GD News

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Interim Payment Of Damages - Can Insurers Breath Easier?

As we noted in our December edition of GDNews in NSW the Civil Procedure Act provides a mechanism for a claimant who brings a claim for damages to seek payment of interim damages whilst the case is pending.

Until recent times the Court had not determined claims brought by parties where liability for the claim had been denied. Rather, the interim payment awards which had been made were in cases where liability had been admitted.

This changed when the Supreme Court of NSW handed down its decision in Matouk – v – Hungry Jacks Pty Limited, which was the first case where an award of interim damages was made against a defendant where liability had been defended. Matouk was successful in obtaining an award for interim damages of $35,000.00. (We reviewed that decision in our December newsletter.) However, in the second judgement dealing with an application for interim damages where liability was denied the NSW Supreme Court in Hardwick – v- McSwiney (No.3) has declined to make an award for the payment of interim damages as the plaintiff was unable to establish that the plaintiff would have obtained judgment for substantial damages.

Section 82 of the *Civil Procedure Act, 2005* provides that a Court can order a defendant to make one or more payments to a plaintiff on the application of a claimant at any stage of the proceedings. However, an order cannot be made unless:

- the defendant has admitted liability; or
- the claimant has obtained judgment against the defendant for damages to be assessed; or
- the Court is satisfied that, if the proceedings went to trial, the claimant would obtain judgment for substantial damages against the defendant.

In Matouk's case Matouk's application was successful despite the fact that liability had neither been admitted by the defendants' nor determined by the Court. Acting Justice Matthews of the Supreme Court ordered an interim payment of $35,000.00 be made to Matouk commenting that she was "comfortably satisfied" that liability would be established, however liability ultimately remained an issue for the trial judge.

Acting Justice Mathews took an interesting approach to the interpretation of the section examining the facts on a subjective rather than an objective basis. Her Honour noted that in the case a number of complications were likely to arise in the assessment of the claim including exaggeration of the claimant's injuries and pre-existing conditions. Her Honour, however, noted that Matouk's pre-injury earnings were in the order of $50,000.00 a year and so Her Honour was satisfied that Matouk would recover damages in an amount of at least $100,000.00. In Her Honour's opinion in this particular case given Matouk's difficult financial circumstances $100,000.00 would be subjectively considered substantial damages.

Her Honour considered the fact that if the claim is ultimately unsuccessful the defendant would have difficult recouping the money however this was not enough to deter Her Honour from ordering an interim payment.

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The approach in the case of *Hardwick – v- McSwiney (No.3)* was a little different.

McSwiney was a specialist ear, nose & throat surgeon who treated Hardwick for a persistent ulcerated lesion on the right side of her tongue. He performed a biopsy of the lesion and then ultimately excised the lesion. Many years later Hardwick developed squamous-cell carcinoma. Hardwick's claim against the doctor was that he failed to completely excise a lesion or to refer her for appropriate specialist treatment or to arrange any appropriate follow up or review. The cancer condition was not detected until approximately10 years after the original excision of the lesion.

The Court noted there was a contest between the parties on the issue of liability and there was competing expert evidence. As the Court noted:

> *"It is unnecessary to do more at this stage than to note that there is a significant difference of medical opinion and to observe that its resolution must necessarily and quite properly await the final hearing."*

The defendant, when resisting the Application for Interim Payments, noted that it had denied liability or breach of duty of care and further, that it relied on Section 50 of the Civil Liability Act, 2002 which provides that a person practising a profession does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professionals as competent professional practice.

The Court noted:

> *"On the present state of the evidence I do not consider that I am in a position to express even a tentative view as to whether or not the defendant was negligent or breached his duty to the plaintiff or more appropriately that he acted in a manner which, at the time his professional service was provided, was widely accepted in Australia by peer professional opinion as competent professional practice. In my opinion it is inappropriate in these circumstances on an application such as the present to comment in terms that may appear to suggest a view of the probable or likely outcome of the proceedings. Clearly enough a conclusion that I was satisfied, if the plaintiff went to trial, that the plaintiff would obtain judgment for substantial damages against the defendant would be an expression of an opinion about the likely outcome of the proceedings. That is what the subsection both contemplates and requires. However, none of the medical experts have been cross examined, nor has any of them given evidence in the witness box before me. I am unable to make any proper or meaningful assessment of the competing views of the experts on each side other than to observe that there is a conflict between them. I cannot presently resolve that conflict. I cannot by the same token be satisfied that the plaintiff would, not merely might, obtain judgment against the defendant."*

The claim for interim payment of damages was rejected on the basis that the Court was not satisfied the plaintiff would obtain substantial damages against the defendant. In this case there was evidence which if accepted would have established the plaintiff's case in negligence, however the competing evidence of the defendant meant that more was needed. The existence of conflict between the experts was sufficient to dispose of the application for interim damages. In this case whilst there was the need for a trial within a trial on the question of liability, the defendant's decision to put its evidence on the table and rely on expert evidence to resist the claim for interim payments ensured that it avoided an order that interim damages be paid and a final determination on liability has been deferred to the hearing date.

The judgement in *Hardwick – v- McSwiney (No.3)* may go some way to closing the floodgates that Matouk's case appeared to open. The Matouk judgment will continue to have impact on the insurance industry and no doubt there will be an increase in the level of interim damages applications and increased legal costs will be a knock on effect. However the Hardwick decision will ally some concerns about the possible need for a defendant to run a trial within a trial and be put to proof on its defence to resist an application for interim damages. It appears that a clear dispute with competing evidence will be enough to resist an application.

Applications for interim damages will provide an opportunity for insurers to resolve matters when the matter is brought before the Court as no doubt the plaintiff at that time will have the benefit of Counsel appearing on their behalf and Counsel no doubt will have considered the liability issues and the quantum of the claim and should be in a position to negotiate an overall settlement. However where liability is hotly contested and evidence can be led which counters expert evidence led by claimants interim damages claims can be resisted.

There is still the option for insurers who receive applications for the interim payment of damages where liability is not admitted to seek a separate hearing on liability at the same time as the interim payment application is heard and then the costs of preparing for an interim damages application will not be wasted as liability will be determined at the same time. Obviously this

may not suit every case.

Hardwick's case provides some hope that for interim damages applications where liability has not been admitted will be met with some resistance from the Court where expert evidence is clearly disputed between the parties in the litigation.

Director Escapes Insolvent Trading Liability

The Corporations Act provides that a director can be held liable to compensate a company for losses if the director permits the company to trade when it is insolvent. The effect of sections 588G and 588M(2) of the Corporations Act is that a company's liquidator can recover from a director of the company loss and damage suffered by creditors of the company where:

- the director failed to prevent the company from incurring debts due to those creditors of the company;
- at the time the company incurred the debts the company was insolvent or became insolvent by incurring the debts;
- at that time there were reasonable grounds for suspecting that the company was insolvent or would so become solvent;
- the director was aware at that time that there were such grounds for suspecting that the company was insolvent or a reasonable person in a like position in a company in the company's circumstances would have been so aware.

There is a defence to the claim under section 588H of the Corporations Act if it is proved that, at the time when the debt was incurred, the person had reasonable grounds to expect, and did expect, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time. In particular the defence applies if it is proved that, at the time when the debt was incurred, the person had reasonable grounds to believe, and did believe:
(i) that a competent and reliable person (the other person) was responsible for providing to the first-mentioned person adequate information about whether the company was solvent: and
(ii) that the other person was fulfilling that responsibility; and
the director expected, on the basis of information provided to the first-mentioned person, that the company was solvent at that time and would remain solvent even if it incurred that debt and any other debts that it incurred at that time.

In addition the Corporations Act contains provisions that permit the Courts to excuse a director from a breach of the Corporations Act. Sections 1317 and 1318 read as follows:

> *"s1317*
> *If:*
> *(a) eligible proceedings are brought against a person; and*
> *(b) in the proceedings it appears to the court that the person has, or may have, contravened a civil penalty provision but that:*
> *(i) the person has acted honestly; and*
> *(ii) having regard to all the circumstances of the case (including, where applicable, those connected with the person's appointment as an officer, or employment as an employee, of a corporation or of a Part 5.7 body), the person ought fairly to be excused for the contravention;*
> *the court may relieve the person either wholly or partly from a liability to which the person would otherwise be subject, or that might otherwise be imposed on the person, because of the contravention*.
>
> *s1318*
> *(1) If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, the court may relieve the person either wholly or partly from liability on such terms as the court thinks fit."*

The good news for directors is that s1317S and s1318 apply to the insolvent trading provisions in the Corporations Act. If a defence under section 588H cannot be made out section 1317S and s1318 can come in to play to relieve a director from their liability for a breach of the insolvent trading provisions as is seen in the NSW Supreme Court's decision in *The Stake Man Pty Ltd v Carroll* .

In *The Stake Man Pty Ltd v Carroll* the liquidator of The Stake Man Pty Ltd (in liquidation) commenced proceedings against

the sole director, Mr Carroll, for insolvent trading. The liquidator alleged insolvent trading between 31 December 2005 and 10 May 2006.

Until 2004 the Company was a successful, profitable company which operated a business of processing and wholesaling raw timber. Towards the end of 2003 Mr Carroll saw that the opportunity would soon arise to expand his production of sawn logs through the State Government's proposal to auction future log licences over the internet which would enable him to obtain more logs and of a better grade. Mr Carroll conceived a plan to capitalise on the expanded production capacity of the Company's Mansfield mill, and the opportunity to obtain a much larger and better log quota. The plan was that the Company would purchase plant and equipment to enable it to kiln dry and machine its own timber rather than be limited to on-selling green rough cut boards. This involved the Company obtaining an injection of capital in order to be able to afford an expansion into kiln drying.

Just before Christmas 2003, the Company placed an order for the supply and installation of the Brunner-Hildebrand vacuum dry kiln. From the outset of the process of installing the kiln, the Company incurred cost blow outs and had problems with the installation and operation of the kilns. By the middle of 2004, the delay in having the kilns operational had started to affect the Company's cashflow. In June 2004 the Company obtained a loan of $700,000 and an overdraft facility from the Bendigo Bank which was secured by a charge over the Company's assets and Mr Carroll's home as collateral security.

Between late 2004 and May 2006 Mr Carroll obtained expert advice from Mr Robert Rule of Timber Training, Mr Creswick and Mr Graeme Dimmack as to possible solutions which the Company put into operation.

By June 2005 it was apparent to Mr Carroll that the Company needed more capital to address the problems which had arisen with the kilns. Although ongoing sales were good the problems with the kilns were damaging the Company's business. In or about June 2005, Mr Carroll personally borrowed $1 million from Bluestone Finance using his wife's and his house as security. This money was paid to the Company in July 2005, $675,000 being new capital and the balance being used to discharge the Company's debt to Bendigo Bank.

In mid 2005, Mr Carroll asked Mr Bright an accountant to draw up a business plan with the aim of encouraging Brunner-Hildebrand the manufacturer of the kiln to invest in the Company's business as a joint venturer or partner of some kind. Mr Carroll believed that this was preferable to taking legal action against Brunner-Hildebrand for the problems with the operation and installation of the kiln.

The Court was satisfied that as at 5 July 2005 when Bright was consulted the Company was not in a precarious financial position nor was it in a near-insolvency situation. Although its cashflow was suffering its inventory of stock was increasing due to its kiln drying problems. The Court was satisfied that the Company was not insolvent as at 5 July 2005. From July 2005 until May 2006, Mr Bright continued to be involved in giving advice to Mr Carroll regarding the Company and its business. Mr Bright was engaged by the Company during the second half of 2005 and the first half of 2006 to provide various business advisory services and to prepare financial statements. Mr Bright's firm prepared the Company's financial statements for the year ending 30 June 2005.

By March 2006 Mr Bright was aware that the Company's cashflow situation was poor and that the funds provided by Mr Carroll had been exhausted in February 2006. Mr Bright was aware that Mr Carroll was looking for potential investors which he discussed with Mr Bright. Between January and April 2006 based upon the value of its stock on hand, which Mr Bright considered was saleable and able to be realised within a short period of time, namely "a couple of months", he did not consider that the Company was insolvent at that time. He told this to Mr Carroll on a number of occasions.

On 3 May 2006 an officer from the Australian Taxation Office telephoned Mr Carroll and told him that the Company owed the Australian Taxation Office $110,000 and that Mr Carroll had until 17 May 2006 to review how he was going to reduce the debt over the next eighteen months. On the following day Mr Carroll spoke to Mr Bright about this conversation and said that the Company did not have $110,000 on hand to pay the tax bill. Mr Bright suggested that Mr Carroll should meet a business restructure specialist, Mr Andrew McLellan which he did on 8 May 2006. Mr McLellan told him words to the effect that the problems of the business were quite fixable. He recommended that the Company should go into voluntary administration. On 10 May 2006 Mr Carroll appointed Mr McLellan as voluntary administrator of the Company. On 6 June 2006 creditors of the Company resolved that the Company be wound-up and Mr McLellan became the liquidator of the Company.

The Court noted:

"A critical issue in the proceeding was the evidence available to Mr Carroll as to the Company's solvency, his belief as

to the Company's solvency, that is to say his belief as to the Company's ability to pay all of its debts as and when they fell due, and what Mr Bright told him during the relevant period."

A temporary lack of liquidity does not mean that there is insolvency. The Court noted that when determining whether the company was insolvent the following criteria applied:

- "whether or not a company is insolvent ... is a question of fact to be ascertained from a consideration of the company's financial position taken as a whole", and is a question to which '[c]ommercial realities will be relevant'":
- "it is useless to say that if its assets are realised there will be ample to pay 20 shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy":
- "it is thus of no consequence, of itself, that assets exceed liabilities, the important point being whether the company can pay its way in carrying on its business"
- "the question is not whether the debtor would be able, if time were given to him, to pay his debts out of his assets, but whether he is presently able to do so with moneys actually available"
- "It is the debtor's inability, utilising such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency"
- "If, as a matter of substance, the company is not able to pay its debts as they become due, the circumstance that the relevant creditors may give the company some time before they actually seek to enforce their remedies, and the company may well be able to pay them out given that time, will not negative the application of the section
- "for the purpose of assessing insolvency, a contractual debt is taken to be payable at the time stipulated for payment in the contract, unless there is evidence of an express or implied agreement between the company and creditor for extension of time, or a course of conduct sufficient to give rise to an estoppel against the creditor, or an established practice in the industry or between the company and its creditors whereby debts are taken to be payable at some other time than provided for in the contract.

After analyzing the facts the Court found that at 31 December 2005 and thereafter throughout the whole of the relevant period up to 10 May 2006 the Company was insolvent. The Court then considered the defences raised by Mr Carroll under ss 588H(2), 588H(3), 1317S and 1318 of the Act which were that:

- At the times when the debts were incurred, Mr Carroll had reasonable grounds to expect, and did expect, that the Company was solvent at that time and would remain solvent even if it incurred those debts and any other debts that it incurred at that time.
- At the times that the debts were incurred Mr Carroll:
    - had reasonable grounds to believe, and did believe, that a competent and reliable person, namely Mr Paul Bright, was responsible for providing to Mr Carroll adequate information about whether the Company was solvent and Mr Bright was fulfilling that responsibility;
    - expected, on the basis of information provided to Mr Carroll by Mr Bright that the Company was solvent at that time and would remain solvent even if it incurred each of the debts in question and any other debts that it incurred at that time;
- if he had contravened s 588M of the Act he acted honestly and, having regard to all the circumstances of the case, he ought fairly to be excused for the contravention: ss 1317S(2) and 1318.

The Court concluded that the defence available to Mr Carroll under s 588H(2) of the Act was not made out. Mr Carroll did not have reasonable grounds to expect, nor did he expect, that the Company was solvent throughout the relevant period, and would remain solvent even if it incurred the debts it did incur during the relevant period.

Mr Carroll placed particular reliance on Mr Bright's advice. But was reliance on Bright's advice reliance on that advice that falls within the "other person" advice provisions in s588H. Unfortunately for Mr Carroll the Court concluded that Mr Bright was not retained to provide advice on insolvency and was not the "other person" that must provide advice referred to in the section 588H defence.

The Court concluded:

"I do not consider that Mr Bright was required to fulfil the role or did fulfil the role of a competent and reliable person who was responsible for providing to Mr Carroll adequate information about whether the Company was solvent. Certainly Mr Bright was a competent and reliable person but I do not consider that it can be said that he was "responsible" for providing to Mr Carroll adequate information about whether the Company was solvent.. ….. The

evidence does not satisfy me that Mr Bright was specifically given the role or task of providing Mr Carroll "adequate information about whether the Company was solvent"…… Having regard to Mr Bright's retainer and the work he carried out for the Company I am not satisfied that Mr Carroll had reasonable grounds to believe that Mr Bright had the role, or was fulfilling the role required by subpar (a) of s 588H(3). Mr Carroll did not say that Mr Bright had been retained by him or the Company to provide, or was responsible to provide to him or to the Company, adequate information about whether the Company was solvent throughout the relevant period."

So Mr Carroll was left with defences under Section 1318 and 1317S of the Corporations Act and fortunately for Mr Carroll his prayers were answered.

When analysing the conduct of a director for the purposes of considering these defences it is necessary to determine whether the director acted honestly. The criteria for determining honesty are set out in the judgement in Hall v Poolman where Justice Palmer found:

"…when considering whether a person has acted honestly for the purposes of a defence under ss 1317S(2)(b)(i) or 1318 of the CA, the court should be concerned only with the question whether the person has acted honestly in the ordinary meaning of that term, that is, whether the person has acted without deceit or conscious impropriety, without intent to gain improper benefit or advantage for himself, herself or for another, and without carelessness or imprudence to such a degree as to demonstrate that no genuine attempt at all has been to carry out the duties and obligations of his or her office imposed by the Corporations Act or the general law. A failure to consider the interests of the company as a whole, or more particularly the interests of creditors, may be of such a high degree as to demonstrate failure to act honestly in this sense. However, if failure to consider the interests of the company as a whole, including the interests of its creditors, does not rise to such a high degree but is the result of error of judgment, no finding of failure to act honestly should be made, but the failure must be taken into account as one of the circumstances of the case to which the court must have regard under ss 1317S(2)(b)(ii) and 1318 of the Corporations Act"

After an analysis of the facts the Court found that:

"Mr Carroll did not profit personally from permitting the Company to trade in this way throughout the relevant period. He was not disregarding advice and, indeed, obtained advice from Mr Bright and others throughout the relevant period. In reaching the conclusion that in all the circumstances of the case Mr Carroll ought to be excused from his contravention of ss 588G of the Act, I have placed particular emphasis and considerable weight upon Mr Carroll's retainer of Mr Bright, the work carried out by Mr Bright and the statements and advice he gave to Mr Carroll from the time of his original retainer in March 2005 up to 10 May 2006. I do not consider that there is any inconsistency or lack of logic in concluding that a significant and substantial reason for excusing Mr Carroll is his resort to Mr Bright and his reliance on what Mr Bright told him when at the same time I have concluded that the defence available to Mr Carroll pursuant to s 588H(3) of the Act did not apply to Mr Carroll because Mr Bright was not a person who "was responsible for providing to [Mr Carroll] adequate information about whether the Company was solvent" nor was Mr Bright fulfilling the responsibility of providing adequate information about whether the Company was solvent to Mr Carroll. In all these circumstances I consider that Mr Carroll should be excused for his contravention of s 588G(2) and that he should be relieved from a liability to pay to the plaintiffs the amount of the loss suffered by creditors of the Company throughout the relevant period whether it be the sum of $356,952.02 to which I have already referred or any other sum. "

Mr Carroll was not so lucky when it came to the question of costs as he was ordered to pay the liquidator's costs of the proceedings as the liquidator was successful in establishing breaches of s588 and Mr Carroll had merely been excused. The Court concluded:

"In bringing the action and not succeeding in obtaining the ultimate orders which they seek, the plaintiffs have not committed any error or default in the way they ran the proceeding. The plaintiffs have made out all the integers of their cause of action. As I said earlier, the liquidator could not have excused the defendant from payment of the loss and damages suffered by the creditors. In short, the plaintiffs were justified in bringing the proceeding and the reason why they do not obtain the orders which they seek in their favour is not due to any failure on their part to prove their case. …Section 1317S is not a defence as such to the substantive action. It is a relief from a liability to pay the amount which otherwise might have been ordered by way of damages. In either case, whether a defence is raised under s 588H of the Act, or relief is sought pursuant to s 1317S of the Act, the basic elements of the claim can be established by a liquidator. Although it is for the liquidator to evaluate the strength or weakness of the defences under s 588H, it is a quite different exercise when considering whether the Court would exercise its discretion under s 1317S of the Act. So I consider that it is not inconsistent, as a matter of logic or principle, for there to be a different costs

order depending upon whether a defence under s 588H of the Act succeeds, or whether relief is granted pursuant to s 1317S of the Act. "

Mr Carroll's decision to seek out professional advice whilst acting honestly provided the basis to excuse his breaches of the insolvent trading provisions. As can be seen the Courts will pay particular attention to a director's reliance on professional advice and the extent to which the director has followed that advice when the company is confronted with cashflow problems. Advice from an insolvency practitioner is important to ground a defence under s588H however expert accounting advice in the lead up to any engagement of an insolvency practitioner will be an important consideration for the defences under s1317S and 1318.

This case is the first case where a judge has exercised his discretion under the Corporations Act to provide a director with complete relief from penalty following a finding of insolvent trading. Will we see a trend develop with other judges following the lead?

Fraudulent Non Disclosure In A TPD Policy

The Supreme Court of NSW has recently found that life insurers are entitled to avoid a TPD Policy pursuant to the Insurance Contracts Act, 1984 ("Act") for fraudulent misrepresentation and non disclosure.

Kenton Berk held a life insurance policy with Westpac Life Insurance Services. Under the policy terms Berk would receive $500,000.00 if he became "totally and permanently disabled by an injury, disease or sickness which prevented the Insured Person from working for six consecutive months and which in our (the insurer's) opinion is likely to prevent them from working in any occupation for which they are reasonably qualified."

Berk sustained injury to his back whilst carrying out building work. He submitted a claim to Westpac that his back injury entitled him to the TPD benefit under the policy. Westpac then sought and obtained information about Berk's medical history and the circumstances in which the application for insurance and personal statement which accompanied the application were completed and signed. The history and related clinical notes were referred to underwriters who concluded that had the history been known Berk would not have been offered TPD cover on any terms.

Westpac declined cover and cancelled the policy under s 29(2) of the Act on the ground that at the time of applying for cover the plaintiff had failed to disclose his medical history in relation to past injuries. Berk commenced proceedings in the Supreme Court challenging that decision and seeking payment of the TPD benefit.

When Berk completed his application for insurance he did not disclose any medical history despite the fact that he had a significant history of neck and back problems which had caused him to be off work for a number of months as well as having suffered from depression. Berk had suffered injury to his neck in 1990, and to his lower back in 1993, chronic pain associated with the 1993 injury, and a depressive condition associated with both injuries. Berk's GP had in fact certified him totally and permanently unfit for his pre-injury work as a shunter and later certified him as unfit for work as a conference organiser. Berk changed his vocation and undertook various roles including the operation of a fashion business, property developer and running a patisserie which he had purchased in 2001.

The proposal form completed by Berk required Yes or No answers to various questions concerning past health conditions and employment history. Interestingly, in the case Berk accepted that accepted that if he answered "No" to these questions, such answers would have been deliberately false and dishonest to his knowledge. Berk asserted that Westpac's insurance agent, a Mr Buxton, had filled in the personal statement of behalf of Berk and that although Berk had disclosed his medical history to Buxton and Buxton had deliberately not disclosed Berk's medical history in the personal statement by answering No to various questions. The Court did not accept that Berk disclosed the medical history to Buxton and it was therefore necessary to determine the insurer's rights as the information supplied by Berk was deliberately false as Berk had conceded.

An insurer's right to avoid a Contract of Insurance for life insurance is found in Section 29 of the Insurance Contracts Act, 1984, which provides:

"1. This section applies to where the person who became the insured under a contract of life insurance upon the contract being entered into:

(a) failed to comply with a duty of disclosure; or

(b) made a misrepresentation to the insurer before the contract was entered into; that does not apply where

(c) the insurer would have entered into the contract even if the insured had not failed to comply with the duty of

disclosure or had not made the misrepresentation before the contract was entered into; or

(d) the failure or misrepresentation was in respect of the date of birth of one or more of the life insured's.

2. If the failure was fraudulent or the misrepresentation was made fraudulently, the insurer may avoid the contract.

3. If the insurer would not have been prepared to enter into a contract of life insurance with the insured on any terms if the duty of disclosure had been complied with or the misrepresentation had not been made, the insurer may, within three years after the contract was entered into, avoid the contract....."

Westpac argued that they would not have entered into the policy had there been disclosure of Berk's medical condition. Westpac relied on evidence from a number of senior underwriters who provided evidence that if the medical history had been disclosed it was likely that the risk would not have been accepted and the insurance policy would not have been issued. The insurer's underwriting guidelines applicable at the relevant time were considered by the underwriters to ground their opinion that the insurance policy would not have been accepted. The underwriter who originally accepted the policy was not available to be called to give evidence as he was no longer employed by Westpac and was working in Tokyo. Notwithstanding, Justice Nicholas held that the underwriter relied upon the information in the personal statement in deciding to accept the risk and there was no reason to doubt that he applied the underwriting guidelines in accordance with the practice followed by other Westpac underwriters who gave evidence in the case. Justice Nicholas concluded:

> "The answers to "L" and "M" of the person's statement were misrepresentations or non disclosures likely to induce an underwriter to write the contract … the inference is inevitable that he (the underwriter) was induced by these false answers to do so"

So, at the end of the day, if a life insurer can establish that it would not have entered into an insurance contract had there been a disclosure, it will have the right to avoid the policy. It will not be necessary for the insurer to produce evidence from the actual underwriter who accepted the risk. The insurer will be able to rely on expert evidence and evidence from employees as to policies and practice as well as its underwriting guidelines at the time the risk was accepted to substantiate that the risk would not have been accepted if the disclosure had been made. It must be remembered that it is necessary to establish that the non disclosure was fraudulent if an insurer is to avoid a policy more than 3 years after the contract is entered into as the insurer will need to rely on section 29(2) of the Act to avoid the policy.

A further question considered by the Court in the case was whether or not Berk was totally and permanently disabled within the meaning of the policy. It was accepted that Berk's injuries prevented him from working for six consecutive months. The question was whether he could ever work again in any occupation for which he was reasonably qualified because of education, training or experience. Medical evidence was provided by Berk and Westpac and the Court held that the evidence supported a finding that there was no more than a chance or possibility that at some unspecified time Berk's condition would improve and Westpac's contention that over time he would be able to do the work for which he was qualified was not made out. Westpac argued that Berk's history indicated that it was likely he would return to work in the future. These contentions were rejected and it was determined that Berk would be entitled to a benefit under the policy except for avoidance of the policy. Justice Nicholas concluded:

> *"The medical evidence, taken overall, supports the finding, which I make, that the plaintiff's disability is a total and permanent disability as defined in cl 20.3. In my assessment, the evidence of Dr Bodel and Dr Westmore indicates no more than that there is a chance or possibility that the plaintiff's condition will improve. It left open for speculation the degree, extent, duration, and timing, of any improvement.*
>
> *Doubtless because prospects and degree of improvement were left as matters of chance, there was no evidence which identified any occupation or form of work which the plaintiff could become capable of undertaking in the future. Accordingly, I was entirely unpersuaded of the likelihood that his present disability will improve sufficiently to enable him to again work in any occupation for which he is reasonably qualified because of education, training, or experience. In my opinion, as a matter of reality and common sense, the evidence negates such a finding."*

The case is instructive in that it demonstrates that:

- insurers that seek to avoid a TPD policy on the grounds of non-disclosure will not as a matter of necessity need to call the original underwriter to demonstrate the policy would not have been written if there had been proper disclosure
- insurers need to adduce medical evidence which identifies occupations or form of work which claimants could become capable of undertaking in the future otherwise they may not establish that the claimant is not permanently disabled.

Proportionate Liability And Claims Against Directors & Officers

In New South Wales the Civil Liability Act, 2002 contains provisions that limit the liability of a wrongdoer for a claim to an amount reflecting that proportion of the damage or loss that a Court considers just having regard to the extent of the wrongdoer's responsibility for the damage or loss.

The Proportionate Liability Regime does not apply to personal injury claims and applies to what are known as an "apportionable claim". The legislation provides that apportionable claims include:

- claims for economic loss or damage to property in an action for damages arising from a failure to take reasonable care, but not including any claim arising out of a personal injury; or
- a claim for injury, loss or property damage to property in an action for damages under the Fair Trading Act, 1987 for a contravention of Section 42 of the Act.

Proportionate liability does not apply to claims where the wrongdoer fraudulently causes economic loss or damage to property or intended to cause the economic loss or damage to property.

So what happens where there is a claim against a director by a company arising out of contraventions of the *Corporations Act, 2001*?

The *Corporations Act, 2001* contains provisions which impose obligations on directors. Duties are imposed under Sections 180, 181 and 182 of the Corporation Act. Those sections read as follows:

> *"**180 Care and diligence—civil obligation only***
>
> *Care and diligence—directors and other officers*
>
> *(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:*
> *(a) were a director or officer of a corporation in the corporation's circumstances; and*
> *(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer.*
> *Business judgment rule*
> *(2) A director or other officer of a corporation who makes a business judgment is taken to meet the requirements of subsection (1), and their equivalent duties at common law and in equity, in respect of the judgment if they:*
> *(a) make the judgment in good faith for a proper purpose; and*
> *(b) do not have a material personal interest in the subject matter of the judgment; and*
> *(c) inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate; and*
> *(d) rationally believe that the judgment is in the best interests of the corporation.*
> *The director's or officer's belief that the judgment is in the best interests of the corporation is a rational one unless the belief is one that no reasonable person in their position would hold.*
> *(3) In this section:*
> *business judgment means any decision to take or not take action in respect of a matter relevant to the business operations of the corporation.*
>
> ***181 Good faith civil obligations***
>
> *Good faith—directors and other officers*
> *(1) A director or other officer of a corporation must exercise their powers and discharge their duties:*
> *(a) in good faith in the best interests of the corporation; and*
> *(b) for a proper purpose.*
> *(2) A person who is involved in a contravention of subsection (1) contravenes this subsection.*
>
> ***182 Use of position—civil obligations***
>
> *Use of position—directors, other officers and employees*
> *(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:*

(a) gain an advantage for themselves or someone else; or
(b) cause detriment to the corporation.
(2) A person who is involved in a contravention of subsection (1) contravenes this subsection."

In addition, directors also owe similar duties under the General Law.

The *Corporations Act* also contains Section 1318, which provides that a director may be relieved from liability for a breach of the *Corporations Act*. Section 1318(i) reads:

(1) If, in any civil proceeding against a person to whom this section applies for negligence, default, breach of trust or breach of duty in a capacity as such a person, it appears to the court before which the proceedings are taken that the person is or may be liable in respect of the negligence, default or breach but that the person has acted honestly and that, having regard to all the circumstances of the case, including those connected with the person's appointment, the person ought fairly to be excused for the negligence, default or breach, the court may relieve the person either wholly or partly from liability on such terms as the court thinks fit.

The NSW Supreme Court's decision in *Resource Equities – v – Carr Resources Equities* provides guidance on these interesting provisions and identifies a possible approach to breaches of the *Corporations Act* where a director has acted honestly and other directors have engaged in contravening conduct.

In the Resource Equities cases claims were brought by Resource Equities against four directors for breaches of the *Corporations Act* which are civil penalty provisions that give rise to a right to seek compensation. Resource Equities advanced six separate claims against directors, Carr, Purves and Thomas as a consequence of the following alleged conduct:

- that Messrs Carr, Purves and Thomas resolved to pay themselves remuneration in excess of the limit fixed pursuant to the company's constitution.
- Carr and Purves caused Resource Equities to make two unsecured loans to Mr Garrett(also a director).
- A transaction with a company known as Fox Technologies that specialised in the development of payment applications software for EFTPOS machines was improvident, and that Mr Carr committed Resource Equities to it not for any proper purpose of Resource Equities but for his own benefit. Resource Equities alleged further that Mr Purves was in a position of conflict of interest, because he was a director of a company known as Cosmos which had installed EFTPOS terminals in numerous pharmacies throughout Australia and success of Fox Technologies would benefit Cosmos. Mr Purves had been appointed a director of Resource Equities by the time the various agreements (in their final form) were signed.
- Resource Equities had a substantial shareholding in a company known as Asia Iron Pty Limited (Asia Iron). In late 2004, it sold those shares for $1,400,000.00. It then caused in excess of $858,000.00 of the proceeds of sale to be distributed to shareholders. Those distributions were said to have been paid as dividends, although in argument Messrs Carr and Purves submitted that they were, alternatively, returns of capital. Resource Equities claimed that the payments were improper, because (among other things) the making of them left Resource Equities insolvent. Some of the payments were made, after Resource Equities had been placed into voluntary administration.
- Litigation arose out of the calling of an extraordinary general meeting which the directors determined to defend. Before the meeting in question, Resource Equities (at the behest of Messrs Carr and Purves) purported to issue some seven million shares to Cosmos E-C Commerce Pty Limited, a subsidiary of Cosmos. Cosmos Commerce voted those shares at the meeting, aligning its interest with the interests of Messrs Carr and Purves. Resource Equities alleged Carr and Purves effectively used the resources of Resource Equities to defend their own positions as directors. Further, Messrs Carr and Purves caused Resource Equities to indemnify Cosmos Commerce, which was a party to the proceeding, for its costs. Thomas was removed as a director at the extraordinary general meeting.
- the costs of the appointment of two administrators were incurred unnecessarily.

The Court found that Carr and Purves had breached their duties owed as directors in each of the ways alleged and were liable for the losses of Resource Equities arising from the breaches. It was argued that the Proportionate Liability Regime should apply and that it was necessary to delve into an apportionment of blame.

The Court however rejected that arguement and confirmed that the Proportionate Liability Regime in the Civil Liability Act, 2002 does not apply to claimed breaches of duty under the Corporations Act. The Court followed the previous decisions of *Dartberg Pty Ltd– v – Wealthcare Financial Planning Pty Ltd* and *Rood Investments (Vic) – v – Abeyratne* which had previously confirmed that the Civil Liability Act, 2002 had no application to claims for breaches of duty under the Corporations

Act.

Thomas however was found to be in a different position to the other directors.

He had reached a settlement with Resource Equities in relation to the director remuneration issue (payment of more than that which was authorized by the constitution) and had not participated in the decision to remunerate Purves and Carr and did not know of the amounts claimed by or paid to Messrs Carr and Purves. The Court held:

> *"even if (contrary to what I have just said) some breach of duty could be spelled out of the facts as I have found them, it would be appropriate for Mr Thomas to be relieved under s 1318. In my view, he acted honestly. In the circumstances that I have outlined, and taking into account the fact that Mr Thomas has effectively expressed contrition by reaching a settlement with Resource Equities, the circumstances require that he be excused from the consequences of this hypothetical breach of duty"*

In relation to the Fox transaction Mr Thomas said, no one told him of Cosmos' interest in the Fox technology, or of the arrangements, as between Resource Equities and Cosmos. Thomas said he was so convinced of the merits of the investment in Fox that he caused his family company Glamont to subscribe for a placement of 3 million shares in Resource Equities.

The Court found:

> *"In essence, the only breach of duty that could be found against (Mr Thomas) is that he was too trusting of Messrs Carr and Purves and failed to apply his mind independently to the false transaction. If some such breach of duty is to be spelled out then, again, Mr Thomas ought to be excused under Section 1318. Again I find he acted honestly. Again, when one takes into account all of the circumstances of the case, he ought to fairly be excused. In this context again I take into account not only the facts as I have found them."*

Messrs Carr and Purves were found liable to indemnify or compensate Resource Equities in the following amounts:

- in respect of overpayments to directors: $368,500.00;
- in respect of the loans to Mr Garrett: $242,035.65;
- in respect of the Fox transaction: $682,000.00;
- in respect of the payments out from the proceeds of sale of the Asia Iron shares: $810,702.58;
- in respect of litigation expenses: $191,004.00;
- in respect of the amount paid for the administration : $25,000.00 and a further amount to be calculated.

Thomas had no liability to Purves or Carr and was relieved from any liability for any breach of the Corporations Act and was not liable to compensate Resource Equities.

Directors can be exposed to breaches of the Corporations Act through conduct of their fellow directors however if a director has acted honestly and having regard to all the circumstances of the case has not unfairly benefited from the transactions there is room for the Courts to excuse a breach of the Corporations Act.

NSW OH&S Prosecution The High Court Speaks

Employers in New South Wales who are prosecuted for breaches of the *OH&S Act* often complain that the onerous obligations found in the Occupational Health and Safety Act give rise to strict liability and when an accident happens a prosecution will simply follow and when a prosecution is brought, there is little chance that there will be a successful defence of the prosecution.

Although a harmonised National OH&S system is not that far away, NSW employers will continue to face prosecutions under the NSW *OH&S Act* until the harmonised regime commences.

Therefore the High Court's recent decision in *Kirk – v – The WorkCover Authority of NSW and the Industrial Court of NSW* is likely to provide some assistance to employers who face prosecution.

In Kirk's case the High Court held that the NSW Industrial Court exceeded its power in convicting an employer on charges which did not identify the acts and omissions which constituted the alleged offence. The High Court also held that the Industrial Court had exceeded its power in allowing one of the defendants to be called as a prosecution witness at trial. These errors were sufficient for the High Court to overturn the convictions and sentencing of Kirk.

Graham Kirk was a director of Kirk Group Holdings Pty Limited which owned a farm. Kirk had no farming experience and left

the day to day operations of the farm to Palmer, who was the farm manager. Palmer was injured whilst using an all terrain vehicle when he was driving the vehicle down a steep slope. Palmer was fatally injured and his reasons for leaving a road and driving down the steep slope could not be ascertained. Kirk and the company were prosecuted for breaches of the *OH&S Act* and ultimately both Kirk and the company were convicted by the Industrial Court. Kirk was fined $11,000.00 and the company $110,000.00. Kirk and the company appealed to the Full Bench of the Industrial Relations Commissions, the NSW Supreme Court and finally, the NSW Court of Criminal Appeal and each of those appeals were unsuccessful. Kirk and the company then appealed to the High Court.

The thrust of Kirk's argument was that the charges brought did not identify what measures should have been taken to prevent the risk of injury to Mr Palmer and did not specify the respects in which the company had failed to ensure Mr Palmer's health and safety. It was said that the deficiency in the particulars was considered unfair because it deprived Kirk and the company from:

> *"Knowing what measures they had to prove were not reasonably practicable."*

The High Court held that any statement of an offence under the Occupational Health and Safety Act must identify not only the risk but also what measures the employer could have taken to address the risk, otherwise it would be impossible for a defendant to establish whether it was reasonably practicable to take such a measure. The offences with which Kirk and the company were charged did not identify the acts or omissions which constituted the alleged offence and thus no measures which could have reasonably and practicably been taken to obviate the risks could be identified and the defendants were denied the opportunity to properly defend the charges.

In passing, the High Court also rejected the Industrial Relations Commission's approach to the interpretation of Sections 15 and 16 of the *NSW Occupational Health and Safety Act*.

The High Court noted:

> *"A consequence of the matter proceeding to conviction on the charges as stated, absent the identification of measures the Kirk company should have taken, was that it was denied the opportunity to properly put a defence under s 53(a). Instead, the Kirk company was required to show why it was not reasonably practicable to eliminate possible risks associated with the use, or possible use, of the ATV. The guarantee against risk, seen as provided by s 15, was treated as continuing, despite a defence under s 53(a) being raised. The operation of that defence was treated as largely confined to an issue of reasonable foreseeability."*

The High Court has clearly set out what is required in a charge under the NSW OH&S Act stating:

> *"A statement of an offence must identify the act or omission said to constitute a contravention of s 15 or s 16. It may be expected that in many instances the specification of the measure which should have been or should be taken will itself identify the risk which is being addressed. The identification of a risk to the health, safety and welfare of employees and other persons in the workplace is a necessary step by an employer in discharging the employer's obligations. And the identification of a risk which has not been addressed by appropriate measures must be undertaken by an inspector authorised to bring prosecutions under the Act. But it is the measures which assume importance to any charges brought. Sections 15 and 16 are contravened where there has been a failure, on the part of the employer, to take particular measures to prevent an identifiable risk eventuating. That is the relevant act or omission which gives rise to the offence."*

On another equally important front, the High Court held that the *Evidence Act* in New South Wales provides that a defendant is not competent to give evidence as a witness for the prosecution and it is not possible to waive that provision and therefore if the Court allowed a director who is also prosecuted to give evidence, it was contrary to the Evidence Act and the Court had no power to do so. This is likely to cause WorkCover to reconsider its approach to prosecuting directors and companies where the essential ingredients of the offence will need to be established by the director.

The High Court also considered the scope of the duties imposed under the *NSW Occupational Health and Safety Act* and confirmed that the duties were not absolute when a defence can be invoked. The High Court found:

> *"The duties referred to in ss 15(1) and 16(1) cannot remain absolute when a defence under s 53 is invoked. The defence allows that not all measures which may have guaranteed against the risk in question eventuating have to be taken. The measures which must be taken are those which are reasonably practicable. The term is not defined in the OH&S Act, but it may often involve a common sense assessment"*

The High Court's decision will have a significant impact on prosecutions in New South Wales. WorkCover will need to

particularise the specific risks that a defendant has allegedly failed to address and the measures that could have been taken to control or eliminate the risks. WorkCover's case will be limited to arguments about those risks and measures identified and defendants will be in a better position to establish defences available to them under the *Occupational Health and Safety Act*.

For NSW the question in the future will be whether or not it is reasonably practicable for the employer to have undertaken the measures identified in the charge to address the risks identified in the charge. It will no longer be sufficient for prosecutions to allege as a consequence of a series of unspecified failures on the part of the employer, there remained present general risks to the health and safety of employees and others, the actual risks and measures that could be taken to avoid the risks will need to be identified in the charge.

Workers Compensation- Details, Details, Details – Getting The Section 74 Notice Right

Since 2006, the declinature of workers compensation claims in NSW by Scheme Agents (acting for the Workcover scheme) has commenced with the issue of a Section 74 Notice. Although the legislative structure had emphasised the "front end loaded" nature of the system in the 2001 Amendments, the introduction of the requirement for a Section 74 Notice in November 2006 to formally set out the basis of their declinature, including the documents relied upon, placed an additional administrative burden on the Scheme Agents.

Two recent Presidential decisions have reinforced the strict requirements of a Section 74 Notice. In *Sydney Night Patrol & Enquiry Company Pty Limited – v – Spasevski [2010] NSWWCC PD7*, Deputy President Bill Roche examined the requirements of an effective Section 74 Notice. The Scheme Agent had issued a 74 Notice simply stating – "In declining liability the sections of the legislation on which we rely are Sections 4, 9, 9A, 10, 33, 40 and 60 of the Workers Compensation Act, 1987 and also Sections 74, 254, 255, 260 and 261 of the Workplace Injury Management and Workers Compensation Act,1998." Deputy President Bill Roche commented that "broad brush assertions" of the kind set out in that declinature do not comply with Section 74. If the Scheme Agent disputed liability in respect of a claim or any aspect of a claim, it must give the worker proper notice of the dispute. Crucially, the notice must be expressed in plain language as well as clearly and succinctly identifying the reasons the Scheme Agent disputes liability. All issues relevant to the decision must also be included in the 74 Notice. A simple assertion that an insurer relies upon one or more sections of the Act does not comply with the requirements of Section 74.

The Deputy President warned that the practice of referring to multiple sections of the legislation, regardless of the relevance to the particular claim, making generalised denials as to the entitlement to compensation wais unacceptable and "must cease."

Further, President Judge Keating in *Hobden – v - South East Illawarra Area Health Service [2010] NSWWCC PD13* examined the specific requirements for Section 74 notice when denying a psychological injury case. In Hobden, there was no dispute that the worker had suffered a psychological injury in the course of her employment and that employment was a substantial contributing factor to that injury. However the denial contained within the Section 74 Notice was simply that the Scheme Agent "relied upon Section 11A of the Act and that the employer had acted reasonably in their actions." Section 11A provides that compensation is not payable in respect of an injury that is a psychological injury if the injury is wholly or predominantly caused by reasonable action or action proposed to be taken on behalf of the employer. Further the section sets out that these actions must be in regard to "transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers." The Section 74 Notice in Hobden did not properly identify the action or the actions the employer relied upon as having been the whole or predominant cause of the psychological injury. If Section 11A is to be relied upon, the insurer must state which various parts of Section 11A it relies upon (i.e. transfer or demotion or promotion, etc) and the basis for that reliance. The section is not invoked merely because an injury resulted from an employer's reasonable actions.

The President noted that it is possible a defect in the Section 74 Notice can be rectified in part by the Reply filed by the legal representatives of the Scheme Agent but this would be subject to leave being granted by the Arbitrator after the Arbitrator had been satisfied there would be no prejudice to the worker when subsequently pleading the specific part of Section 11A the Scheme Agent relied upon.

These decisions are a timely reminder to Scheme Agents that Section 74 Notices must be both detailed and expressed in plain language. A worker must clearly understand the reasons for the declinature and the issues relevant to the decision. If a person preparing the Section 74 Notice adopts the mindset that the Notice is sufficiently detailed to be the basis of final Submissions in Arbitration process, it is unlikely the detail required in the Notice will be overlooked. Although there is a window of opportunity to allow for some correction of the grounds of denial when the matter proceeds in the Workers Compensation Commission, this will always be subject to leave being granted by an Arbitrator. When preparing a Section 74

Notice you should not assume that defects in the Notice will be allowed to be corrected once the matter is subject to litigation in the Commission.

Legal Representation At Fair Work Australia

Prior to 1 July 2009, it was widely assumed that legal representation before Fair Work Australia and its forebears would be allowed as a matter of formality.

In Timothy *Visscher v TK Shipping Australia Pty Limited, [2004], AIRC 1235*, the Full Bench affirmed that:

> *"It has become almost a formality that leave to be represented by counsel, solicitor or agent be granted to a party in such matters."*

That is no longer the case. A change in the legislation and some recent decisions of Fair Work Australia indicate that an employer will not be entitled to legal representation as of right. Parties require the permission of Fair Work Australia to be legally represented. There is now a chance that a business will not be entitled to representation in unfair dismissal matters even though the Applicant is represented by a union advocate.

Section 596 of the Fair Work Act 2009 provides:

> *"FWA:*
>
> *(a) may grant permission for a person to be represented by a lawyer or paid agent in a matter before FWA only if you would enable the matter to be dealt with more efficiently taking into account the complexity of the matter; or*
> *(b) it would be unfair not to allow the person to be represented because the person is able to represent himself/herself or itself effectively; or*
> *(c) it would be unfair not to allow the person to be represented taking into account the fairness between the person or other person in the same matter."*

In *Rodney James Rogers –v- Hunter Valley Earthmoving Company Pty Ltd [2009] FWA 877*, the CFMEU successfully objected to Freehills acting for Hunter Valley Earthmoving Company in unfair dismissal proceedings. The CFMEU contended that the matter was a simple contest to be decided on the facts and did not involve complicated legal argument. In that case the person who represented the employer was legally qualified.

It is now less likely that leave will be granted where disputes are purely factual.

In *Lois O'Grady - v - Royal Flying Doctor Service [2010] FWA 1143* before Deputy President Leary, O'Grady made application to Fair Work Australia alleging that the termination of her employment was unfair. The employer objected to the Application on jurisdictional grounds arguing that termination occurred because of redundancy. DP Leary found that while the factual circumstances surrounding termination were relatively simple, the argument about redundancy was complex novel and unsettled. Representation was allowed for the jurisdictional dispute only. In that case the employer's representative was not legally qualified and had no experience in advocacy.

In *Venn - v- Salvation Army [2010] FWA 912*, Deputy President Leary identified the tension present when a human resources specialist may have to act as both an advocate and a witness. In such a case he granted leave for the employer to be legally represented over the worker's objection. That case also expressed the view that leave for representation was more likely to be granted when the relationship between a worker and a business has broken down such as where gross misconduct is alleged.

A general principle arising from the decided cases is that a business is more likely to be granted legal representation where the onus is on the employer to prove its case either in respect of a jurisdictional objection or in respect of an allegation of summary misconduct however employers need to be ready to run claims without lawyers.

Although legal representation remains available to employers, Fair Work Australia may well call on an employer to run a claim without any legal representation.

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