer and thus owed him a non-delegable duty of care requiring it to ensure that reasonable care for his safety was taken. Under its contract with Jigsaw, Pacific was required to submit an SWMS, which ought to have specified the safety requirements for tasks that were properly classified as a class 1 or 2 risk. The preparation of an SWMS was important because it provided a framework or check list for the provision of safe work methods. However, the mere preparation of an SWMS would not satisfy or in any way qualify Pacific's non-delegable duty of care as an employer.

Mr Barber no doubt had an obligation to his employer as site foreman to ensure that all trades had adequately and competently carried out their work. However, a mere direction to a particular trade to do rectification work would not have broadened the duty that Jigsaw, as principal contractor, owed to persons working on the site. In this case Pacific directed Mr Barahona to work on site under the 'supervision' of Mr Barber…….

Unless the evidence reveals that Mr Barber assumed a responsibility to supervise Mr Barahona as to how he did his work there may be seen to be an absence of foundation for a relevant duty of care owed to Mr Barahona….

If Mr Barber did not take on the role of supervising Mr Barahona in the performance of his work, we do not think that Jigsaw can be seen to owe him a relevant duty. From what we have already said, the evidence does not show that Mr Barber assumed responsibility to supervise Mr Barahona in the relevant sense or that he knew that Mr Barahona would seek to use the ladder without assistance."

The relationship of the principal and the contractors and the roles they assume and the actions each takes will continue to be crucial in the consideration of the duty owed by a principal. One thing is certain however. *Leighton v Fox* does not mean that a principal has no liability for an accident that involves an employee of a contractor during a construction project and it will be necessary to consider all the facts to determine whether a duty of care was owed by the principal.

Insolvency And D&O Claims

Disgruntled shareholders that look to recover losses that arise consequent to the liquidation or administration of a company until recent times had as a potential target the remaining assets of the company. The High Court's decision in the Sons of Gwalia case determined that claims brought by shareholders based on misleading and deceptive conduct by the company would rank equally with other creditor's claims.

However, times are changing. In January 2010 the Federal Government announced that it will introduce changes to the Corporations Act that will reverse the Sons of Gwalia decision and the changes will result in more litigation against directors and office-holders and increased claims on D & O policies as shareholders seek to recoup their losses from other sources.

Sons of Gwalia - background

Sons of Gwalia Ltd ("SOG") was a publicly listed gold mining company. On 18 August 2004, Mr. Margaretic bought 20,000 shares in SOG at a cost of $26,200.

On 29 August 2004, administrators were appointed to SOG. The parties to the litigation agreed that by the date of appointment of the administrators, shares in SOG were worthless.

Margaretic sued in the Federal Court alleging that in breach of the stock exchange listing rules, SOG had failed to notify the ASX that its gold reserves were insufficient to meet its gold delivery contracts and that it could not continue as a going concern. Margaretic alleged that SOG had breached a number of Acts which proscribe misleading or deceptive conduct and sought damages measurable as the difference between the cost of his shares and their value (nil). There were many other

shareholders with similar claims, so the litigation was in effect a class action.

This was a test case brought to determine the entitlement of shareholders in Margaretic's position to claim, in competition with general creditors of SOG to a dividend from SOG. The case concerned the proof and ranking of claims against an insolvent company as between the general creditors and shareholders in the company having claims against the company for alleged misleading or deceptive conduct.

The High Court's reasoning

The result of the case turned on the meaning and operation of section 563A of the Corporations Act, which reads:

> *"Payment of a debt owed by a company to a person in the person's capacity as a member of the company, whether by way of dividends, profits or otherwise, is to be postponed until all debts owed to, or claims made by, persons otherwise than as members of the company have been satisfied." (emphasis added)*

More particularly, the result depended on whether, any "debt" (which includes a damages claim like Margaretic's) owed by the insolvent company to the claimant shareholder, if the claims were proved, were owed in that person's "capacity as a member of the company".

The general creditors said that Margaretic's claim was a "debt" owed to him in his capacity as a shareholder and was therefore postponed until all of their claims had been satisfied. The claimant shareholder argued otherwise.

The majority of the High Court decided that Margaretic's claim against SOG was not a "debt" owed by SOG to Margaretic in his capacity as a shareholder in SOG because his cause of action against the company arose under separate legislation proscribing misleading or deceptive conduct. As such his claim ranked equally with creditors' claims against SOG.

In the United States, specific legislation governs this point and directly subordinates claims made by shareholders arising out of the purchase of shares to claims by creditors. An interesting point which emerges from the SOG decision, which many commentators have failed to grasp, is that section 563A of the Act does not adopt a general policy that shareholders always rank after creditors in a corporate insolvency. In fact the section specifies the situations in which shareholders' claims will rank after creditors' claims in a corporate insolvency and the decision simply shows that outside of those situations, shareholder and creditor claims against an insolvent company will rank equally.

So why all of the controversy about Sons of Gwalia?

Section 563A requires a line to be drawn between a shareholder claiming in their capacity as a member and a shareholder claiming otherwise than in the capacity of a member. To draw that line it is necessary to analyse the nature of a claim; it is not sufficient to describe its effect on other creditors.

The problem for the markets and for insolvency practitioners alike has been the difficulty in identifying when a shareholder with a claim against the company makes that claim in their capacity as a shareholder. If there are many shareholders affected, the circumstances of each of them need to be assessed on their merits.

While in reality, the case shows that only in limited situations shareholder claims will rank equally with creditor claims, the decision has been criticised for:

- creating uncertainty resulting in higher funding costs and greater difficulty for ASX listed companies in obtaining finance;
- adding complexity, cost and delay to external administrations;
- diluting available assets divisible among creditors;
- being contrary to what is (erroneously) described as a general principle of corporate law – that debt always ranks before equity;
- being illogical; and
- opening the flood gates for shareholder class action litigation.

Some of the criticism is valid, and some of the effects of the case that were foreshadowed in the dissenting judgment of Callinan J. have come to pass. The following passages from that judgment are illustrative:

> *"[legislation proscribing misleading or deceptive conduct] has extended greatly the scope for "shareholder claims"*

> *against corporations…ordinary creditors…may find themselves…proving in competition with members now armed with statutory rights…"*
>
> *"Corporate regulation has become more intensive, and legislatures have imposed on companies and their officers obligations, breach of which may sound in damages…"*
>
> *"The [Corporations] Act imposes many duties upon directors. Section 180 expressly requires that they act as carefully and diligently as a reasonable person would in the circumstances of the corporation and its business…"*

Callinan J.'s dissenting judgment also makes justifiable criticism of a lack of logic in relation to the measure of damages available to Margaretic as opposed to the measure of damages available to other members of SOG who had been shareholders for a longer period.

As to the "flood gates", the High Court's Fostif decision in 2006 which removed potential impediments to litigation funding in Australia, and the Sons of Gwalia decision coincided with the commencement of a number of high profile shareholder class actions in this country. Litigation funding has been a more prominent, widespread and lucrative activity in the past 3 years than it had been previously.

When the law is changed to overturn SOG, why will there be more claims on D & O policies?

The law will be changed (possibly as soon as March 2010) to include a US-style provision to provide that shareholder claims will be subordinated to creditor claims. The consequence will be the removal of a lucrative area of work for litigation funders and plaintiff lawyers, who will look to alternative bases on which to bring shareholder claims.

One alternative base on which shareholder claims can be brought is the oppressive conduct provisions in sections 232, 233 and 234 of the Act. (Justice Callinan specifically referred to that possibility in SOG). Under those provisions, shareholders have standing to apply for compensation and other prescribed orders against the company.

It is not difficult to imagine the following situation arising more often:

(a) shareholders who argue that they were misled into buying the company's shares or retaining ownership, bringing a class action under sections 232, 233 and 234 with litigation funding; or

(b) in the alternative to (a) shareholders sue directors for being knowingly concerned in the company's misleading or deceptive conduct in failing to inform the market of material facts (in breach of the listing rules); and

(c) the company defends the claim, and perhaps at a time when it is under the control of an Administrator or Liquidator, brings a cross-claim against current and former directors for breaches of directors' duties under section 180 of the Act with the objective of recouping, or being indemnified for, losses incurred as a result of the shareholder class action; or

(d) in the alternative to (c), ASIC brings an action against current or former directors alleging breaches of directors' duties under section 180 of the Act; and

(e) directors who are sued make claims on their D & O policies.

Additionally, the regulator's willingness to pursue directors can be seen in the recent actions relating to the One-Tel, HIH, James Hardie and AWB matters.

At the end of the day as a consequence of the upcoming legislative changes, D & O insurers should steel themselves for an increase in claims activity in the near future.

Insolvent Defendant - Action Against Insurer - Is The Non Payment Of The Excess Relevant

In NSW the Law Reform Miscellaneous Provisions Act, 1946 provides that where a company has entered into a contract of insurance which provides indemnity against liability to pay any damages or compensation the amount of that person's liability shall on the happening of the event give rise to a charge on all insurance monies which are or may become payable in respect of that liability. Every such charge is enforceable by way of an action against the insurer in the same court as if the action were commenced against the insured. This allows the person who has suffered damages to bring a claim against an insurer direct.

However insurance policies are commonly subject to excess clauses. Generally claims are brought against insurers where a company has been placed in liquidation. That would usually mean that the insured will not be able to pay its excess. So does this have any impact on the entitlement to pursue the insurer direct.

The situation was considered by the NSW Court of Appeal in *Calliden Insurance Limited v Chisholm*. In that case Calliden effected a public liability contract of insurance. The policy schedule stipulated a standard excess for each and every claim of $25,000. Excess was defined in the policy as "*the amount the insured first bears in relation to each claim caused by an occurrence. The excess applies to all amounts payable under this policy*." There was also a provision in the contract that provided:

> *"Where an excess is shown in the schedule within your policy wording you or any other person must first bear the amount of the excess for each and every claim arising out of the one event or occurrence before becoming entitled to cover under your policy. Where two or more different excesses apply to any event or occurrence giving rise to a claim only the greatest of those excesses shall be applied to the whole claim".*

The operative provisions in the contract provided that the insurer will pay to or on behalf of the insured all amounts which the insured shall become legally liable to pay for compensation in respect of personal injury.

A District Court judge was called on to determine whether or not leave shall be granted to proceed against the insurer direct. The insurer resisted the application on the basis that it was inappropriate to grant leave as the insurer was entitled to disclaim liability under the policy as the excess had not been paid and payment of the excess was a condition precedent to indemnity.

The trial judge ultimately granted leave to proceed against the insurer concluding that:

> *"“Bear" the specified excess did not mean pay the amount and the provision did no more than relieve the insurer from liability to pay the first $25,000 of a claim."*

An appeal followed.

The Court of Appeal agreed with the finding of the trial judge. The Court of Appeal also noted that the insurer had given indemnity for payments under other provisions in the contract most significantly defence costs.

As the appeal required the leave of the Court of Appeal to appeal, leave to appeal was ultimately refused without the issues being formally determined with the net effect that the original trial judge's grant of leave to proceed against the insurer standing.

What is important is that all terms relevant to the excess will need to be carefully considered in applications to join insurers direct although as in this case the Court will be averse to finding that non payment of an excess could result in avoidance of a contract of insurance where rights are sought to be enforced pursuant to the charge created in favour of a claimant against the insurer under the *Law Reform (Miscellaneous Provisions) Act 1946*.

Medico-Legal Examination and Negligence

Medico-legal assessments can give rise to personal injury claims where there is negligence on the part of an expert practitioner if examinations are not carried out appropriately and a person is injured as was seen in the recent decision of *Basha v Vocational Capacity Centre* ("VCC").

In any personal injury claim the earning capacity of an injured person is an important consideration. Vocational capacity assessments have become common place in personal injury litigation as defendants seek to meet claims for economic loss. A vocational capacity assessment may be carried out by a physiotherapist, an occupational therapist or other professional and an injured person may be called on to carry out an exercise regime or tests which if not properly carried out may cause or aggravate an injury.

Basha's case demonstrates that experts need to be aware that they should be careful to consider the risks involved in undertaking an assessment before requiring an injured person to undertake physical exertion as injuries that ensue may well be their responsibility.

The NSW Court of Appeal confirmed that medico-legal providers will be liable for damage caused to an injured person during the course of a vocational assessment where the injury resulted from negligence on the part of the examiner.

Basha was an employee of the Government Insurance Office. She sustained work related injuries in March 2001. She was

made redundant. She had a right shoulder injury which came to a rotator cuff repair and a decompression procedure. Approximately 3 weeks after that procedure Basha was scheduled to attend a Vocational Capacity Assessment to be undertaken by a physiotherapist. Basha alleged in the course of the assessment she was required to perform physical tasks and exercises which were beyond her capacity and which were ill advised having regard to her medical condition. She was required to crawl a distance of 9 metres or thereabouts which caused her to favour her left shoulder and thus causing her to put excess weight on the right shoulder. She alleged that as a consequence of being required to undertake that exercise she sustained further injury, in particular aggravation of the injury she had previously suffered to the shoulders and neck.

Expert evidence relied on by Basha from a physiotherapist concluded the assessment was ill advised, misdirected because it employed unsuitable, unnecessary irrelevant tests of activity and the test were inappropriate on a recently operated shoulder. Evidence from medico-legal experts noted that the treating practitioner would have been *"horrified to learn of the assessment and would have forbidden such assessment to be done so soon after surgery"*. The trial judge concluded that it was inappropriate to carry out the test and there had been negligence. An appeal followed.

The Court of Appeal noted that the duty of the Vocational Capacity Centre when conducting an assessment required testing of physical capacity in all respects. It was foreseeable that during the crawling exercise Basha's left shoulder could be favoured and therefore result in an increased loading of her right shoulder. This was a risk inherent in the process and the scope of the duty of care owed by the Vocational Capacity Centre was to take reasonable steps to avoid that risk eventuating.

The Court of Appeal noted that it was accepted that the Vocational Capacity Centre owed Basha a duty to exercise reasonable care and skill in the provision of professional advice and treatment, the standard of which was that of the ordinary skilled person exercising and professing to have the skills of a physiotherapist.

The Court of Appeal went on to consider the specific obligations in the *Civil Liability Act, 2002* necessary to determine that there had been a breach of duty of care, namely that:

- (a) the risk was foreseeable;
- (b) the risk was not insignificant;
- (c) in the circumstances a reasonable person would have taken precautions against a risk having regard to:
  - (i) the probability that the harm would occur if care were not taken,
  - (ii) the likely seriousness of the harm,
  - (iii) the burden of taking precautions to avoid the harm,
  - (iv) the social utility of the activity that creates the risk of harm.

Considering those factors the Court of Appeal concluded that the trial judge did not make a mistake when he concluded that the VCC was negligent in carrying out the assessment rather than postponing it.

The amount of damages awarded was also re-considered by the Court of Appeal. Ultimately that award was increased substantially with Basha ultimately receiving an increased award for non-economic loss (pain and suffering) to $103,500 and an allowance for past and future wage loss to $116,883. According Basha received more than $220,000 in damages for the injury she sustained when undergoing the medico-legal examination.

Timing in this case was very much an issue. The case provides a warning to all medico-legal practitioners and lawyers that they need to carefully consider the nature of the medico-legal examinations to be carried out as any examination or test which is carried out that results in injury may lead to an action for damages against the medico-legal practitioner.

OH&S Roundup

Conviction For Design Failure

The NSW Occupational Health & Safety Act imposes obligations on designers of plant and equipment to ensure that the plant and equipment is safe and without risk to health when properly used.

We have not seen a lot of prosecutions brought against designers. However the Industrial Court's decision in Inspector Chin v Simpson Designer Associates Pty Limited demonstrates that the risk of prosecution for designers cannot be ignored.

A number of companies were involved in the construction of Hy-Tech's batching plant and the fabrication, installation and/or

maintenance of three sets of bi-sliding metal gates. Simpson Design were structural engineers responsible for the design of the gate. The gate ultimately caused a fatality to a non-employee of Hy-Tech who was operating the gate manually.

Ultimately the designer was found to be guilty of a breach of the OH&S Act for failing to include in the design of the gate, any or any adequate device to prevent the gate falling during manual operation.

In essence the fatality occurred as there was a risk that the gate would fall when operated manually as there was an inadequate stop. A stop was not included in the design and the designer argued that it was appropriate not to include a stop in the design having regard to its limited role as a structural engineer.

The designer also argued that the stop that was ultimately installed which was inadequate was not designed by him. It was common ground that the designer did not include a stop in the design.

The case demonstrates that structural engineers need to be very careful to consider the overall impact of their designs and carefully contemplate the manner in which their designs will be used and ensure that their designs incorporate features that will allow for the safe use of the plant having regard to the intended use. A structural engineer should carefully identify the manner in which the plant will be used to ensure that designs take into account all risks involved in the intended use of that plant. A failing in the initial design will expose the designer to the risk of a prosecution under the OH&S Act and arguments that the involvement of subsequent designers or failures to properly maintain plant and defect faults in the plant will not result in an escape for the original designer from their OH&S obligations.

In this case a penalty has yet to be decided and will be determined in due course.

$90,000 Fine For Fall From A Mezzanine Level

Australian Regional Wholesale Pty Limited was recently fined $90,000 for a breach of the NSW *Occupational Health & Safety Act* following a fall by an employee from the second mezzanine level of their premises where stock was stored. The employee was a storeman and driver and was assisting to put stock away on the second mezzanine level of the premises. Whilst carrying out that work he slipped and stepped backwards over a joist and fell onto the plaster board ceiling of the customer service and sales area which collapsed. He fell 2.8 metres to the carpet covered concrete below.

It was noted that the defendant did not conduct a risk assessment of the suitability of the area for storage or access by staff. No assessment was conducted as to the load bearing capacity of the ceiling material underneath the second mezzanine level prior to using the level for storage. No fall arrest system was provided whilst employees were working on the second mezzanine level. There was no adequate flooring or no suitable guardrails and there was no adequate training and information with respect to working on the second mezzanine level. Finally the occupational health and safety management system did not contain information in relation to working at heights. The problem was that the defendant assumed that the second mezzanine level was safe however it did not undertake any risk assessment.

In those circumstances where the defendant faced a maximum penalty of $550,000 and had no prior convictions the Court imposed a fine of $90,000.

Director Escapes With Minimal Penalty

The Industrial Relations Commission in Mintark Pty Limited fined a company $115,000 and its director $3,000 in connection with a breach of the NSW *Occupational Health & Safety Act* when an employee was injured during construction work. The circumstances of the offence were not controversial and the defendants pleaded guilty however the approach of the Court in sentencing provides hope for directors who operate their businesses through a corporate entity.

It is not uncommon for WorkCover to prosecute both a company and its director who will be deemed to have committed the same offence as the company by virtue of Section 26 of the *Occupational Health & Safety Act*. Some commentators speculate that directors are prosecuted in part based on concerns that a company may not have sufficient assets to pay any fine or costs ordered against the company in the prosecution.

However a fine imposed on a company will impact on its shareholders. Commonly in a small business the director of the company will be the sole shareholder of the company who ultimately bears the impact of the fine on the company. A further penalty imposed on the director therefore has a compounding effect.

Justice Marks in this case noted that the financial burden imposed on the company by the imposition of a penalty of $115,000 would ultimately be borne by the director and his wife as shareholders. The company faced a maximum penalty of $550,000 and was fined $115,000. The director on the other hand faced a maximum penalty of $55,000. Justice Marks assessed the culpability of the company and the director as being equal however in considering the appropriate monetary penalty for the director, the significant financial impact of the incident on the business and the director needed to be taken into account as well as the impact of the ultimate fine on the company and the fact it would impact on the director.

The Court fixed a penalty of $3,000 for the director.

In addition in relation to costs the Court ordered that the costs should be borne in such proportions as the penalties imposed upon the defendants bore to the total penalties. In other words the director would be liable for less than 3% of the cost.

No doubt if the company had been liquidated the director would have faced a larger fine. In this case the compounding effect of a fine on a company and its director who is also a major shareholder has been ameliorated with what is a relatively low fine for the circumstances and culpability of the director.

Changes For Workers Compensation Insurers From 1 January 2010

From 1 January 2010 the Fair Work Act will take full effect with those provisions in the legislation which had a deferred commencement coming into operation from 1 January 2010. Importantly the concept of modern awards introduced by the legislation will commence at that time.

Workers compensation legislation throughout Australia requires reference to the industrial instrument governing an employee's remuneration when an insurer determines the weekly compensation payable. So from 1 January 2010 it will be crucial for workers compensation insurers and employers to identify the industrial instrument which governs their employment relationships as this will impact on the amount of weekly compensation that is payable.

Fortunately in NSW the Government has referred its industrial relations power to the Commonwealth Government and the Fair Work regime will apply to all private sector employees in New South Wales. The only NSW employees left out of the loop will be local council employees and other public sector employees.

Identifying the industrial instrument applicable to an employer and the remuneration payable will not be without difficulties.

State Awards that used to apply will no longer apply and employers will need to look to the modern awards which have been developed pursuant to the Fair Work legislation as the fundamental basis for any industrial instrument they negotiate.

So workers compensation insurers will need to identify the relevant industrial instrument and if the workers compensation legislation provides that weekly payments are based on the award for the employee they will need to identify the relevant modern award.

The first step for workers compensation insurers will be the identification of the relevant modern award applicable to employer to ensure that weekly payments are calculated in accordance with the remuneration provisions in the modern award.

In the majority of cases, the starting point in the analysis for workers' compensation insurers will be the identification of the relevant modern award. There are 122 modern awards.

However, many businesses will have enterprise agreements registered on a state or federal basis which were in existence prior to 1 January 2010. Some of those agreements may have passed their notional expiry date. Notwithstanding those industrial agreements will continue to apply to the employers relationship until they are replaced by a new enterprise agreement.

It is not as simple as looking to an unexpired enterprise agreement or an enterprise agreement which has passed its nominal expiry date to calculate the appropriate amount of weekly compensation. If the enterprise agreement sets rates lower than a modern award the rates in the modern award will apply. However, the rates in the modern award will not apply to all matters where there is an existing enterprise agreement as the relevant transitional provisions in the Fair Work legislation provide that an unexpired enterprise agreement remains on foot, but for terms about pay which must be at least equal to the relevant

award or alternatively, the National Employment Standard, during the life of the award.

The process of identifying the industrial instrument which will apply to an employer will be relatively straightforward but one that employers will not necessarily have undertaken for compensation claims on foot or perhaps for new claims. The step by step approach to identifying the relevant industrial instrument and the rate to use to calculate workers compensation benefits will be to:

1. Identify the modern award relevant to the employer/employee.
2. In the absence of any enterprise agreement the rates in the modern award will apply.
3. Identify whether the employer entered into an enterprise agreement and registered that agreement (State or Federal) prior to 1 January 2010. Secure a copy of the agreement.
4. If there was a pre 1 January 2010 enterprise agreement check with the employer to see if that agreement has been replaced with a new enterprise agreement. If so refer to the new agreement.
5. If there was no enterprise agreement before 1 January 2010 identify whether the employer entered into an enterprise agreement and has registered that agreement since 1 January 2010. Secure a copy of the agreement.
6. If there is a post 1 January 2010 agreement it will comply with the modern awards so it will be appropriate to simply refer to that agreement to calculate benefits.
7. If a pre 1 January 2010 enterprise agreement has not been replaced the old agreement will still apply even where it has passed its notional expiry date.
8. If the employer has a pre 1 January 2010 enterprise agreement check that the wage rates in the applicable enterprise agreement equal or exceed the rates in the modern award which would apply to the employer/employee as the modern award rates will apply to the employment arrangements despite the rates specified in the agreement. Use the modern award rates if they are more that the rates in the enterprise agreement.

Modern awards contain coverage clauses. It will be important for worker's compensation insurers to have a working knowledge of the coverage provisions in modern awards so as to be able to quickly determine whether or not a modern award properly applies to an injured worker and the quantum of benefits they may be entitled to as a result of coverage of an award. The coverage of modern awards will be quite different to coverage provided in pre-reform awards: it will not be as simple as looking up the old heading for the old award to see if the re is a modern award with the same heading. Employers previously subject to a particular award may be subject to a different award because of Award Modernisation. Modernisation may also provided coverage to workers who were previously not covered.
Workers Compensation insurers should note Fair Work Australia has drafted a "Modern Miscellaneous Worker Award", which has been designed with the explicit intention of covering workers whose employment was not previously governed by awards at all.

In practice, the identity of an industrial instrument governing an injured worker's employment may have changed overnight. It may also be the case that different workers in an enterprise will be covered by different instruments based both upon the work which they perform and the level of their remuneration.

Insurers and businesses will need to take some time to understand the full impact of the Fair Work Act and the impact which will flow from modern awards. Identification of the correct industrial instrument will be vital in ensuring the correct level of weekly compensation benefits are paid. Collaboration between employers and workers' compensation insurers to identify the industrial instrument that applies to an employee will be vital on old and new claims to ensure the correct weekly compensation is paid. From 1 January 2010 employers and workers' compensation insurers will need to make reference to the correct industrial instrument be it a modern award, an existing enterprise agreement or an existing enterprise agreement impacted by the rates specified in a modern award to determine the quantum of weekly compensation payable.

Deemed workers: a recent Presidential Appeal decision in the Workers Compensation Commission

The recent decision by Deputy President Bill Roche in the Workers Compensation Commission matter of *Pasqua v Morelli Constructions Pty Ltd* demonstrates the complexities involved in the determination of whether or not a contractor is a deemed worker for the purpose of the Workers Compensation Act 1987.

The common law test of whether a contractor is an employee has been set out in the High Court decision of *Stevens* v *Brodribb Sawmilling Pty Ltd*. The Court considered a number of factors including who controlled the worker, the mode of remuneration, the provision of equipment and tools, the hours of work, the deduction of income tax and the delegation of work.

In each case the facts will be examined before a determination is made whether someone is an employee or an independent contractor.

The deemed worker provisions in the *Workplace Injury Management and Workers Compensation Act* 1998 extend the common law definition even further to apply to certain independent contractors.

Schedule 1 of Clause 2 of the *Workplace Injury Management and Workers Compensation Act* 1998 states that:

"(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
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. "

The facts of the case involved a worker, Mr Pasqua, who had originally been employed by Morelli Constructions for a number of years. He resigned from Morelli Constructions and commenced his own business as a carpenter. When he found that work had slowed down, he contacted Morelli Constructions and asked if there was any work available. Morelli drew up a trade contract naming Morelli Constructions as principal contractor and Mr Pasqua's company Rocco Pasqua Carpentry as the trade contractor. Morelli Constructions paid Rocco Pasqua Carpentry and did not deduct taxation. Mr Pasqua was required to hold public liability and personal accident and sickness insurance as part of the contract.

While working at a site on a job for Morelli Constructions, Mr Pasqua injured his back and lodged a workers' compensation claim against Morelli Constructions.

The insurer denied liability on the basis that Mr Pasqua was not a worker for the purposes of the *Workers Compensation Act* 1987.

Mr Pasqua argued that he was a deemed worker within the meaning of the *Workplace Injury Management and Workers Compensation Act* 1998. He advised that, although he was a contractor not an employee of Morelli Constructions, he no longer advertised his business, was not looking for alternative work, attended jobs exclusively provided by Morelli Constructions regularly on a full-time basis, wore a uniform provided by Morelli Constructions, used tools provided by Morelli Constructions and when attending the work he was under the direction, control and supervision of Morelli Constructions.

Morelli Constructions argued that Mr Pasqua remained a subcontractor and continued submitting invoices and was paid in the same manner as on previous occasions.

At first instance the Arbitrator found that Mr Pasqua was not a deemed worker and had continued carrying on his regular business as a carpenter. The Arbitrator concluded, although Mr Pasqua was only working for Morelli Constructions at the time of the accident, this was due to the fact that there was no other work available and did not indicate Mr Pasqua was a deemed worker. If other work became available, the Arbitrator indicated that Mr Pasqua was able to take on the opportunity of other work.

The Deputy President reviewed the evidence and weighed up the various factors. He found that it was not determinative that Mr Pasqua presented invoices in his business name, nor was the existence of the trade contract. The Deputy President found that once Mr Pasqua contracted exclusively for Morelli Constructions, Mr Pasqua ceased conducting his own business, and he was therefore entitled to the benefit of the deemed worker provisions of the Act.

This case reminds us that each claim by a contractor needs to be determined on its own set of facts.

It is important when determining whether or not a contractor is a deemed worker to ascertain the following information:

- Was the agreement to carry out work in writing and if so on what terms?
- Could the contractor employ other people to perform work? In fact did they employ others?
- 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?
- Did the contractor supply his own tools?

- Was the contractor obliged to remedy any defects at his own expense?
- Did the contractor deal direct with the client requesting the work?
- Was sick pay, holiday pay or superannuation paid?
- Were PPS payments deducted from payments to the contractor and after 2000 was GST paid on invoices of the contractor?
- Did the contractor provide material and invoice for material?
- Was the contractor responsible for fixing defective work at his cost?
- Could the contractor engage subcontractors or delegate the work (e.g. to a partner or anyone else)?
- Did the head contractor 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, the white pages or by any other means?
- Did the contractor have business cards?
- Did the contractor perform work for anyone other than the head contractor in each year? If so, for who and what percentage of time each week was worked for the head contractor?
- Did the contractor have a genuine and practical entitlement to work for others?
- Could the contractor choose when to do the work?
- Did the head contractor have the right to suspend or dismiss the contractor?
- Does the contractor create goodwill or saleable assets in the course of his work?
- Did the head contractor present the contractor to the world as an emanation of its business?
- Did the contractor spend a signification portion of his remuneration on business expenses?

The fact remains that a contractor may well be a "deemed worker" for the purpose of the Workers' Compensation Act 1987 and entitled to payment of workers compensation benefits by the head contractor despite the apparent intention of any contractual documents.

Labour Hire-Termination Of Employment Was A Genuine Redundancy

Businesses involved in the labour hire industry are subject to their clients changing needs and employees are often categorised as casuals by the labour hire business. However regular casual work can give rise to a relationship of a different nature that will be subject to unfair dismissal claims when the relationship ends although those claims may be successfully defended if the termination is the result of a genuine redundancy as was seen by the decision of Fair Work Australia in Mr M v in LD Pty Ltd.

Mr M was employed by a labour hire company initially on a casual basis in June 2007. He subsequently worked on a regular basis averaging 35 hours per week.

In June 2008 he breached the host employer's Occupational Health and Safety requirements. As a result he was advised he could not work again at the host employers facility for at least thee months.

Mr M was subsequently transferred to another host employer. The work with this host employer involved a range of cleaning and repair activities on residential properties. Mr M continued on the same casual basis of an average of 35 hours per week.

On 13 August 2009 the employer elected not to allocate work to the employee on the basis of a decline in the work available from the new host employer. Mr M was advised he was not required to work and he would be called into work when he was next needed.

Mr M lodged an application claiming he was unfairly dismissed. The employer:-

- denied the employee's contract of employment had been terminated; and
- if the employment contract had been terminated it had been terminated as a result of a genuine redundancy.

The concept of genuine redundancy is defined in section 389 of the Fair Work Act 2009 (the "Act") in the following terms:-

> *"389 Meaning of genuine redundancy*
> *(1) A person's dismissal was a case of genuine redundancy if:*
> *(a) the person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and*

(b) the employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

(2) A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:-

(a) the employer's enterprise; or

(b) the enterprise of an associated entity of the employer."

Senior Deputy President O'Callaghan ("SDP") in his decision concluded the employees regular casual employment was terminated on 13 August 2009 when he was advised that he was not required to work on that day and not required not to work until further notice. The SDP found this statement to be a termination of the regular employment relationship which had existed since 2007. Whilst the employee was a casual employee, he had been in regular employment and the change from regular to irregular casual employment was, in the opinion of the SDP, of such a magnitude that it constituted a termination of employment.

Having found the contract of employment was terminated, the SDP reviewed whether the termination constituted unfair dismissal.

Section 385 of the Act states:-

A person has been unfairly dismissed if FWA is satisfied that:

(a) the person has been dismissed; and

(b) the dismissal was harsh, unjust and unreasonable; and

(c) the dismissal was not consistent with the Small Business Fair Dismissal Code; and

(d) the dismissal was not a case of genuine redundancy.

The SDP found the employer no longer required the same number of staff for the new host employer as a result of the reduced demand on the part of the new host employer. The SDP considered this constituted a change in the employee's operational requirements and met the circumstances for a genuine redundancy.

Whilst there was no modern award that regulated the employees employment, the SDP considered the consultation requirements set out in the Metal Industry (South Australia) Award which is a Notional Preserving State Award was most likely to regulate the employee's employment. The evidence provided the employee was telephoned by his leading hand and advised of the down turn in work. Consequently the SDP was satisfied that any award consultation obligation had, in a somewhat rudimentary fashion, been met. The SDP noted there was no capacity for a review of whether the employee should have been selected for redundancy in advance of other persons.

The SDP concluded the employees employment was terminated as a genuine redundancy. Consequently the application for unfair dismissal was dismissed.

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

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