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 the employment and insurance market in Australia. We can be contacted at any time for more information on any of our articles.

Hail Damage Claims- A Timely Decision From The NSW Court Of Appeal

The NSW Government has recently threatened to name and shame insurance companies who fail to fix storm devastated areas of western Sydney. The government is said to share residents' frustrations at the slow response to many of the 58,000 insurance claims that have been lodged for homes and cars since the December 2007 hail storms.

The Insurance Council of Australia has said the main reason for the delays in repairs has been the consistent rain and large storms in the town for months after most of the damage was done.

But will all the claims be payable pursuant to contracts of insurance? Surely exclusions in some policies will prevent recovery.

The NSW Court of Appeal has recently delivered a timely reminder that damage from a severe storm including hail and torrential rain will not be covered by all insurance policies and the validity of the claim will turn on the circumstances of the loss and the wording in the policy.

The NSW Court of Appeal delivered its decision in *Robert Caine - v - Lumley General Insurance Limited* on 6 February 2008. Caine and Byfield owned real estate and a caravan park on the far north coast of NSW. The caravan park is in flood prone area. The business included 34 permanent caravan sites with vans. 26 caravans were owned by Caine and Byfield. Each caravan had an annexe which sat on a concrete slab and adjoined a caravan. The caravans had solid tropical roofs above them. The tropical roof was a fixed structure erected above the caravan and served to reduce heat penetration and the likelihood of the caravan being damaged by hail and other weather conditions.

Work to the annexes or roofs of the caravans required approval of the Tweed Shire Council and a development application had to be lodged and an engineer's certificate provided.

On 16 January 2002 the caravan park was struck by a severe storm including hail and torrential rain which caused damage to the house at the park, 25 caravans and tropical roofs and 24 of the annexes.

Caine and Byfield had a commercial business policy with Lumley General Insurance Limited. The basis of settlement pursuant to the policy was reinstatement value of the property damaged. The claim for reinstatement value was $97,500.00 for the caravans, $83,031.00 for the roofs and $477,903.00 for the annexes.

Lumley paid $100,000.00 in respect of the damage to the caravans which it asserted included the annexes and tropical roofs, $35,000.00 in respect to business interruption and $7000.00 in respect of damage to the residence but said that this was the limit of its liability under the policy. There was an exclusion in the policy that excluded liability for hail damage unless the hail penetrated the entire thickness of the material damaged, causing water to enter and in that event the limit of liability was $100,000.00 in any one year

The issue for the Court of Appeal was whether the reference in the policy to caravans included

Inside

Gillis Delaney Lawyers
Level 11,
179 Elizabeth Street,
Sydney 2000
Australia
T +61 2 9394 1144
F +61 2 9394 1100
www.gdlaw.com.au

We thank our contributors

David Newey dtn@gdlaw.com.au
Amanda Bond asb@gdlaw.com.au
Naomi Tancred ndt@gdlaw.com.au
David Collinge dec@gdlaw.com.au
Lou Stojanovski lxs@gdlaw.com.au
Michael Gillis mjg@gdlaw.com.au
Stephen Hodges sbh@gdlaw.com.au
Michael Hayter mkh@gdlaw.com.au
Natalie Poretti nyp@gdlaw.com.au

the annexes and tropical roofs and if it did, whether the damage to the caravans was caused by hail thus attracting the exclusion clause which capped recovery at $100,000.00. In the trial a further issue arose. Caine and Byfield incurred extra costs of reinstating the caravans of approximately $72,000.00 which arose as a result of Council requirements imposed to raise the floor height of the caravans to a level designed to avoid flooding. This became an issue as there was a clause in the policy which might trigger a further entitlement for additional reinstatement costs which Caine and Byfield argued was not caught by the limit of liability in the exclusion clause. The original judge at the first hearing did not directly resolve that issue but held that the claim was validly restricted by the exclusion clause.

Caine and Byfield appealed however the appeal resulted in no real joy. The Court of Appeal also concluded the caravans included the tropical roofs and annexes and that the proximate cause of the damage was hail so that a clause which capped recovery at $100,000.00 for the caravans applied. The Court of Appeal however found that the additional reinstatement costs clause applied and a further sum of $72,808.00 was payable being the costs of reinstating the annexes and tropical roofs to comply with Council requirements. The Court of Appeal found that the exclusion clause did not limit the claim for the additional reinstatement costs.

The relevant terms of the policy contained a general insuring clause which included:

> *"Provided that our liability will not exceed the sum insured nor any specific sub-limits contained in the schedule or any specified section of the policy covering that particular loss, damage or liability."*

The schedule contained a table with headings "Material Damage" and "Declared Asset Value". Caravan Indemnity was noted as an item under the Material Damage with a Declared Asset Value of $192,000.00. There was also an entry Caravans Replacement which had no Declared Asset Value. The basis of settlement of claims was found in a clause which provided:

> *"Reinstatement value - is the cost necessary to replace, repair or rebuild the property insured to a condition substantially the same as but not better or more extensive than its condition when new."*

An additional clause provided extra cost provided:

> *"Extra Costs of Reinstatement. We will also pay the extra costs of reinstatement (including demolition or dismantling) of property insured which has been damaged necessarily incurred by you to comply with the requirements of any statutory regulation or of any municipal or statutory authority provided that:*
>
> *We shall not pay for any additional costs incurred in complying with such requirement which you had been required to comply with prior to the happening of the damage;*
>
> *The average/under insurance clause shall not apply to any amount recoverable under this clause, and any amount payable shall not be taken into account for the purposes of the application of the average/under insurance clause;*
>
> *If the costs of reinstatement of damaged property insured is less than 50% of the costs of reinstatement if such property had been totally destroyed, the indemnity under this clause shall be limited to the extra costs necessarily incurred in reinstating only that portion damaged or the sub-limit of liability stated in the schedule, whichever is the lesser."*

Finally the relevant Exclusion clause was in the following terms:

> *"Section 1 of this Policy does not cover Damage to the following property in the circumstances set out:*
>
> *…*
>
> *11 (a) Gates, fences, retaining walls, textile awnings and blinds where caused by wind, rain water or hail.*
>
> *(b) Property in the open air unless such property comprises or forms part of a permanent structure designed to function without the protection of the walls or roof where caused by wind, rain water or hail;*
>
> *(c) Provided that this exclusion shall not apply to caravan and cabin annexes, and shelters built of sail material or perimeter fencing less than 10 years old where damage is caused by storm, tempest, wind, rain water or hail.*
>
> *……..*
>
> *14 Caravans, Manufactured Homes, Relocatable Homes, Park Homes, and Cabins where caused by wind, rainwater, storm or tempest, where there is a statutory requirement for the Manufacturer to cyclone rate the structure or for any special cyclone rating Anchorage, unless such requirement is adhered to… ;*
>
> *15 Caravans and all aluminium foam sandwich construction where caused by hail. Unless the hail penetrates the*

entire thickness of the material damaged, causing water to enter. Limit of Liability $100,000 any one year;

There was also an averaging provision in the policy where there was underinsurance.

McColl J in the leading judgment noted that a policy of insurance is a commercial contract and should be given a business-like interpretation and this required attention to the language used by the parties, the commercial circumstances which the document addresses and the objects which it is intended to secure. It was noted that the declarations of value in the schedule are used for the basis of setting premiums and settling claims and are a means of minimising under insurance.

So what was the meaning of the word "caravan" in the exclusion clause? The original Trial Judge found the caravans included an annex and tropical roofs. The caravans were elevated on Bessa blocks. Some had wheels whilst others were removed. The tropical roofs were not separate structures but were permanent or semi-permanent structures connected to the caravans. The annexes and the tropical roofs were bolted to the caravan incorporating a stationary van as part of a residential unit for use by patrons of the caravan park. According to the Trial Judge it followed that the use of the word "caravan" in the policy was used in the sense of a permanent or semi-permanent structure and all parts of appurtenances to the structure including annexes and tropical roofs, should be regarded as part of that structure. The Trial Judge commented that it would be a misuse of language to describe the annexes and tropical roofs as anything other than a part of the relevant whole.

McColl J in the Court of Appeal found the Trial Judge's reasons compelling. The overwhelming conclusion was that the policy was intended to cover the structure which the owners offered as accommodation. Those structures comprised of the caravans of which the tropical roofs and the annexes were a part. McColl J noted:

> *"It is evident that a caravan in situ could not become mobile without the structure of which it was an integral component being dismantled. The caravans were let as a whole with tropical roof and annex attached. The commercial object of the Policy was to insure those structures, not their individual components. …..*
>
> *This conclusion, as His Honour found, is supported not merely by the stark absence of any separate reference in the schedule to the tropical roofs or the annexes, but also by the factual findings concerning the nature of the structures themselves."*

McColl J also concluded that the policy schedule included an exhaustive list of the property insured and thus the enumeration of property and values in the schedule represented the owner's identification of the property at the caravan park which they had insured for the material damage. There was no separate item for annexes or tropical roofs.

It was also argued by Caine and Byfield that the damage was caused by a storm which included hail and torrential rain. Caine and Byfield argued that exclusion clause 15 required damage by hail alone before it could apply. The original Trial Judge found that the exclusion clause which included the words "damage by hail" meant damage by reason of hail or caused by hail in the sense that the hail was a proximate cause of the damage. The Trial Judge had held that the proximate cause of the damage was hail and while the exclusion clause contemplated that there may be other causes operating concurrently with hail, such as wind to drive the hail into the damaged material and torrential rain to enter that material, at the point of penetration of the entire thickness of the material, those additional elements did not defeat the engagement of the exclusion clause. Thus the Trial Judge concluded the policy allowed a limited form of cover where the severity of the impact by hail caused the foam sandwich materials to be breached. The insurer argued that where there were two concurrent causes of damage to the caravans, one of which was excluded and the other not, then the exclusion still applied.

McColl J noted that when considering the proximate cause of the loss in the insurance context, the Court has regard to the reality, predominance and efficiency of a cause rather than proximity in time. It was noted the Court applies common sense standards in determining what is a proximate cause, approaching the question by reference to the understanding of the man in the street and not as either the scientist or metaphysician would understand it. In this case the insurer bore the onus of proving the exclusion applied. McColl J found that the original trial judge's findings were correct. The hail was the proximate cause of the damage. McColl J noted:

> *"Damage which was caused by hail without at least elements for storm coinciding, would be a meteorological anomaly."*

It was true that the damage was caused by a storm including hail and torrential rain but it was not inconsistent with hail being the proximate cause of the damage. The hail had penetrated the materials from which the caravans were constructed, the entire thickness of the walls and windows of the caravans were penetrated by the hail, then holes of various sizes and descriptions were made and this allowed water to penetrate. In this case it was not correct to say that two concurrent causes were involved.

But what if there had been two concurrent proximate causes? The insurer argued that if there were two or more concurrent causes of damage, one of which is excluded and the other not, then the exclusion clause still applies as this submission was supported by the decision in *Wayne Tank & Pump Co Limited - v - Employers Liability Assurance Co*. The principle has been described as the *Wayne Tank* principle. McColl J noted a recent decision in *McCarthy - v - St Paul International Insurance Co*. where it was noted when explaining the Wayne Tank principle that:

> *"The principle comes into play where there are two proximate causes which are concurrent and interdependent in the sense that neither would have caused the loss without the other. . . . The two clauses can be seen as inseparable and so in effect as joint."*

In such cases, even though it could be argued that the damage may or would have occurred in any event by the cause that was not excluded, the fact is that the policy must be construed as excluding damage caused in a particular way. If the intention of a policy is to exclude a particular type of damage the claim will be excluded where another factor has caused the loss where that cause is inseparable from the excluded event.

McColl J noted in this case that the definition of damage included damage caused by wind and rainwater. This was therefore a policy in which cover was provided for damage caused by wind and rainwater, but excluded damage caused by hail (save in restricted circumstances). McColl J noted the *Wayne Tank* principle could apply where there were multiple concurrent proximate causes. The damage was caused by an excluded condition, whether or not there was another concurrent cause. In this case the exclusion clause applied however as the damage was caused by hail penetrating the entire thickness of the material damaged causing water to enter the cap of liability of $100,000.00 in the exclusion clause for such circumstances was triggered. Thus the Court of Appeal recognised the limits of cover agreed upon and the loss exceeding $100,000 fell outside the terms of the policy. The end result was that the exclusion clause applied but the $100,000.00 limit was available due to the nature of the damage caused.

McColl J then turned to consider whether or not the extra costs of reinstatement clause was capped by the exclusion clause. McColl J noted that the policy expressly did not require the owners to estimate extra reinstatement costs when the schedule was completed. In addition, the words in the clause: "We will also pay the extra cost of reinstatement" demonstrated that the clause bore the hallmarks of an insuring clause although clearly it was not an insuring clause. It was noted that the express purpose of the clause was to provide a sum in addition to the amount necessary to reinstate the property insured. On this basis McColl J found that the extra costs of reinstatement were payable in addition to the limit of liability in the schedule.

In this case the end result was a win for Lumleys and a win for the owners. Lumleys were required to pay one-third of the owners' costs of the appeal and the owners were required to pay two-third of Lumley's costs of the appeal. Lumley held its original judgment on the primary issues limiting liability to $100,000.00 but the extra cost of reinstatement provision was triggered and not capped by the exclusion clause. An expensive exercise for all and a clear reminder that claiming storm damage does not necessarily result in cover in all situations.

The Wayne Tank principle can and will come into play where there are exclusions in policies limiting liability. It must be remembered that where there are two concurrent causes of a loss which are interdependent, one of which is excluded, and the other not, then the entire claim will be excluded by virtue of the exclusion policy. A lesson well learnt.

It is far too easy to criticise insurers for failing to deal with claims promptly when the reality is that claims may well be more complex and policies of insurance may contain exclusion clauses that limit or exclude liability in specified circumstances. The question will always be "What was the true intentions of the parties when the policy was arranged."

Country Rugby League Successfully Defends Claim

Sporting events carry a level of risk for participants. Injuries can occur during a sporting event and quite often those injured ask whether the administrators of the sport have done everything necessary to protect the participants. Rugby league is a contact sport. Scrums are part of the game and injuries can occur during a scrum, sometimes with catastrophic consequences. Those injured may look to the administrators of the game for compensation. So what is the situation? A claim for damages by a claimant who sustained catastrophic injury when a scrum collapsed in a game of country rugby league has recently failed.

In 1994 Shane Green, then 16 years of age, was playing as a hooker in a game of rugby league. During the scrum he suffered a fracture of the cervical spine resulting in tetraplegia. Green brought a claim in the Supreme Court against the Country Rugby Football League of NSW Inc ("CRL") alleging that given his young age, slight build, low weight and long thin

neck CRL should have ensured he was not selected to play in the position of hooker.

Green argued that CRL had the sole responsibility for organising and controlling rugby league in country New South Wales and should have ensured that its constituent bodies, such as the club that Green played for, did not permit players with physical characteristic such as his to play in the front row, especially in the absence of their undertaking proper neck strengthening exercises.

CRL denied negligence. CRL argued that it had no knowledge of Green or his characteristics and any rule prohibiting players with physical characteristics such as Green from playing in the front row would have been unenforceable and out of step with the New South Wales Rugby League and the Australian Rugby League.

The accident occurred and proceedings had been commenced prior to the commencement of the Civil Liability Act which meant the provisions relating to dangerous recreational activities in that Act had no application. If the Act did apply and the game of rugby league is properly classified as a dangerous recreational activity then the CRL would not liable in negligence for harm suffered by a player as a result of the materialisation of an obvious risk of the game engaged in by the injured person.

Green also sued his club but this claim was not pursued as the club was wound up prior to the trial. Claims against his coach and the referee resolved during the course of the hearing. This left only the claim against CRL to be decided. If the claim against CRL was successful then Green would receive damages of $6,500,000 as this was the quantum of damages agreed.

Acting Justice Walmsley found that CRL did owe Green a duty of care but the CRL had not been negligent. The trial judge considered the particulars of negligence pleaded against CRL at length and weighed up the evidence and concluded that Green's claim must fail. The allegations of failure on CRL's part were lengthy and included allegations relating to a failure to warn, failure to provide Coaches with the Coaches Manual and failure to regulate or control the games by stipulating that players of inappropriate physique were not to play in the front row. None of the allegations succeeded. The judge essentially found that the CRL's actions did not amount to negligent conduct.

Although administrators owe a duty of care to players it is incumbent on a claimant to establish facts that demonstrate that the administrators have failed to meet the duty they owe if the claimant is to succeed in a claim for damages against the sport's administrators.

All Too Late To Blame The Doctors

What happens if a person is injured in a motor vehicle accident and needs surgery but the surgery goes horribly wrong? Is the negligent driver who caused the injured person to be hospitalised in the first place to blame for any loss or damage? Or is it the surgeon who has failed to perform the operation correctly? The usual approach of the Court is that unless there has been gross negligence on the part of the surgeon then the blame should fall at the feet of the person who caused the original injury. The injured person and drivers can however bring claims against medical providers where there has been gross negligence and that gross negligence has caused damage.

Unfortunately the gross negligence of a medical provider is often only detected after extensive scrutiny by medico-legal providers who are asked to comment on a persons injuries during a claim arising out of a motor vehicle accident. Sometimes the negligence is detected many years after the treatment was provided and sometimes after the limitation period to bring a claim against the medical provider.

A claimant may be deprived of his rights to bring a claim against the medical provider as may the person that caused the injury. So what happens? Can the person that caused the injury be responsible for the loss caused including the loss caused the gross negligence of the medical practitioner?

In NSW Court proceedings are governed by the Civil Procedure Act 2005 and the Uniform Civil Procedure Rules 2005. These provide that when a claim is brought against a defendant then a defendant can cross-claim against a third party who in the defendant's opinion is also responsible for the claimant's loss. Generally cross-claims can be brought at any stage before the conclusion of the claim subject to the leave of the Court. Occasionally however this leave is not granted.

In Gordon v NSW Insurance Ministerial Corporation the Court considered a claim where Renee Gordon was injured in a motor vehicle accident on 3 May 1986. On 6 August 1986 Gordon commenced proceedings in the District Court of NSW against the third party insurer who denied liability. On 19 October 2004, 8 years after proceedings were commenced, the defendant driver

sought leave to issue a cross claim to join Gordon's two treating specialists to the proceedings. Leave was granted on 10 February 2005. On 15 June 2005 the proceedings were transferred to the Supreme Court where they remain. On 1 May 2006 Justice Grove of the Supreme Court upheld an application by the specialists to dismiss the cross-claims on the basis that the limitation period to cross claim against them had expired on 11 June 1997. This meant that the defendant could no longer pursue the cross-claims and the injured person also could not pursue the medical specialists due to the expiration of the limitation period.

The defendant subsequently sought to overcome this problem by filing an application to amend their defence to the injured person's claim to argue that all of Gordon's loss and damage was caused by the grossly negligent treatment of her doctors and not by the driver's negligence.

Justice Hislop of the Supreme Court who heard the defendant's did not allow the defendant to do so. Justice Hislop noted that to allow the defendant to rely on the amended defence would have significant consequences for Gordon who was now herself unable to sue the doctors because she was out of time to do so.

A decision that may have significant financial consequences for the defendant who will not be unable to put the blame at the feet of the doctors. It remains to be seen whether the defendant will appeal this decision as undoubtedly it has the potential to be a costly one for the defendant. Whether the amendment was necessary is also an issue as the defendant will still seek to argue that the damage that was sustained was caused by an intervening act for which it cannot be responsible. The progress of this case will continue to be of interest in future editions of GDNews.

Caveats and the Building and Construction Industry Security of Payments Act

Can a contractor register a caveat over a residential property based on an adjudication determination obtained under the *Building and Construction Industry Security of Payments Act (the SOP Act)*?

Many believe that as the adjudication process under the *Security of Payments Act* is only an interim process, a contractor carrying out residential building work cannot register a caveat over the property based on an adjudication determination. However this may not be the case.

The Home Building Act

Section 7D of the *Home Building Act 1989 (NSW)* provides four prerequisites for a valid charge:

- the land that is the subject of the charge must be the land on which the contract work was carried on;
- the charge is in favour of the builder who is a party to the contract;
- the owner of the land must be the person against whom the judgment or order was made;
- the charge must be created to secure to the builder money due under the contract, but only if a Court or Tribunal had made an order or judgment that such payment be made.

If the above prerequisites are satisfied a charge is created entitling a caveat to be lodged against the property by the builder to secure payment.

Kell & Rigby Pty Ltd v Flurrie Pty Ltd

In *Kell & Rigby Pty Ltd v Flurrie Pty Ltd [2006] NSWSC 906* the Court examined section 7D to determine whether a valid charge was created by lodging an adjudication certificate as a judgment of the Court.

The Court held that it was possible in certain circumstances to be able to register a caveat on a property based on a adjudication determination. So what are these circumstances?

Flurrie engaged Kell & Rigby to provide construction management services in connection with the construction of a residential/commercial development on property owned by Flurrie. Flurrie failed to pay progress claims 11 and 12 and Kell & Rigby suspended works under the SOP Act. The parties entered into a variation being Special Condition 1 granting Kell & Rigby a charge over Flurrie's properties so that Kell & Rigby would recommence work. Kell & Rigby obtained an adjudication determination against Flurrie in the amount of $1,177,933.12 under the *SOP Act*. Flurrie failed to pay the adjudicated amount. Kell & Rigby then obtained an adjudication certificate, which was registered as a judgment in the Supreme Court. Kell & Rigby

sought to rely on special condition 1 to register a caveat over properties owned by Flurrie. Special Condition 1 provided:

> *"Flurrie provides as security for its obligations under the PM Agreement by way of a charge and acknowledges the right of Kell & Rigby to lodge caveats over the following properties:*
>
> - *Lot 12 and 13 DP 857630 – being 58-60 Terry Street Rozelle;*
> - *Lot 1 and 2 DP 711316 – being 561-563 Darling Street, Balmain"*

Flurrie sought to argue that special condition 1 of the contract was void because of section 7D(1) of the Home Building Act which voids provisions in contracts which provide an entitlement to a charge over the land to the builder.

Section 7D of the Home Building Act was amended to its current form in 1998. The Government as it was introducing this legislative provision noted that the right to lodge caveats was often provided for in building contracts and was seen as a way to secure payment for builders. However, this right had been abused by some unscrupulous contractors. Accordingly, the amendment was intended to restrict the circumstances where a caveat may be lodged to a situation in which the builder had obtained a judgment or order from a Court or Tribunal against the owner of the property.

The Court held that even thought the process provided by the SOP Act does not result in a final determination of the contractual rights of the parties, section 7D of the Home Building Act does not expressly require a final judgment. Furthermore the Court determined that a judgment obtained by registering an adjudication certificate in respect of a progress payment is a judgment that payment of money is due under a contract. Accordingly the Court in rejecting Flurrie's submission determined that generally judgments obtained by registration of adjudication determinations made pursuant to the SOP Act satisfy the description of judgments required in section 7D of the Home Building Act.

However, in this case Kell & Rigby failed in maintaining their caveat because the Court determined that the wording of Special Condition 1 purported to secure all of Flurrie's obligations under the agreement rather than just creating a charge only where a Court or Tribunal had made an order or judgment that moneys due under the contract be paid. Accordingly, the Court determined that special condition 1 did not satisfy the requirements of section 7D which prohibits the creation of a charge by a contract term unless it complies with the four indicia in section 7D(3). The clause was void and unenforceable as it went too far.

Summary

This case demonstrates that the Courts are willing to allow contractors to register caveats on properties in limited circumstances where there are valid contractual rights to do so. These limited circumstances have been held to include judgments obtained by registering an adjudication certificate with the Court, provided that the contract provisions provide a right for a charge over the property only in the limited circumstances specified in section 7D of the Home Building Act.

The clause 31 of BC4 contract provides a charge on the land upon an order or judgment by a Court or Tribunal for money due under the contract. Clause 28 of the CPC Residential contract also provides a charge over the land as long as the Home Building Act has been complied with.

Clause 31 of the HIA Residential Building Contract for New Dwellings and clause 26 of the HIA Building Contract for works on a Cost Plus Basis have identical wording that provide a charge on the land upon a order or judgment by a court or tribunal for money due under the contract.

Builders and subcontractors should take care to ensure that the contractual provisions relied upon have been drafted carefully having regard to section 7D. If a clause is drafted too widely and falls outside the parameters in section 7D it will have no benefit for a builder and will be unenforceable.

OH&S Roundup

$300,000.00 Fine for Barclay Mowlem Construction Limited

Barclay Mowlem Construction Limited ("Barclay Mowlem") were the principal contractors at a construction site at Kingscliff. The company had contracted with Marveldale Pty Limited to undertake concreting tasks and had also engaged Lindales Pty Limited to supply labour to the site. An employee of Lindales, James, was working as the operator of a Manitou mobile crane and in the process of moving a kibble suspended by a chain from a jib attached to the boom of the Manitou, the crane hit a

bump, became unstable and toppled over down a ramp. James received serious injuries as a result of being thrown from the cabin and Palmer, who was employed as a labourer by Barclay Mowlem was fatally injured. Barclay Mowlem were prosecuted for breaches of the *Occupational Health and Safety Act.*

The physical layout of the site at the area of the concrete pouring and the space available for the operation of the Manitou was such that the Manitou had to approach the concrete block wall with its boom extended and elevated resulting in an elevated suspended load. Travelling and manoeuvring with a raised and freely suspended load resulted in excessive swinging and inertia forces being exerted by the load. These forces adversely affected the stability of the crane. The crane was also unsafe in itself. It did not have a load indicator system to measure and display the mass of the load being lifted. There was no rated capacity limiter to restrict motion of the crane within tolerances of a rated capacity. There was no angle indicator to indicate the angle of the boom or jib to the horizontal. In addition, the Court found that there were insufficient operating manuals for the crane. Barclay Mowlem pleaded guilty. The Court found that it was difficult to comprehend why Barclay Mowlem with long experience in the construction industry and undoubtedly a very good occupational health and safety policy and practices in place failed in so many ways to ensure the health and safety of personnel on the site. The failure in the system of work occurred essentially because Barclay Mowlem allowed the crane to traverse across a slope with a raised and freely suspended load. The Court was critical as the supervisor had no experience operating the Manitou crane and he held no certificate of competency to operate such a crane and was unaware of its capabilities and limitations. The Court was also critical that the attempted pour occurred in the absence of supervision.

The Court noted that it had previously convicted Lindales in relation to the incident primarily because Lindales had failed to ensure the plant was safe. At that time Lindales was a first time offender and it received a fine of $80,000.00. The Court determined that the offence of Barclay Mowlem in exposing employees to risks should result in a fine of $200,000.00 with a further fine of $200,000.00 for exposing non-employees to a risk. However, as there was significant overlap between the elements of the respective offences it was appropriate to reduce the overall fines to $300,000.00. Once again an accident from the use of cranes on a construction site which has had tragic circumstances and resulted in substantial penalties for those operating on site.

Forklift Accident Leads to Substantial Fines

The NSW Industrial Court has recently determined four prosecutions, two against companies and two against company directors arising out of a forklift accident in a loading dock. The case serves as a reminder that use of external labour continues to expose those who use the labour and those who supply the labour to substantial penalties under the Occupational Health and Safety Act.

An employee of Primary Contracting Services Pty Limited ('PCS") was working in a loading dock owned by Rorato Nominees Pty Limited ("Rorato"). Rorato had engaged PCS to provide workers. Rorato owned and operated a tomato processing factory. One of PCS's employees was working in the loading dock of Rorato and was hit by a forklift engaged in the tasks of unloading tomato bins from a truck.

The worker sustained severe injuries including fractures to his ankles, a crush fracture to his left arm and fractures to the bones in his left hand. Charges were laid against the companies and the directors, principally due to the failure to adequately restrict access to the loading/unloading area, failing to erect signage and failing to employ a safe system of work for the use of forklifts. The loading dock area was noisy and the worker claimed he had not been taught to wear a reflective jacket while using the forklift.

Ultimately Rorato was fined $75,000 and its director was fined $7,500 whilst the labour hire supplier, PCS, received a fine of $70,000 and its director a fine of $7,000.

Importantly the Court found that PCS had a significant degree of control over the premises in relation to the circumstances of its contractors although that degree of control might not be regarded as absolute in its nature nor the same degree of control exercised or capable of being exercised by Rorato. Nevertheless very similar penalties were imposed.

Once again the case serves as a reminder to all of those who use labour hire or supply labour that it is not sufficient to delegate control of workers to a host and it is incumbent on labour hire companies to take an active role in the management of their staff, even when they are lent on hire.

Employers Must Prove Termination Was Made For "Operational Reasons"

The unfair dismissal provisions in the *WorkChoices* legislation cannot be relied on by employees who have been dismissed for "genuine operational reasons" or for reasons that include genuine operational reasons. This exclusion was introduced by the *WorkChoices* reforms and prevents retrenched employees from claiming their retrenchment was unfair.

The *Workplace Relations Act, 1996* defines "operational reasons" as reasons of an economic, technological, structural or similar nature related to the employer's undertaking, establishment, business or service (or to a part thereof). Basically, these are reasons which render an employee's position redundant.

Where an employee brings an unfair dismissal claim, an employer can seek dismissal of the claim on the basis the employee was dismissed for genuine operational reasons. The Australian Industrial Relations Commission must hold a hearing to decide whether the genuine operational reasons exclusion applies.

In *Phillips - v - Custom Security Services Pty Limited (2008) AIRC25*, an employee brought an unfair dismissal claim when she was dismissed from her employment.

The employee had been a casual employee for 14 months. She had two children aged 9 and 15.

One of her children was an asthmatic which required the employee to absent herself from work to look after him. She had taken approximately 20 sick days in her 14 months of employment.

The employee telephoned the employer to advise that she could not attend work as her son was ill. Later that same day, the employee received a telephone call from a representative of the employer telling her not to return to work.

The employer argued the termination was made for "genuine operational reasons". The employer claimed that it had experienced a downturn in business during October 2007 and needed to reduce its wages bill.

The AIRC did not consider the employer had produced satisfactory evidence the employee had been terminated for genuine operational reasons. The employer claimed there had been a downturn in business during October 2007. However, there was evidence before the AIRC that the employer had hired additional staff in September 2007. Further, the evidence presented by the employer did not convince the AIRC that its financial position had dramatically changed within 1 month such that it needed to terminate employees.

The AIRC allowed the employee's claim for unfair dismissal to continue.

Employers must be aware that if they seek to rely on the exclusion for unfair dismissal claims that the employee was terminated for "genuine operational reasons", the employer must put before the AIRC evidence that:

- Consideration has been given by the employer prior to the termination specifically in relation to the employee's position; and
- A decision had been made, prior to the termination, to make the employee's position, in effect, redundant.

Changing Employee's Working Conditions Was Effectively A Termination

Employers should be aware that in some circumstances changing an employee's working conditions may in fact be considered a termination by the employer which exposes the employer to the unfair dismissal and unfair termination provisions of the Workplace Relations Act, 1996. Where an employer substantially alters the terms and conditions of an employment contract, it may have the effect of terminating that contract and offering employment on new terms. The consequence is the employee may accept or reject the new contract. If the employee rejects the new contract, the employee may argue that he or she has been dismissed because the existing contract has been effectively withdrawn.

An example of some contractual changes which may actually result in an employee's employment being terminated are:

- A reduction in wages or other benefits.
- Substantial changes to the description of an employee's duties.
- Breaches of key working conditions by the employer.
- Relocating an employee to different work sites which are not geographically close to the existing work sites.

In the matter of Radman - v - Flight Centre Limited (2007) AIRC937, the employee had worked as an accounts assistant with the employer for 10 years. In August 2006 the worker agreed to change her position to job share a “home user” role. This involved the employee working from home 5 days per fortnight and only visiting the office 1 day per month.

Some 9 months later the employer advised the employee the company had decided to cease “home user” arrangements. All home users were required to work from the company's offices twice a week.

The worker resigned from her employment 2 weeks after the new arrangements were advised to her.

The employee lodged a claim in the Australian Industrial Relations Commission ("AIRC") for unfair dismissal. The employer claimed that the employee had terminated her own employment by way of her resignation.

Section 642(4) of the Workplace Relations Act, 1996 provides that a resignation can be considered a termination if the employee can prove they did not resign voluntarily but were forced to do so because of the conduct of the employer.

The Court will examine on an objective basis whether in fact the employer’s conduct was of such a nature the employee’s resignation was a probable result or the employee had no effective or real choice but to resign.

The AIRC accepted the new office position that was offered to the employee was very different to the "home user" position that she had occupied previously. The Commission noted there was a different location and that she would have to have much greater contact with the public when working in the office. The new position was also more demanding and the employee would be required to take a greater number of calls.

Consequently the Commission considered the employee’s resignation of her employment was at the employer’s initiative. The Commission was satisfied the changes to the employee’s position left the employee with no choice but to resign.

Employers should be aware that substantially changing an employee’s conditions, location or the nature of their duties may in effect be terminating the employee’s current employment contract and offering the employee a new employment contract. The employee, in this situation, can reject the offer of a new contract of employment and leave the employer liable for the costs of termination of the existing contract of employment by way of proper notice or redundancy payment.

Prohibited Industrial Conduct by Employer results in $60,000 Fine

The Federal Workplace Relations legislation seeks to provide some measure of protection to workers who become embroiled with their employer over an 'industrial law'. The provisions can have real bite.

A recent example is a case decided in the Federal Court - *Byrne v Australian Ophthalmic Supplies Pty Ltd [2008] FCA 66*.

The worker was engaged as an optical dispenser at one of the "Merringtons" chain of retail shops. Over a period of about 15 months the employer failed to pay the worker and several other employees their correct wages and entitlements. The worker complained to the Office of Workplace Services, and an inspector commenced a proceeding against the employer in the Magistrates Court in respect of the underpayment.

What happened next may seem very foolish - the employer transferred the worker from a store reasonably close to her home, to one much further away and which would take her many hours of travel each day. The reason given? "We just have to transfer you". The worker refused the transfer and the employer suspended her.

The Office of Workplace Services then commenced Federal Court proceedings against the employer alleging breaches of the Workplace Relation Act 1996. In essence, it was said that the employer had injured the worker in her employment because:

- she had complained to a body (OWS) having the capacity under an industrial law to seek compliance with that law;
- she had participated and proposed to continue to participate in a proceeding under an industrial law, that is, the Magistrate's Court proceedings;
- she proposed to give evidence in the Magistrate's Court proceedings.

All these actions are prohibited by section 793. The Court had no difficulty in finding them all proven.

For its petty and 'myopic' approach to its industrial relations obligations, the employer was fined $60,000 - almost the maximum. It lost the claim for underpayment of wages also.

Pain and Suffering Benefits in NSW Workers Compensation Claims

In workers compensation claims in NSW if an injured worker has a 10% whole person impairment or greater they are entitled to benefits for pain and suffering up to $50,000.00. But if you have two injuries, can you add the impairments from each injury to get over 10%?

The answer will be “no” unless the pathology caused by each incident is identical.

The Workers Compensation Commission, in the recent decision of *Department of Juvenile Justice - v - Edmed*, discussed the aggregation of entitlements to meet the threshold for Section 67 pain and suffering.

Edmed sustained two injuries during the course of his employment as a prison officer with the Department of Juvenile Justice. The first was on 1 March 2003 when he fractured his right scaphoid and distal radius of his right wrist. In the second injury, on 25 August 2004, he suffered a further injury to his right wrist by way of re-fracturing his right scaphoid and aggravating a problem with his right ulnar nerve.

An approved medical specialist assessed a 13% whole person impairment. The approved medical specialist determined Edmed sustained a 9% whole person impairment arising from the first injury and a 4% whole person impairment arising from the second.

Based on the fact Edmed reached the 10% whole person impairment threshold an arbitrator awarded compensation for pain and suffering.

The employer appealed on the basis Edmed suffered two separate and distinct injuries.

Injury in compensation claims refers to both the event and the pathology arising from it.

A difficulty arises when an injured worker suffers one 'injury', or rather one pathology, as a result of several independent incidents or events. In this case, the approved medical specialist assessed Edmed to have a 13% whole person impairment as a result of the combined effects of two incidents, however, the pathology resulting from the second incident was not identical to the pathology resulting from the first. Therefore, Edmed did not suffer the same 'injury' in each incident.

To be entitled to pain and suffering benefits the Commission must look at the end result of the injury in terms of whole person impairment. Edmed could not aggregate his impairments unless the pathology caused by each incident was identical. The appeal was allowed and Edmed's award for pain and suffering was overturned.

If an injured worker relies on two separate incidents to reach the Section 67 pain and suffering threshold he or she must sustain exactly the same pathology in each incident to aggregate impairments. Impairments cannot be added together simply because the same body part was injured in two or more accidents. It is necessary for the pathology to be identical, a situation which will generally be very unusual.

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