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Head Contractor Liability For Accidents - You Cannot Escape! Unsafe Scaffolding Leads To Substantial Liability For A Head Contractor

Construction sites are fertile grounds for personal injury claims. The use of independent contractors is prevalent throughout the construction industry with head contractors utilising a wide range of specialist subcontractors to provide services during a construction project.

Where a person is injured during the course of a construction project there can be a myriad of contractors that have an involvement in an incident which causes injury. It is not uncommon in litigation to see various contractors and the head contractor involved in a personal injury claim and the courts will be called on to apportion liability between the various defendants.

However after the decision of the High Court in *Leighton v Fox*, head contractors have resisted claims arguing that they have no liability for injuries to employees of independent contractors. The basic principle that flowed from the *Leighton v Fox* decision was that a principal contractor has no duty to retain control of the system of work of an independent contractor if it is reasonable to engage the services of an independent contractor who is competent to control the system of work without supervision and the activity has been organised and has been placed in the hands of the independent contractor.

Following on from *Leighton v Fox* the NSW Court of Appeal delivered a number of judgments which confirmed that head contractors did retain responsibility for accidents where they retained and exercised a supervisory role in the overall system of work.

A head contractor cannot avoid liability for accidents at a worksite by simply arguing that it engaged an independent contractor. The liability of the head contractor will turn on the activities it has undertaken and the responsibilities it assumes or must assume by virtue of what needs to be coordinated.

Head contractors must also note that the predominant share of liability for an accident can still fall to a head contractor, as seen in the recent NSW Court of Appeal decision in *Ilvari Pty Limited t/as Craftsman Homes v Sujuk*.

Sujuk was a brick cleaner. He was employed by his wife trading as Rosa's Cleaning Service. Craftsman Homes was a head contractor involved in the construction of a residential dwelling. Craftsman Homes arranged for Rosa's Cleaning Service to clean the external brickwork of newly constructed residential premises at Cherrybrook. During the course of carrying out the work Sujuk was working from scaffolding that had been erected at the request of Craftsman Homes when he fell through a gap in the scaffolding falling a distance of 3.5 to 4 metres.

Sujuk simply attended the site to clean the bricks and was injured when he fell through the hole in the scaffolding that he did not supply.

The scaffolding had a safety sign confirming the scaffolding complied with the appropriate standards. The evidence at trial established that sometime between Wednesday afternoon and the Saturday morning of the accident persons unknown moved a piece of scaffolding from its

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position thereby leaving a gap on the lower scaffolding. Sijuk's accident occurred approximately 30 minutes after he had commenced work and it was likely that his vision would have been impaired by an accumulation of materials on his work goggles. The court accepted that Sijuk saw a notice or certificate to the effect the scaffolding had been passed or certified as safe and that gave him a level of comfort. The trial judge found that the primary liability for the accident rested with the principal of the project, an occupier of the site.

Liability was apportioned 90% to the head contractor and 10% to the employer and there was a reduction for contributory negligence of 15%. The trial judge saw Craftsman Homes as the entity which had control over and responsibility for managing the onsite construction including, in particular, the scaffolding for the use of subcontractors and employees and it was their responsibility to ensure that the site maintained access for the performance of work was reasonably safe. It was noted the minimum required was to ensure that there was a proper inspection undertaken before a new contractor was invited on site to perform work. It was also noted that Craftsman Homes had the responsibility for properly coordinating contractors and this would involve proper arrangements being made at the outset before the contractor entered onto the site. Effectively, the trial judge found that whilst Rosa's Cleaning Service was an independent contractor, the business was an unsophisticated entity and Sijuk's onsite activities did not involve any obligation to supply safe work method statements.

Craftsman Homes appealed.

The Court of Appeal noted the central issue was whether or not Craftsman Homes' responsibility was such that it was obliged to exercise reasonable care to make the site safe for workmen who were invited on to do work. Craftsman Homes argued that its only duty was to coordinate trades and that since the question of co-ordination of trades had nothing to do with the accident there was no duty, breach or possible causal link. President Allsop in the majority judgment commented that:

"The appellant (Craftsman Homes) was the builder in occupation of the building site, including the scaffolding. I agree that co-ordination of trades had nothing to do with the accident. The accident was caused by the dangerous state of the scaffolding which bore a reassuring sign that it was safe. The question is whether the appellant (Craftsman Homes), as the builder having possession of the site, owed any duty to tradesmen such as Mr Sijuk to exercise reasonable care to make the site safe for them to work upon.... A building site and scaffolding on a building site can be dangerous places. People work at heights, machines are in use and other dangers exist. As the occupier with possession of the site for the undertaking of its contractual obligations for its own commercial benefit, a builder owes a duty to exercise reasonable care to avoid the exposure of persons coming on to the site to risk of injury from the dangerous condition of the site."

President Allsop noted that tradesman of Mr Sijuk's class are not accustomed to dealing with dangerous scaffolding, especially scaffolding that was said by a sign to be safe. President Allsop noted:

"Undoubtedly an occupier, especially a non-technical occupier, is entitled to expect that a tradesman will deal with dangers or defects which his trade skills allow him in the ordinary way to perceive and deal with. That does not mean that a builder is free not to exercise any reasonable care about the safety of the building site of which it has possession. ... The relevant question here is a factual one that feeds into a legal one: whether or not a duty of care exists. The scaffolding was dangerous; someone had made it so. The state of the scaffolding was within the control of the builder (though, of course, it could be checked by tradesmen working on the site).

No doubt, in some respects, a person who retains an independent contractor can expect the latter to decide how to do the task and what safeguards to put in place. This does not include leaving it to the contractor to find the danger in scaffolding at a building site that reasonable care by the builder/occupier would have found and eliminated."

Effectively the Court of Appeal determined that a practise of inspecting scaffolding before any tradesman began to use it accorded with reasonable common sense and the exercise of reasonable care to reduce the risk of injury on a building site. As there was no inspection there had been a breach of duty of care by the head contractor.

Craftsman Homes also challenged the findings on contributory negligence and the assessment of the liability of the employer. Craftsman Homes argued the allocation of employer liability was unreasonably low as was the finding of contributory negligence. The court noted that Sijuk should have inspected the scaffolding, he did not and to a degree he relied on the statement that the scaffolding was safe. It was noted that 15% for contributory negligence was within the range albeit at the lower end of the range. On that basis the finding of contributory negligence was not overturned. The Court of Appeal noted in relation to the liability of employer the assessment was low but not so impermissibly low that it should be overturned.

We will have to wait and see whether or not this case has wider ramifications for the construction industry. The case involved

residential building works with a company erecting a single dwelling. The trade involved in the incident was brick cleaning, a trade that does not necessarily require significant expertise. The business that supplied the brick cleaner was an unsophisticated entity.

The case demonstrates that a head contractor can and will have responsibility for the state of a construction site and its dangerous conditions and perhaps is obliged to inspect the site for dangers before bringing new contractors onto site. No doubt injured persons who seek to sue head contractors will find comfort in this decision. The High Court's judgment in *Leighton v Fox* will continue to be an impediment to claims brought against head contractors although the decision in *Craftsman Homes v Sijuk* is certain to cause a chink in the armour of head contractors.

Does a head contractor owe a duty to inspect scaffolding on site before it brings a new contractor on site? An argument will be mounted by claimants to this effect by virtue of the decision in *Ilvari Pty Limited t/as Craftsman Homes v Sijuk*. So will the effect of the judgement be restricted to small scale residential projects rather than major construction projects. We will wait and see.

Council Liability For Dangerous Recreational Activities

In NSW the Civil Liability Act, 2002 (the "Act") imposes restrictions on the duty of care owed to those involved in dangerous recreational activities. A person is not liable in negligence for harm caused as a result of the materialisation of an obvious risk of a dangerous recreational activity.

In claims for compensation by persons injured whilst engaged in recreational pursuits the three questions which often arise are:

- Was the activity in question a dangerous recreational activity.
- Did the injury result from the materialization of an obvious risk.
- Was there a risk warning that was provided that absolves a party from responsibility.

A recreational activity will be a dangerous recreational activity where it involves a significant risk of physical harm. The defendant bears the burden of proof in establishing there was a significant risk of physical harm. The Courts have held that "this question is to be determined objectively and prospectively. The standard lies somewhere between a trivial risk and one that is likely to occur. Significance is to be informed by the elements of both risk and physical harm. The characterisation must take place in the particular context in which the plaintiff places himself or herself."

The question of obvious risk involves the determination of whether the conduct involved a risk of harm that would have been obvious to a reasonable person in the injured person's position.

A risk warning must warn a person engaged in recreational activities of the actual risk and an inadequate warning will preclude a person from obtaining the benefit of the immunity that is available.

The recent decision of Harrison J in the NSW Supreme Court in *Vreman and Morris v Albury City Council* has brought the application of all of these issues into focus.

The NSW Supreme Court was called on to determine two claims by injured BMX riders brought actions against the Albury City Council arising from injuries they sustained riding BMX bicycles at a skateboard park controlled by the Council.

In early 2003 the Albury City Council took possession of a skate park on land under its control near Pemberton Street, West Albury. The park included areas constructed of concrete with a wet steel trowelled finish. The park was used apparently without incident by local young people for some years. Sometime prior to 25 April 2006, and probably in March of that year, the Council painted concrete surfaces of the skate park with blue paint in order to facilitate the removal of graffiti that was constantly being applied to it. Shortly thereafter, on 25 April 2006, Jade Vreman was severely injured at the skate park when he fell from his BMX bike whilst attempting a jump. On 13 August 2006 Joshua Morris was also injured when he fell from his BMX bike in the course of riding down the centre ramp. Vreman and Morris alleged that their falls were caused by the slippery and dangerous condition of the skate park that resulted from the application of the paint.

A sign was erected at the skate park and was there when the accidents occurred. It was made up of words and pictograms. Two of the pictograms relate to bottles and littering and the other two appeared to advise that there were steep slopes and that skateboarders should wear protective clothing. The sign contained the following words:

" WEST ALBURY SKATE PARK

*This facility is available for skateboarders and rollerbladers.
Please cooperate with and be considerate of all users.*

Conditions of safe use:

*Protective clothing, including helmet, knee and elbow pads and wrist guards must be worn at **ALL TIMES** .*

Skate at your own risk

Only skate in the designated areas of the facility

Always skate carefully and within your skill level

The facility should be used in daylight hours only

This is a drug and alcohol free facility

Please place all rubbish in bins provided

Children under 12 years of age are to be supervised by an adult at all times whilst using the facility.

For further information or reporting of faults contact AlburyCity 6023 8111 or after hours 1300 133 391

IN THE EVENT OF AN EMERGENCY PLEASE RING -

Fire Brigade, Ambulance, or Police - Dial 000

Address of facility:

Pemberton St. West Albury "

The Council argued it was not liable as:

- The injuries were the result of the materialization of an obvious risk of a dangerous recreational activity and the Council owed no duty.
- In any event the negligence alleged did not cause any injury; there was no foreseeable risk arising from the negligence alleged.
- The acts and omissions alleged did not amount to negligence.
- The Council provided a risk warning about the activity and section 5M of the Act therefore provided an immunity from liability for the Council.

First up was the argument on dangerous recreational activity.

The provisions governing civil liability for harm caused in dangerous recreational activities are found in sections 5K, 5L and 5F of the Act. They are in the following terms:

" 5K Definitions

In this Division:

"dangerous recreational activity" means a recreational activity that involves a significant risk of physical harm.

"obvious risk" has the same meaning as it has in Division 4.

"recreational activity" includes:

- (a) *any sport (whether or not the sport is an organised activity), and*
- (b) *any pursuit or activity engaged in for enjoyment, relaxation or leisure, and*
- (c) *any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.*

5L No liability for harm suffered from obvious risks of dangerous recreational activities

- (1) *A person ("the defendant") is not liable in negligence for harm suffered by another person ("the plaintiff") as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.*
- (2) *This section applies whether or not the plaintiff was aware of the risk."*

"5F Meaning of "obvious risk"

- (1) *For the purposes of this Division, an "obvious risk" to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.*
- (2) *Obvious risks include risks that are patent or a matter of common knowledge.*
- (3) *A risk of something occurring can be an obvious risk even though it has a low probability of occurring.*
- (4) *A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable."*

The first issue for the Court was whether riding a BMX bike at the West Albury skate park was a recreational activity that involved a significant risk of physical harm. "Harm" means harm of any kind, including personal injury or death and economic loss.

There was no dispute that Vreman and Morris were involved in a recreational activity and that they suffered harm.

In concluding Morris and Vreman were involved in a dangerous recreational activity Harrison J concluded:

"In my opinion, the activity in which Mr Vreman and Mr Morris were engaged when they were injured was a dangerous recreational activity. It clearly involved a significant risk of physical harm. The nature and degree of the harm that might be suffered was significant, as was the likelihood of it occurring. I do not consider that the risk of physical harm was low, but even if it had been, the potential harm was catastrophic. I also consider that the risk of physical harm was significant because in this case the likelihood of both the occurrence and the harm was more than trivial."

When the court turned to the consideration of the risk Harrison J noted:

"The risk in this case was one that included at least the following segments or elements: (i) falling from a BMX bike, (ii) while riding at the West Albury skate park, (iii) when a wheel that might not slip on an unpainted concrete surface might slip on a painted concrete surface (iv) in the course of landing from a jump or when descending during a roll-in, (v) leading to or causing injury.

*.....
I consider that a reasonable person in the position of each man would have known, as Mr Vreman and Mr Morris knew, that the slippery surface of the skate park increased a risk that he or she might fall and be injured. That was something that Mr Vreman gleaned from riding on the painted surface many times before. Mr Morris knew that Mr Vreman had allegedly fallen because his bike had slipped on the painted surface. This is not a case like Maloney v Hutton-Potts where the person suffering harm was confronted with a risk that could not have been anticipated or detected as a normal (or obvious) risk associated with a freshly polished floor. The fact that the floor had been polished was obvious but the unremoved residue of polish was not obvious to a reasonable person in that plaintiff's position. The reasonable person in the position of Mr Vreman must be taken to have ridden on the painted surface of the skate park many times and to have been able to form his or her own conclusions about its suitability for riding upon in those circumstances. Similarly, the reasonable person in the position of Mr Morris must be taken to have had knowledge that Mr Vreman had been injured because his bike wheel reputedly slipped on the painted surface and also to have been able to form his or her own conclusions about its suitability for riding upon in those circumstances. The risks would have been obvious to a reasonable person in the position of each man."*

The Council had established that the activities were dangerous recreational activities and the harm had resulted from the materialization of an obvious risk of that activity.

Harrison J concluded that the Council was not liable in negligence for harm suffered by Vreman and Morris because the harm was suffered as a result of the materialisation of an obvious risk of a dangerous recreational activity in which they were each engaged. The claims therefore failed.

However Harrison J then went on to consider the Council's argument that it had provided a risk warning and had no liability to the bicycle riders by virtue of an immunity provided by Section 5M of the Act.

Section 5M of the Act is in the following relevant terms:

" 5M No duty of care for recreational activity where risk warning

- (1) A person ("the defendant") does not owe a duty of care to another person who engages in a recreational activity ("the plaintiff") to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.
- (2) ...
- (3) For the purposes of subsections (1) and (2), a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.
- (4) A risk warning can be given orally or in writing (including by means of a sign or otherwise).
- (5) A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).

- (6) A defendant is not entitled to rely on a risk warning unless it is given by or on behalf of the defendant or by or on behalf of the occupier of the place where the recreational activity is engaged in.
- (7) ...
- (8) A defendant is not entitled to rely on a risk warning to a person to the extent that the warning was contradicted by any representation as to risk made by or on behalf of the defendant to the person.
- (9) ...
- (10) The fact that a risk is the subject of a risk warning does not of itself mean:
- (a) that the risk is not an obvious or inherent risk of an activity, or
- (b) that a person who gives the risk warning owes a duty of care to a person who engages in an activity to take precautions to avoid the risk of harm from the activity.
- (11) This section does not limit or otherwise affect the effect of a risk warning in respect of a risk of an activity that is not a recreational activity."

The Council had erected a sign at the skate park. Harrison J when considering the nature of the sign observed:

"The sign in question was a general warning sign in the sense that it warned generally about the need to wear protective clothing, including helmet, knee and elbow pads and wrist guards at all times and that users skated at their own risk. It drew attention to the need for users to skate carefully and not to exceed their skill level. It also advised that the facility should only be used in daylight and that children under 12 were to be supervised by an adult. The sign did not warn that the surface of the skate park may be, or become, slippery if wet, that it was likely to be more slippery on steeper slopes or that it was, or could be, more slippery on surfaces that were painted. It did not warn of anything at all specifically directed to bike riders, as opposed to skateboard riders, and did not warn that the wheels of bikes may slip or "wash out" in circumstances that either equated to, or that incorporated, the events that occurred in the plaintiffs' accidents. It did not mention that there was a risk of serious or catastrophic injury, as opposed by implication, to bruises or grazes or other minor injuries that could be prevented or lessened by protective gear and falling short of tetraplegia or brain damage."

Harrison J then concluded it was necessary to resolve the following questions to determine the adequacy of the sign:

1. What was the risk associated with the recreational activity of riding bikes at the West Albury skate park?
2. Was the risk warning given by the Council specific to the particular risk encountered by the plaintiffs, or was it a general warning?
3. Did the Council give a warning in relation to the recreational activity of riding bikes at the West Albury skate park that was reasonably likely to result in people being warned of the risk before engaging in the recreational activity?
4. If the risk warning given by the Council was not specific to the particular risk encountered by the plaintiffs, but was a general warning, did it warn of risks that included the general nature of the particular risk concerned?
5. Did the Council owe a duty to the plaintiffs in the circumstances?"

After identifying the risks Harrison J concluded that the sign did not provide a risk warning as envisaged by section 5M of the Act and the Council was not entitled to an immunity. Harrison J concluded:

"The risk warning given by the Council was not specific to the particular risk encountered by the plaintiffs, but was a general warning. Indeed, it did not in terms warn of any "risk" at all. A warning that users skated at their own risk clearly implies that a risk exists but is silent upon what it might be. Alternatively, coupled with the reference to protective clothing, the warning may be one that actually warns of risks but only those that can be obviated or sufficiently guarded against by conforming to the requirement to wear such equipment. Even if it be accepted that the nature of the activities engaged in at skate parks obviously include a risk of falling, the warning in this case did not extend to include the most serious consequences that may be caused by a fall. More particularly for present purposes, the warning did not include a reference to the risk of serious or catastrophic injury. Finally, the warning in this case said nothing about any risk or risks associated with the slipperiness of the surface of the skate park, the difference between a painted and an unpainted surface, the characteristics of gradients or steep surfaces and their relationship to the likelihood of slipping or falling or the effect upon any of these of the presence of moisture on the surface.

..., in my opinion the Council did not give a warning in relation to the recreational activity of riding bikes at the West Albury skate park that was reasonably likely to result in people being warned of the risk before engaging in the recreational activity. This is because the warning was general and not sufficiently specific to do so. The reasonable likelihood of the warning having such an effect must be judged at least by reference to the content of the warning. I consider that the warning was inadequate to convey the nature or extent of the risks associated with riding bikes at the

skate park to which I have previously referred.

.. in my opinion the warning, even in its general form, did not warn of risks that included the general nature of the particular risk concerned."

In those circumstances the Court concluded the Council owed a duty of care to Vreman and Morris as it had not provided a risk warning. But for the application of sections 5K and 5L of the Act which defeated the claims this may have caused the Council a problem. However for completeness Harrison J continued on to determine whether the Council's actions in painting the ramp could have amounted to negligence no doubt in anticipation of an appeal by Morris and Vreman against the findings on sections 5K and 5L of the Act.

Harrison J ultimately concluded that the actions of Council could not amount to negligence for a multitude of reasons.

Firstly Harrison J concluded that the actions did not amount to a breach of duty finding:

"It seems to me that in order to establish that the Council has breached its duty of care to the plaintiffs it is necessary for them to establish that the Council actually knew or ought reasonably to have known that there was a well recognised or at least discoverable unacceptably greater risk of injury associated with the application of paint to the skate park surfaces that was measurably different to the equivalent or corresponding risk to users of the skate park performing the same activities on unpainted surfaces.

Painting is not prohibited by any authoritative publication. The only publication dealing with skate parks does not mention painting at all and does not warn against it by implication or inference. There is no source from which some person or body in the position of the Council could have gleaned any reliable information about the issue in specific or general terms. There are no statistics that existed of the comparable rates of injury between painted and unpainted skate park surfaces. There are no specified tolerances or standards with which a person or body such as the council ought to have complied. There is no evidence to suggest that the Council failed to meet some appropriate tolerance or standard. The plaintiffs have not established that the Council did something that it should not have done (painting the skate park surfaces), or that it failed to do something that it should have done (seeking expert advice before painting or removing the paint). The allegation that the Council breached its duty to the plaintiffs is supported by no more than the retrospective assertion that the plaintiffs' falls occurred on a painted, as opposed to an unpainted, surface."

Secondly Harrison J concluded that there could be no liability for the Council as the risk was not foreseeable finding:

"In my opinion the risk was not foreseeable in the sense that it is a risk of which the Council knew or ought to have known. I consider that whilst the risk of falls such as those suffered by Mr Vreman and Mr Morris was not insignificant, the additional or greater risk of falls associated only with the application of paint to the concrete surfaces was insignificant. I also consider that a reasonable person in the Council's position would not have taken any of the precautions particularised by the plaintiffs. Moreover I am not satisfied that the probability, that the harm that the plaintiffs suffered would occur if the Council failed to take the care that the plaintiffs contend it failed to take, was different to the probability that the same harm would occur even if the surfaces of the skate park had not been painted. There is no discernible difference in my view either between the seriousness of the harm that was caused and the seriousness of any harm that might otherwise have occurred if the surfaces had remained unpainted."

Thirdly Harrison J concluded that the test of causation had not been satisfied as it was not possible to say that either accident would not have happened if the surface of the skate park had been unpainted concrete. Morris and Vreman had not established that the negligence alleged was a necessary condition of the occurrence of the harm.

Generally the Council had a resounding win despite the fact the Court found that the Council's sign did not provide an adequate warning to attract the immunity provide by Section 5M of the Act.

The Court determined that the Council had no liability as:

- the Council had not been negligent;
- Morris and Vreman had failed to establish that increased risks flowing from painting the surface were foreseeable;
- any acts or omissions of the Council were causative of the injuries; and
- the harm was the result of the materialisation of an obvious risks of a dangerous recreational activity.

No doubt its back to the drawing board for the skate park sign but we will have to wait and see whether the comprehensive victory is enough to stave off an appeal by Morris and Verman.

Recreational pursuits will continue as a fertile source of potential personal injury claims however where the harm results from the materialisation of an obvious risk of a dangerous recreational activity the claims will fail- at least for now.

Contract Works Policy - Guilty of OH&S Breach But Not In Breach Of Conditions In The Policy

A breach of a condition in an insurance policy can result in an insurer declining the claim as a result of prejudice it suffers as a consequence of the breach of that condition. Policies may contain conditions that impose obligations on an insured to "take reasonable care" or "comply with legal requirements" or "Occupational Health and Safety legislation". However a literal reading of a condition may not reflect the commercial intent of the policy and a Court when considering the denial of a claim will be called on to properly construe the terms of the policy having regard to its intended purpose and may read down conditions found in the policy.

A condition may be read down and concepts of "reasonableness" may be read into the condition with the end result that conduct which appears to be in breach of a condition will not amount to a breach when the clause is read down. So what happens when a policy provides an insured must fully comply with all legal requirements and relevant work place authority regulations regarding safety, and maintenance of property, including but not limited to observance of the Occupational Health and Safety Act applicable in your State, and the insured has on advice pleaded guilty in a prosecution for a breach of the Occupational Health and Safety legislation? This was one issue that Justice Hislop was required to determine in a recent decision in the NSW Supreme Court in *Dargham v Kovacevic*.

Dargham a 24 year old construction worker sustained an injury when, whilst working on a construction site at Strathfield, NSW, he fell down an unguarded stairwell void. He had been working as a subcontractor on the site and sought damages for his injuries from the Radovan Kovacevic, who was sued as the builder/head contractor, Nutalab Construction Pty Limited, which was sued in the alternative as the head contractor (this company took no part in the proceedings as it was in liquidation) and Sibin Djuric, who was sued as an owner/occupier of the site and as principal.

Djuric held a contract works insurance policy with Mecon Insurance and liability for the claim had been denied by Mecon who was joined as a party in the proceedings. The denial of liability was based on the alleged breach of one or more conditions of the policy. The relevant conditions were:

"Each condition reflects a reasonable requirement of you as a condition or precedent to receiving insurance under the Policy. If you fail to observe these conditions, and such failure increases MECON's exposure to a claim or directly or indirectly exacerbates or causes loss, damage or legal liability, MECON may reduce, or avoid paying, any claim submitted by you.

0.08 Risk Management

Without exception, you and your Employees must:

- (a) fully comply with manufacturer's instructions*
- (b) fully comply with all legal requirements and relevant work place authority regulations regarding safety, and maintenance of property, including but not limited to observance of the Occupational Health and Safety Act applicable in your State, and,*
- (c) ensure that any safety devices (including, but not limited to, load movement and overload indicators), where fitted or required to be fitted, are in place and fully operational at all times, and*
- (d) take all reasonable steps to prevent incurring any loss, damage or liability."*

Mecon's primary submission was that Djuric was not entitled to indemnity as he had breached one or more of conditions 10.08(b), (c) or (d) of the policy.

Mecon also submitted that Djuric was not entitled to indemnity pursuant to the policy as he had breached cl 10.08(b) and/or (d) of the policy in that he had done "residential building work" or "specialist work" in breach of ss 12 and 13 of the Home Building Act 1989 on the site.

Djuric argued there was no breach of clause 10.08, or the reasonable requirements of that clause; ss 12 and 13 of the Home Building Act 1989 did not provide a basis for denial of liability and no loss had been established by Mecon.

The question for the Court of Appeal was whether any breach of the condition was established and whether the breach, caused loss or legal liability, there being no evidence that Mecon's exposure to a claim was increased or that the liability or

loss was exacerbated.

The initial issue for the court to determine was the proper construction of the policy having regard to its intended commercial purpose. The trial judge noted *"Mecon, in the manner in which it particularised breach of condition 10.08(d) appears, correctly, to have accepted that condition 10.08(d) should be read down in order to give effect to the commercial purpose of the policy which was to indemnify the insured against liability for his negligence, a literal interpretation of that condition being repugnant to the commercial purpose of the policy."*

So in construing the policy the trial judge concluded:

"In my opinion, the opening words of general condition 10 should be construed as meaning reasonable as between the insured and insurer having regard to the commercial purpose of the policy, thus leading to a similar reading down of conditions 10.08(b) and (c) as for 10.08(d)."

The breach of condition 10.08(b) was particularised as a breach of reg 39 of the Occupational Health and Safety Regulation 2001 which, relevantly, required that the controller of the premises must ensure that:

"(a) safe access is provided to all parts of a place of work to which a person may require access and from which the person may fall, and

...

(c) walkways are provided and maintained over roofs that are wholly or partly covered by brittle or fragile roofing material, and

...

(e) floors are designed to be safe without risks of slips, trips or falls, with adequate drainage (if necessary) and appropriate floor coverings (if necessary)."

The trial judge whilst rejecting that there had been a breach of the condition for several reasons noted *"Additionally, no breach of the condition, when read down, has been established as Djuric had taken steps to avoid such a danger and was not indifferent to whether it was averted or not."*

The concept of "lack of indifference" in the trial judge's determination demonstrated that there was no breach of the condition when read down to reflect the commercial purpose of the policy. The trial judge noted that the Courts have when considering conditions in insurance policies held *:"the requirement in an insurance policy that the insured "take all reasonable precautions to avoid or minimise injury, loss or damage..." is satisfied by the insured proving either that he did not recognise that a danger existed or that perceiving its existence he took some action to avoid it and was not indifferent to whether the danger was averted or not."*

So in considering this case Justice Hislop concluded:

"It may be accepted Djuric was aware of the danger posed by the void. However, Djuric had retained qualified personnel to perform the work in which the plaintiff was engaged. Action was taken either by those persons or Djuric himself to cover the void to an extent consistent with its use as a means of access. I accept neither the Djuric nor the contractor was aware that the cover was not satisfactory in that it could give way. It is true that with the benefit of hindsight it is apparent more may have been done by way of provision of a fence or a stronger cover. However, the evidence does not establish indifference on the part of Djuric as to whether the danger was averted or not. On the contrary, in my opinion there was no breach of this condition properly construed."

On the issue of breach of the Home Building Act, Hislop J noted:

"The Home Building Act contains provisions concerning the residential building industry. It is concerned to ensure the actual building work is performed in a proper and tradesman-like manner and that insurance is available to meet deficiencies in this regard. It is not concerned with matters of building site safety, that is the role of the Occupational Health and Safety Act and the regulations thereunder. The provisions of the Home Building Act are not properly categorised as "legal requirements regarding the safety or maintenance of property" or "relevant workplace authority regulations regarding safety and maintenance of property". Accordingly, condition 10.08(b) has no application."

Djuric did not carry out any actual building work, all of the actual work was done by subcontractors employed by Mr Marroun. Mr Marroun held the relevant licence. He acknowledged his obligation to take reasonable care in respect of his subcontractors. In these circumstances, any supervision by Djuric was excluded from the definition of residential building work by the Home Building Act regulations. There was no breach of condition 10.08(d) by Djuric literally construed, and, the more

so, when read down so as to have regard to the commercial purpose of the policy. The absence of a certificate was not causative of the legal liability of the Djuric.”

At the end of the day Hislop J determined that there were no breaches of conditions in the policy. When considering the alleged breach of the conditions the conditions had to be read down and concepts of reasonableness needed to be imposed having regard to the commercial purpose of the policy which was to provide cover for negligence. Djuric had not been “indifferent” to dangers and he was not in breach of those conditions when read down.

Djuric also relied upon s 54 of the Insurance Contracts Act 1984 as confirming its entitlement to indemnity. The trial judge determined that Djuric proved that no part of the loss that gave rise to his claim was caused by any of the acts relied upon by Mecon to refuse to pay the claim and Mecon was not entitled to refuse to pay the claim by virtue of s 54(3) Insurance Contracts Act . Additionally, the trial judge concluded there was no evidence Mecon was prejudiced as a result of any of the acts relied upon by it to refuse indemnity.

Even though Djuric had on advice pleaded guilty in a prosecution for a breach of the Occupational Health and Safety legislation arising out of the injury to Dargham he had not breached conditions in the policy when properly construed.

Dargham’s case serves as a reminder that when a policy of insurance contains a condition that provides an insured must fully comply with all legal requirements and relevant work place authority regulations regarding safety, and maintenance of property, including but not limited to observance of the Occupational Health and Safety Act applicable in your State, a plea of guilty to a breach of Occupational Health and Safety legislation by an insured will not necessarily amount to a breach of that condition.

What Does An Employer Do When Faced With Conflicting Evidence About An Employees Conduct?

The *Fair Work Act, 2009* (“the FWA”) provides obligations on employers when investigating matters involving employees in the workplace to act fairly in those investigations. During such an investigation, an employer may be required to come to a conclusion at the end of the investigation as to whether or not an employee should be dismissed, disciplined or demoted.

An employer may be faced with conflicting evidence that is obtained during an investigation. This may come about because an employee who is guilty of conduct that may put him or her in breach of their employment contract or an employer’s policy, refuses to admit to that breach. How does an employer resolve such conflict when it arises as a result of its investigation?

Employers should be aware that Section 387 of the FWA sets out what should be considered by the Tribunal in determining whether a particular dismissal is harsh, unjust or unreasonable and provides the following criteria that must be taken into account:

- whether there was a valid reason for the dismissal related to the person’s capacity or conduct (including its effect on the safety and welfare of other employees); and
- whether the person was notified of that reason; and
- whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- any unreasonable refusal by the employer to allow the person to have a support person present to assist in any discussions relating to dismissal; and
- if the dismissal related to unsatisfactory performance by the person – whether the person had been warned about that unsatisfactory performance before the dismissal; and
- the degree to which the size of the employer’s enterprise would be likely to impact on the procedures followed in affecting the dismissal; and
- the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- any other matters the Tribunal considers relevant.

Some guidance to employers was provided by Commissioner Stanton of FWA in a decision of *Craft v Glennis Creek Coal Management Pty Limited* as to resolving conflicting evidence obtained during investigations.

Craft had been employed as an underground production with nine years service with the employer. He was dismissed

summarily by the employer on 13 November 2009 for allegedly writing racially discriminatory graffiti about another employee on a whiteboard at the employer's premises. Craft denied writing the graffiti and also stated he had no motive to write the graffiti.

The employer alleged the offending graffiti amounted to harassment and discrimination. The employer had prevention of workplace harassment and equal opportunity policies in place (the "Policies"). There was no issue in the proceedings that Craft and other employees knew of the existence of the Policies.

The employer had a zero tolerance of employees breaching the Policies. Employees who are found to be in breach of the Policies were subject to an established disciplinary procedure. The Commissioner determined that the intent of the Policies were articulated to employees in a series of toolbox talks during May 2008 and July 2009. Craft accepted he attended staff training sessions in relation to the Policies on 6 February 2009.

The employer conducted extensive interviews of its employees who were involved in the shift work when the graffiti was written. All employees denied writing the graffiti or seeing any other employee write the graffiti on the whiteboard.

The employer engaged a handwriting expert to examine handwriting specimens of those employees who were working on the shift when the graffiti was created. The expert came to the conclusion it was "highly probable" Craft wrote the graffiti.

Craft was critical of the investigations, the conclusion reached by the expert and the process where he was required to "show cause" at a management meeting as to why he should not be dismissed.

The Commissioner confirmed the civil standard of proof applies in unfair dismissal proceedings and the tribunal must determine whether, on the balance of probabilities, the conduct as alleged occurred having regard to the evidence. The Commissioner went on to say that this means that, upon consideration of the evidence submitted by the contesting parties, the account that is more probable than not should be accepted.

The Commissioner referred to a decision of Schmidt J in *Lawrence v Catholic Education Office, Sydney* who made the following observations concerning employee's protestations of innocence in relation to allegations of misconduct:

"Employers who have to determine whether or not misconduct has occurred, usually must do so without the assistance provided by access to evidence and cross examination about events in question given in a court in which the criminality of such conduct has been determined against the employee by a jury. In circumstances where allegations of misconduct arise, it is common place for the employee concerned to vehemently protest his or her innocence. So too do those charged with and even those convicted of crimes. Nevertheless, decisions must be made by employers as to whether or not such protestations are to be accepted. The continued making of such protestations cannot itself led to the conclusion that misconduct has not occurred."

The Commissioner carefully considered the evidence and determined the employer was acting reasonably in accepting the evidence of the handwriting expert. The Commissioner came to the conclusion the employer's decision to dismiss Craft was not a disproportionate response taking into account his 9 years of service and his work history.

The Commissioner determined the employer had a valid reason for dismissing Craft and concluded the termination was not harsh, unjust or unreasonable.

Employers in reviewing investigations undertaken in relation to disciplinary issues of employees do not have the benefit of observing employees and other witnesses giving evidence under oath and being cross examined. The same civil standard should be used by employers in coming to conclusions as to whether or not circumstances have occurred where there is conflicting evidence. Employers should make decisions, on the balance of probabilities, as to whether or not events have occurred.

Employees Cannot Promote Their Own Interests To Obtain A Financial Benefit Over The Interests Of Their Employer

The NSW Supreme Court has recently sounded a warning to employees that during employment it is the employer's interests that must be promoted and not the personal interests of the employee.

In *H & H Consulting Engineering Pty Limited ("H&H") & Ors v Jason Myers*, Justice Gzell of the NSW Supreme Court was

called onto consider a claim by H & H, a multi disciplinary consulting engineering company, that its employee Myers, a business government engineer had promoted his own interests and those of another company in breach of his fiduciary duty as an employee of H & H. H & H sought an account of profits and equitable compensation.

The Rocher Group of Companies was headed by a German based company and had subsidiaries worldwide. Port Marine Pty Limited ("Port Marine") was its representative in Australia. Port Marine was Mr Myers' father-in-law's company. The name Rocher Technical Services was registered to Port Marine.

In early 2006 Mr Myers was seeking to set up a project related to Rocher in Australia that provided renewed water solutions. He used the names Rocher Technical Services and RTS Renewed Water Solutions. A director of H & H interviewed Mr Myers for employment on a number of occasions during the recruitment process. Myers claimed that he told the director that he was assisting Rocher Technical Services to develop renewed water solutions and he would not want to be prevented from continuing his professional relationship with the people developing renewed water solutions if he became an employee of H & H. This conversation was denied by the director. The court accepted the director's version on this rather than Mr Myers.

The terms of Myer's employment included a provision that he would not engage directly or indirectly in any other business or occupation whatsoever during his employment with H & H without the prior written consent of H & H. It also provided that he would not accept any payment or any other benefit in money or in kind from any person as an inducement or reward for any act or forbearance in connection with any matter or business transaction by or on behalf of H & H without the prior knowledge and written authorisation of H & H. Further the contract provided he could not make any representations or give any warranties regarding the business other than those representations and warranties contained in the published literature regarding H & H or as were approved by H & H and he would not sign or enter into any agreement or contract on behalf of H & H or make any promise or representation on behalf of H & H without its prior approval. There were also post employment restraints relating to intellectual property rights.

Approximately six months after commencing employment Myers conducted a workshop discussing renewed water solutions, explained to the directors of H & H that RTS was the exclusive Australian distributor of Rocher equipment and services providing solutions for recovery of high quality water and removal of toxic contaminants. He proposed that RTS form a consortium with H & H and a number of companies. H & H directors rejected the consortium proposal because they thought it would provide the sort of services that H & H would provide through its own water engineering department or a subsidiary. Myers developed a business plan which reflected the position he put in the workshop and subsequently developed an action plan to implement the strategy.

H&H had incorporated Innaco Pty Limited as a wholly-owned subsidiary early in 2006 for the purpose of designing and constructing large continuous span structures. That was unsuccessful and the company lay dormant for a few months until it was revived to become H&H's water department business. The directors had resolved to establish a water-engineering department to develop a presence in the market for the supply of engineering and related services. The H&H directors rejected Mr Myers' consortium proposal because they thought it would provide the sort of services that H&H and Innaco would provide through the water-engineering department.

In about December 2006, Mr Myers told a director of H&H that he had a potential business partner that could bring in a lot of good work. The partner was EcoNova Operations Pty Ltd ("EcoNova").

The directors of H&H agreed with Mr Myers that EcoNova and H&H could be a good fit. Heads of agreement were executed between them on 13 April 2007. The purpose of the agreement was that the parties wished to cooperate in the acquisition of customers, design of buildings/developments, design of all water related infrastructure and the realisation (construction and delivery) of the same.

H&H would introduce EcoNova's water solutions to their potential customers while EcoNova would introduce H&H to their potential customers on a national basis and would promote H&H as the consulting services provider for those projects. The agreement provided that H&H would not act as a reseller of EcoNova equipment and would not receive any commission or kickback from projects/sales. But if H&H issued a quote to the end-customer as the main contractor, EcoNova would provide H&H with a binding quote for the project and H&H could choose the sales price.

On 8 November 2007 RWS entered into heads of agreement with EcoNova. The evidence demonstrated Myers built up EcoNova at the expense of H&H, and in causing RWS to enter into the heads of agreement with EcoNova on 13 November 2007, Mr Myers breached his fiduciary duty not to promote personal interests of persons other than H&H by making or

pursuing a gain for such persons where there was a conflict, or a real substantial possibility of a conflict, between the interests of those other persons and the interests of H&H and Innaco that Mr Myers had a duty to promote as business development engineer of H&H.

Gzell J noted:

*“A person who knowingly participates in a breach of fiduciary duty is liable to account to the person to whom the duty was owed for any benefit received as a result of such participation.
RWS was also an accessory and an accessory is fixed with transmitted fiduciary obligations. The accessory is treated as the fiduciary and must accordingly account to the same extent the actual fiduciary would have had to account if the fiduciary had made the profit “*

H & H had sustained losses from Myer's failure to promote Innaco as a lead contractor. The loss was the loss of the chance of making profit. Whilst damages for loss of a chance are difficult to estimate in this case they were seen as reasonably assured. Had Myers done for the subsidiary of H & H what he did for other companies, the subsidiary should have won the contracts the other two did. H & H were entitled to elect to receive equitable compensation or an account of profits with the end result that Myers and RWS which benefited from Myer's actions were ordered to pay compensation or account for profit to H & H.

Employees owe a fiduciary duty to their employer. An employee is not entitled to profit from activities that ought to be performed for the employer. A carefully drafted employment agreement can add to the duties owed by an employee to an employer however the simple fact is that an employee must serve this employer in good faith.

The case is a reminder that employees who derive individual profit to the detriment of their employers can be called on to account for any profit which they make if they breach their fiduciary duty which they owe to their employer. In addition a company which aids and abets in that breach or benefits from a breach of the fiduciary duty by an employee can and will be called on to account to the employer for profits which they make from the employees breach of fiduciary duty.

OH&S Roundup

Prosecution Of Designers How Far Does The Designer's Responsibility Extend?

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

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

A number of companies were involved in the construction of Hy-Tech's batching plant and the fabrication, installation and/or maintenance of three sets of bi-sliding metal gates. Simpson Design were structural engineers responsible for the design of the gate. The gate ultimately caused a fatality to a non-employee of Hy-Tech who was operating the gate manually.

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

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

The designer also argued that the stop that was ultimately installed which was inadequate was not designed by him. It was common ground that the designer did not include a stop in the design. Simpson Design was convicted and fined \$185,000. An appeal followed to the Full Court.

The Full Court noted that the designer failed to incorporate in its design of the gate plant travel limiting devices that would avoid the risk of the gates coming free of the portals. It was however noted that an unknown person bolted a stop to the western leaf of the west gate and that stop failed when the gate was manually operated. The Full Court rejected the designer's argument that its original design was not the cause of the risk but rather the modification made by installing the stop which failed. The argument that there was an intervening act that absolved the designer from responsibility was rejected. The risk of

injury which flowed from Simpson Design's design was that the gate would come out of the portal if there was no stop. The fact that someone incorporated a stop at a later time did not remove the risk caused by the originally flawed design.

The Court noted that the designer's failure to incorporate a stop remained a substantial cause of the risk. The Court noted that but for the failure to incorporate a stop in the design the accident would not have occurred (notwithstanding the fact that a stop was actually installed by someone else and that stop failed).

A deficiency in design will not be cured by the involvement of subsequent persons that adds to the original design concept. The fact was that the design was not right at the start as the design did not include a stop.

The majority judgement of the Court noted that more than one person can contribute to the creation of a risk as was the case in this incident. The person's act in bolting a stop to the gate did not transform the designer's conduct in failing to design a stop into something of far greater consequence. Nor was the consequence not readily foreseeable by the designer. It was always foreseeable that in the absence of a stop in the original design no stops would be affixed to the gate thereby creating a risk of the gate coming out of its portals and causing injury. The majority judgement noted it made no sense that the designer could escape liability by contending that the risk it caused was "negated or nullified" by a person fixing a faulty stop to the gate when the reason why it became necessary to install a stop, albeit a faulty one, was the designer's omission in the first place. The Court provided the following analysis by way of example:

"If a builder erected a unsafe wall and a contractor was engaged to brace a wall because it was unsafe, but the brace failed to prevent the wall toppling over and injuring someone, it seems to us that both the builder and the contractor would be culpable. We do not see it being any different in this case."

The Full Court of the Industrial Court of New South Wales confirmed the conviction and penalty of \$185,000.

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

Fatality From Wall Collapse - \$165,000 Fine

Mainbrace Constructions (NSW) Pty Limited was recently fined \$165,000 by the Industrial Relations Commission of New South Wales as a result of a fatality on a site when a brick wall collapsed.

Brick and block contractors had been engaged by Mainbrace Constructions (NSW) Pty Limited to carry out work at a residential complex that was to be integrated as part of a golf course.

An employer of the brick and block layer was fatally injured when a completed brick wall collapsed on him. The completed wall had been braced however the bracing was removed some time prior to the accident and it could not be determined when and how long before the accident that had occurred. In addition it was apparent that the wall fell as a result of someone leaning scaffolding planks against the wall.

Whilst Mainbrace argued that the lions share of responsibility rested with the subcontractor (which was not prosecuted as it was in liquidation) the prosecutions case was that there were glaring omissions in respect of safety and in respect of the support of walls and masonry brickwork during the course of construction, known and identified risks in the construction industry. It was also argued that the safety audits performed by Mainbrace did not adequately identify the risk arising from brick and block laying including constructing inadequately braced or unsupported brick and block walls at site. A risk assessment had identified risks of walls falling over but not risks associated with lateral loads.

The Court ultimately determined that the subcontractor and Mainbrace were equally culpable for the events. The Court noted that Mainbrace had the contract for the development works and subcontracted certain aspects of that work but Mainbrace had a full time site manager present as well as a full time project manager. Mainbrace had the authority to direct the subcontractor and although the two companies came to be involved in the accident as a result of contractual arrangements in this case that

factor would not operate so as to cast a high level of culpability on either of them.

Mainbrace entered an early plea of guilty and received a discount on its penalty of 25%. Notwithstanding that discount the penalty imposed was \$165,000.

As the subcontractor was in liquidation WorkCover prosecuted its director and a fine of \$9,000 was imposed on the director.

Workers Compensation Roundup

Can A Tenant Become A Deemed Employee?

In the recent decision of *Al Othmani v Massoud & Anor [2010] NSWCCPD 129*, Acting Deputy President Lorna McFee found that a landlord tenant relationship satisfied the indicia for deemed employment.

The tenant sustained severe injury resulting in paraplegia when he fell through sheeting on a pergola roof on a house he had rented from the landlord one week earlier. There was conflicting evidence from the tenant and the landlord. The tenant alleged that he had been employed by the landlord to undertake some of the repair work pursuant to an agreement that the landlord would pay him \$1,000. The landlord denied having any discussions about payment.

WorkCover, who were joined to the proceedings as the landlord was uninsured, issued a Section 74 Notice disputing that the tenant was a worker or a deemed worker. At the arbitration, the arbitrator found that the tenant failed to discharge the onus of proof that there was a contract of employment or a contract to perform work.

On appeal, the parties acknowledged that the tenant was not a worker as defined in Section 4 of the 1998 Act. McFee ADP found that whether a contract to perform work existed and whether there was an intention to create legal relationships must be determined objectively. She accepted that a contractual arrangement can be inferred from the conduct of the parties, there being no need to isolate offer, acceptance and consideration. If a person intends to offer his services for reward, belief by the person to whom he offers his services that the offer was gratuitous does not prevent a contract arising. She found that the landlord conducted himself so that the tenant may reasonably have inferred the existence of an agreement to be paid for services performed. She accepted that it was more probable than not that the landlord offered to pay the tenant \$1,000 to fix all of the defects in the house, having already incurred \$500 for an electrician and the potential cost of the plumber, roofer, cleaner and gardener. She accepted that the landlord behaved in the manner from which it could be reasonably inferred that there was an agreement that the tenant would carry out the work and be paid and the agreement was the most probable explanation for the tenant performing the work prior to and on the accident date.

As the work exceeded \$10 in value and was not incidental to a trade carried on by the tenant who neither sub-let nor employed workers in the performance of the contract, the provisions of Schedule 1 Clause 2 of the 1998 Act were established and the tenant was deemed to be an employee of the landlord.

One wonders if the outcome would have been different if the tenant had not been rendered paraplegic by the fall. Nevertheless the result is a very troubling outcome with far reaching ramifications.

Medical Evidence in the Workers Compensation Commission

In the matter of *Hancock v East Timber Products Pty Limited (2011) NSWCA 11* the New South Wales Court of Appeal examined the admissibility and weight given to tendered medical reports. The worker was employed as a labourer and injured his knee whilst stacking timber in the course of his employment. There were no witnesses to the incident and he did not report the incident. Save for a few days off work after the incident, he continued to work for another two and a half years before ceasing that employment, allegedly due to the injury. On appeal from the Arbitrator who originally determined the matter, the President of the Workers Compensation Commission revoked the Arbitrator's decision on the basis that the worker had failed to discharge the onus of proving that his permanent incapacity resulted from the original injury sustained at work.

Integral to this conclusion was President Keating's rejection of the evidence of the worker's treating orthopaedic surgeon. The rejection was on the basis that the surgeon failed to consider the effect of subsequent non-work related activities undertaken by the worker and did not provide a scientific basis for his opinion that the work incident was the cause of the worker's incapacity. President Keating relied upon the often quoted decision of *Makita (Australia) Pty Limited v Spowles*, a 2001 Court of Appeal decision, in relation to the admissibility of expert (including medical) reports.

It is important to keep in mind that in *Makita*, the Court of Appeal was concerned about the admissibility of evidence under the Evidence Act. The Workers Compensation Commission is not bound by the rules of evidence but rather section 354 of the Workplace Injury Management and Workers Compensation Act 1998. In broad terms, the Commission may inform itself on any matter in such manner the Commission thinks appropriate without being bound by the rules of evidence. In the leading judgment in the Court of Appeal, Justice Beazley specifically commented the Commission is required to be satisfied that the expert evidence provides a satisfactory basis upon which the Commission can make its findings.

In a non-evidence based jurisdiction such as the Commission expert evidence will be examined not so much in relation to admissibility but as to weight. Whilst to a certain degree President Keating fulfilled that requirement, it was incumbent upon the parties seeking to discount the evidence to challenge the doctor's field of specialised knowledge or his status as an expert. In this matter, the fact that the reports of the orthopaedic surgeon did not specifically refer to the subsequent non-work related incidents did not amount to a failure to satisfy the requirements of expert evidence. The rejection of the doctor's opinion for that reason by President Keating was flawed.

Beazley J also pointed out it is important to consider all of the reports provided by doctors and not consider reports in isolation. A deficiency in one part of an expert's evidence can be made good by other material either in another report or in oral evidence. A failure to consider all the material relevant to a particular issue is an error in the process of fact finding and therefore amounts to an error of law.

The worker on appeal succeeded on the basis that a rejection of evidence by DCJ Keating due to a failure to comply with the *Makita* principles was flawed given the parties had not been given the opportunity to address the Commission on this issue. This resulted in a failure to provide procedural fairness.

As a final note it was interesting to read Justice Tobias' additional comments that he had a "significant feeling of unease" when an appeal is conducted purely "on the papers" without oral submissions. This was particularly relevant where there were questions as to the credit of the worker or procedural fairness issues. The Court of Appeal has now remitted the matter to the Workers Compensation Commission for redetermination in accordance with the law.

The decision is a timely reminder that although the Workers Compensation Commission is not bound by the strict rules of evidence, evidence cannot be rejected or given no weight without proper consideration of the totality of the evidence and without giving the parties an opportunity to address the Commission on questions of alleged deficiencies in the evidence. Consistent with a number of other decisions recently handed down in the Workers Compensation Commission and the Court of Appeal, the judiciary has been particularly scathing of various legal practitioners and their inadequate preparation of matters for hearing. Reading between the lines, the Court of Appeal appears to support a contention that proper preparation by the legal practitioners will result in matters such as *Hancock* never reaching the Court of Appeal. It is also interesting to note Justice Tobias' comment that the large number of appeals proceeding strictly on the paper appears to be an unsatisfactory state of affairs. One wonders whether the President and Deputy President of the Workers Compensation Commission will now insist on oral hearings before making their final determinations in appeals in the Commission.

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

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