GD News

Gillis Delaney Lawyers

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

High Court Decides No Damages For The Loss Of The Chance Of A Better Outcome

The High Court of Australia has recently handed down its decision in Tabet v Gett and has confirmed that an injured person is not entitled to sue for damages for the loss of a chance of a better outcome.

The High Court has concluded that the chance of obtaining a benefit or avoiding harm does not have a value in itself that gives rise to an entitlement to legal protection. If a person was entitled to sue for a loss of a chance the standard of proof in a claim would significantly change as it would no longer be necessary to demonstrate that the actual damage was caused by a negligent act.

The case of Tabet v Gett concerned a medical negligence claim. Tabet suffered irreversible brain damage. Dr Gett was a pediatrician and a Visiting Medical Officer at the Royal Alexandra Hospital for Children in Sydney. When Tabet was aged 6 she was admitted to hospital under the care of Dr Gett. She had suffered from chicken pox which had resolved but before and after her illness she suffered from headaches, nausea and vomiting. A provisional diagnosis of chicken pox, meningitis or encephalitis was made. Three days after admission after a seizure and after a CT and EEG were performed, Tabet was diagnosed as suffering from a brain tumour. She received treatment including an operation to remove the tumour. She suffered irreversible brain damage, partly as a result of the events on the day of the seizure and partly from the tumour which had been growing over two years and partly from the operative procedure and other treatment (not said to be in any way negligently performed). The essential allegation was that the CT scan should have been performed earlier and if it had Tabet would have had a better medical outcome.

Tabet was successful in her claim before the trial judge with the trial judge finding that Dr Gett was negligent in failing to order a CT scan the day before the seizure. After a 36 day trial, the trial judge then turned to the question of whether the negligence caused or contributed to the seizure and deterioration of Tabet's condition. The trial judge found that Tabet had lost a chance of a better medical outcome had the brain tumour been detected the day before the seizure when the CT scan should have been performed. The trial judge effectively found that there would have been a 40% chance of a better outcome of avoiding 25% of the brain damage.

In order for a patient to succeed in a medical negligence claim it is necessary to establish that a medical practitioner owed a duty of care to the patient to avoid harm which is reasonably foreseeable, and that there is a breach of that duty and that damage results from that breach.

Damage is an essential ingredient to a claim and the High Court was simply called on to determine whether or not loss of a chance of a better outcome was damage which was actionable. Justice Keifel commented:

> *"the common law requires proof, by the person seeking compensation, that the negligent act or omission caused the loss or injury constituting the damage. All that is necessary is that, according to the course of common experience, the more probable inference appearing from the evidence is that a defendant's negligence caused the injury or harm.*

We thank our contributors

David Newey dtn@gdlaw.com.au
Amanda Bond asb@gdlaw.com.au
Stephen Hodges sbh@gdlaw.com.au
Michael Hayter mkh@gdlaw.com.au
Nicholas Dale nda@gdlaw.com.au
Michael Gillis mjg@gdlaw.com.au
Marcus McCarthy mwm@gdlaw.com.au
Naomi Tancred ndt@gdlaw.com.au
David Collinge dec@gdlaw.com.au

May 2010 Issue

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

'More probable' means no more than that upon a balance of probabilities, such an inference might reasonably be considered to have some greater degree of likelihood, it does not require certainty."

In this case the probability was that the tumour would have caused the damage in any event. The evidence did not support a conclusion that there would have been a better outcome. It only supported the conclusion that there could have been a better outcome if treatment had been rendered earlier.

The Appeal to the High Court raised the question whether the common law of Australia should now recognise the loss of a chance of a better outcome in cases of medical negligence. It was noted that this question has divided the Courts and legal commentators throughout the common law world. The High Court noted that Lord Hoffman in a UK decision of Gregg v Scott had noted the wholesale adoption of possible rather than probable causation as a condition of liability as radical. Whilst jurisdictions outside Australia, in particular France and the US, have tended towards the recognition of a loss of a chance as actionable damages the High Court determined that Australia will not follow that lead.

As Justice Keifel concluded:

"the Appellant (Tabet) is unable to prove that it was probable that, had treatment by cortico steroids been undertaken earlier, the brain damage which occurred on 14 January 1991 would have been avoided. The evidence was insufficient to be persuasive. The requirement of causation is not overcome by redefining the mere possibility, that such damage as did occur might not eventuate, as a chance and then saying it is lost when the damage actually occurs. Such a claim could only succeed if the standard of proof were lowered, which would require a fundamental change to the law of negligence. The Appellant (Tabet) suffered a dreadful injury, but the circumstances of this case did not provide a strong ground for considering such change. It would involve holding the Respondent (Gett) liable for damage which he almost certainly did not cause."

In light of the High Court's stance previous Australian decisions that had recognised that recovery for physical injury not shown to be caused or contributed to by a negligent act were wrongly decided.

The decision will have significant ramifications. It will not be enough for a plaintiff to demonstrate that if treatment was afforded there would have been a chance of a better outcome. Claimants will need to establish that the actual physical damage they suffer was the result of the negligent act. Claimants will look to medico-legal experts to firm up their views on the cause of the outcome in the hope that the expert concludes that on the balance of probabilities had treatment been rendered the end result would have been avoided. Claimants' lawyers will need to go back to the drawing board in many medical negligence claims where expert evidence falls short of establishing that the ultimate outcome was caused by the negligent act the claims will fail.

If an insured establishes that it is entitled to indemnity under a statutory policy the onus will be on the insurer to prove any limitation of its liability to indemnify the insured for the whole amount of damages.

Missing Insurance Policy – Who Bears The Onus Of Establishing The Limit Of Liability?

Many moons ago in New South Wales the workers compensation legislation provided that an employer was obliged to effect a policy of insurance or indemnity for the full amount of liability under the workers compensation legislation to all workers employed by him and for an amount of at least $40,000.00 in respect of liability which arose independently of the workers compensation legislation for any injury to any such worker. Some employers would arrange insurance in those terms and others would arrange insurance which was not subject to any limits of liability that arose independently of the Act. Now days in NSW workers compensation policies must provide unlimited cover for liability arising independently of the Workers Compensation Act however latent claims that arise from incidents many years ago will impact on older policies which may not provide unlimited cover.

Asbestos related claims brought the policies which were limited in liability sharply into focus as employers would be covered for a maximum of $40,000.00 for liability arising independently of the workers compensation legislation. Asbestos claims ran into many hundreds of thousands of dollars leaving employers with very limited cover for the claim.

With the passing of time policies can and do go astray. So what happens if a policy cannot be located; was the policy one which complied with the minimum statutory requirement or was it extended to provide unlimited cover?

The High Court has recently been called on to determine who bears the onus of establishing that an insurer's policy was limited to the minimum statutory limit where the policy cannot be found.

In Wallaby Group Limited v QBE Insurance Limited Marlene Stewart in her capacity as a legal representative of the Estate of the late Angus Stewart who had died from the effects of mesothelioma recovered damages of $356,510.00 arising from a claim that he had contracted mesothelioma as a result of his exposure to asbestos fibre during his employment with Pilkington (Bros) Australia Limited ("Pilkington") from about 1964 to 1967. Pilkington had arranged workers compensation with Eagle Star Insurance Limited. The general terms and conditions of the statutory policy were found in the workers compensation legislation and QBE through acquisitions had become liable for the liabilities of Eagle Star.

QBE argued that as part of the statutory scheme the policy that was required by employees was intended to be a policy which covered an employer up to a specified minimum unless there was an alteration or endorsement to the policy by the insurer. QBE considered that a policy might have been taken out for a higher level of indemnity but in that case the policy had to first be issued in the prescribed form and then be subject to a procedure for variation. QBE argued that the onus of proof rested on the employer to establish that it had a policy in terms different to the statutory policy.

In the original trial the trial judge found that QBE were liable for the totality of the claim as the evidentiary onus lay upon QBE because it was asserting the limits of its liability. On appeal the NSW Court of Appeal did not agree and held that the terms of the cover was an essential term of the contract of insurance which according to ordinary principles relating to proof, the party asserting the agreement and its terms was required to prove. QBE had not accepted that the policy of insurance was for unlimited cover and only conceded the policy was in the terms of the statutory minimum and there was no onus on QBE to negative the possibility of unlimited cover, that onus lay with Mrs Stewart as the plaintiff.

The issue did not rest there. The case proceeded to the High Court. In a somewhat worrying decision for insurers involved in statutory compensation the High Court concluded that the onus of establishing the limit under the policy does not rest on an insured.

Whilst the amount that QBE was obliged to pay under the contract of insurance contained within the policy was not proved the question was which party had the burden of that proof and what were the consequences?

The High Court concluded:

> *"It is said that it is necessary for an insured under a contract of indemnity insurance to prove the extent or amount of the loss claimed, but this is because the indemnity concerns only actual loss. The purpose of the proof required is not to establish that the loss is within the cover of the contract of insurance; it is to establish that loss has occurred and to give it a value. In circumstances where there is a limit placed upon the extent of the indemnity, proof of actual loss does not create 'a condition precedent' to that obligation. Where an indemnity is limited to payment of a specified, maximum sum, proof of actual loss will identify whether all or part of the loss is recoverable, but that is merely a practical consequence. It does not reflect a condition of the insurance contract."*

The High Court noted that QBE did not raise an exception in its defence, rather it raised a limitation. The High Court noted:

> *"The difference between the two is that an exception may prevent an insurer's liability from arising, whereas a limitation of the kind here in question operates after the obligation to indemnify has arisen not upon the amount payable pursuant to it. It limits the extent of the insurer's liability. What they have in common is the purpose of limiting an insurer's liability, where the circumstances necessary for it have otherwise been shown to exist. In each case the insurer should bear the onus of proving the limitation."*

QBE in the absence of evidence to the contrary could not rely on an assertion that the policy which was arranged was a statutory policy without any additional cover.

Insurers and re-insurers who have been involved in workers compensation insurance for many years, particularly in those years where it was not compulsory for an employer to arrange unlimited liability cover for common law liability, will need to take heed of this judgment as employers continue to face claims from asbestos related exposure. A missing policy may have a more detrimental effect than was previously thought.

If an insured establishes that it is entitled to indemnity under a statutory policy the onus will be on the insurer to prove any limitation of its liability to indemnify the insured for the whole amount of damages.

Equipment Supply Contracts – Repair Indemnity And Insurance Clauses – What Do They Mean?

The allocation of risk under a contract by way of indemnity and insurance provisions is not something new. Agreements often contain detailed provisions allocating liabilities between parties and provisions which require parties to arrange insurance.

The NSW Supreme Court has recently been called on to consider the effects of clauses in a Construction Equipment Supply Agreement. In the case of MLA Holdings v Asciano the indemnity and insurance provisions proved to be of no help to the hirer.

MLA Holdings Pty Limited imports and supplies Vulcan range forklift trucks and reach stackers. Asciano Services operates a large private rail freight business. Pursuant to an agreement MLA Holdings supplied equipment including reach stackers to Asciano. A labour hire employee under the direction of Asciano used a reach stacker to load a 5.76 tonne shipping container onto a train wagon. The reach stacker was attached to the container which was resting on the train wagon when the wagon unexpectedly moved forward causing the reach stacker to be caught on a container that was already on the wagon. The reach stacker was dragged forward and sideways before tipping and sustaining significant damage. The damage to the reach stacker arose solely through misuse or accident on the part of Asciano.

The Agreement between the parties contained 3 relevant clauses which were as follows:

> *"7.1 If any item of equipment is damaged while the equipment is being operated by Pacific National (Asciano's former name) solely through misuse or accident on the part of Pacific National or any of its Personnel the direct cost of repairs will be met by Pacific National but does not include any consequential or indirect loss or damage or any nature.*
>
> *19.1 Subject to clause 7.1, MLA must indemnity and keep indemnified Pacific National from and against:*
>
> *(a) any costs, expenses, loss, liability or damage, whatsoever and howsoever whether directly or indirectly and whether or not foreseeable, suffered or incurred by Pacific National; and*
>
> *(b) any liability whatsoever in respect of any action, claim, proceedings brought or threatened to be brought (including all costs and expenses which Pacific National may suffer or incur in disputing any such action, claim or proceedings) against Pacific National, in respect of, in relation to or in connection with the supply of the equipment, the provision of the Services or the use of any building, facility or area referred to in one or more of clauses 3.9 to 3.14.*
>
> *20.1 MLA must, at its costs, effect and maintain during the term the following insurances with an insurer of repute and good standing:*
>
> *(a) public liability insurance for the amount set out in the Schedule ..*
>
> *. . .*
>
> *20.2 The insurance policies referred to in clause 20.1(a) and (b) must include:*
>
> *(a) Pacific National as an insured for its respective rights and interests; and*
>
> *(b) A cross liability clause in which the insurer agrees to waive all rights of subrogation or action that it may have or acquire against all or any of the persons comprising the insured and for the purposes for which the insurer accepts the term insured as applying to each of the persons comprising the insured as if a separate policy of insurance had been issued to each of them."*

Asciano conceded clause 7.1 applied and it was liable to pay the repair costs pursuant to that clause.

At the time of the incident MLA Holdings held property insurance for loss and damage to the equipment under an ISR policy underwritten by Allianz. MLA Holdings also held public liability insurance with Allianz. Asciano was not named as an insured under the ISR policy or the liability policy. MLA Holdings demanded the repair costs from Asciano. Asciano refused to pay. Asciano resisted the claim based on an assertion that MLA did not take out required insurance. MLA Holdings submitted that the obligation to repair was a stand alone obligation and an express allocation of risk. Asciano submitted the insurance obligation was intended to backup the contractual allocations of risk and what it had assumed by clause 7.1 was required to be the subject of insurance taken out pursuant to clause 20.

The Court noted that the starting point was obvious. The contractual allocation in clause 7.1 cast an obligation on Asciano. Outside that operation the indemnity provisions applied which would make MLA Holdings liable for losses suffered by Asciano. Justice McDougall noted "by contrast clause 7.1 and 19 the obligation to insure does not seem immediately to be related to the risk allocation that clause 7.1 and 19 provide. No doubt, the obligation to effect insurance could be seen to underpin the indemnity obligations assumed by MLA Holdings pursuant to clause 19. But on any view the obligations seemed to go beyond that."

The Court noted that the insurance to be effected was to include Asciano as an insured for its respect rights and interests. Justice McDougall noted:

"By cl 20.2, the insurance effected pursuant to (among others) cl 20.1(b) is to include Asciano as an insured for its respective rights and interests. It is not easy to see what right or interest Asciano would have in any item of equipment provided to it on the terms of the agreement. There is no reason to think that it would have any proprietary right or interest. At most, perhaps, it might have some right or interest as a hirer (if indeed, on the proper construction of the agreement as a whole, it does provide for the hire, as opposed to the mere supply, of equipment).

Even if Asciano has some right or interest in "Equipment" that is provided to and used by it on the terms of the agreement, it does not follow that it is such a right or interest that would be damaged, and the subject of indemnity under a policy of property insurance, through the assumption of liability under cl 7.1. Clause 7.1 does not provide for anything other than an express assumption of liability to make good the direct cost of repairs in the circumstances contemplated by that clause. That is something that would ordinarily be covered by some form of liability insurance, not by a form of property insurance. The liability imposed by cl 7.1 does not seem to me to fit easily within the concept of a policy of property insurance, in respect of the equipment, extending to Asciano as insured for whatever right or interest it has in that property. To put it another way, it does not."

The Court held that the obligation to indemnify cast on Asciano by clause 7.1 was not required to be the subject of a contract of insurance effected pursuant to clause 20.1.

Asciano were liable for the repair costs and the loss caused by Asciano rested with Asciano. As can be seen a catch all clause requiring insurance to be effected in the name of the hirer and the apparent failure to comply with that obligation by the owner of the equipment did not provide the hirer with any recourse for the loss on this occasion.

Proportionate Liability - Architects and Engineers

Proportionate liability limits 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 States and Territories in Australia have introduced legislation that created proportionate liability for property damage and economic loss claims. The legislation is different in each State and Territory and generally it is possible to contract out of the proportionate liability regime.

The proportionate liability regime does not apply to personal injury claims and does not apply to claims where the wrongdoer fraudulently causes economic loss or damage to property.

In New South Wales the proportionate liability regime applies to apportionable claims. Apportionable claims are defined to be claims for economic loss or damage to property in an action for damages (whether in contract, tort or otherwise) arising from a failure to take reasonable care, but not including any claim arising out of personal injuries. Claims under the Fair Trading Act, 1987 are caught by the New South Wales proportionate liability provisions. Amendments to the Trade Practices Act resulted in Trade Practices Act claims also being caught by proportionate liability regimes where the action arises from a failure to take reasonable care.

One of the benefits for wrongdoers under the proportionate liability regime is that they are only liable to pay damages based on their share of responsibility. If there are two or more wrongdoers a plaintiff must sue both wrongdoers otherwise the plaintiff will only recover part of their loss. Another advantage is that a cross claim cannot be brought against a wrongdoer by another wrongdoer to recover contribution or indemnity as is seen in the recent NSW Supreme Court decision in *Dymocks – v – Capral.*

In *Dymocks – v – Capral* the Court was called on to determine a claim for damages which was said to have been caused by water penetration through a metal roof of a building. Capral supplied the roofing material. An architect was said amongst other things to have given advice in relation to the roof, including, in particular, as to the way the metal roof should be affixed to the underlying steel rafters. The supplier of the material and the architect had been sued for damages by the owner. The architect filed a cross claim in which it sought relief against a number of parties for contribution or indemnity alleging negligence on the part of those parties.

In particular, the architect, in its cross claim, brought a claim against an engineer that provided an opinion that alleged that certain Buildex roofing screws would be suitable for affixing the roof to the rafters. It was Dymocks' case that those screws were not suitable, that the use resulted in corrosion to the roof and that the water penetration occurred through the corroded fixing points.

The engineer argued that the claim could not be made by the architect as it was an apportionable claim under the *Civil Liability*

Act, 2002 and the architect had no right to bring the claim. It was argued that if the plaintiff did not bring the claim against the engineer, the architect had no right to do so.

The architect attempted to argue that his claim against the engineer was not caught by the proportionate liability regime and the cross claim was maintainable.

The architect sought to meet the problem by propounding an amended cross claim which introduced claims under the *Trade Practices Act, 1974* and the *Fair Trading Act, 1974*.

The claim under the *Fair Trading Act* did not help as the proportionate liability regime in New South Wales catches claims under the *Fair Trading Act* where they arise as a consequence of a failure to take reasonable care.

The claim under the *Trade Practices Act* however was not an apportionable claim as it was a claim which arose before the commencement of the amendments to the *Trade Practices Act*.

The Court concluded that in the absence of the *Trade Practices Act* claim, the cross claim by the architect against the engineer should be summarily dismissed and would have been dismissed but for the *Trade Practices Act* claim.

The timing of the negligent act was the only fact that permitted the cross claim to remain on foot and if the cause of action had accrued after 26 July 2004 (the date of the *Trade Practices Act* amendments that introduced the proportionate liability regime to *Trade Practices Ac*t claims) then the cross claim would have been dismissed.

So an architect cannot bring proceedings against an engineer in negligence to seek contribution or indemnity from the engineer where a claim arises from a failure to take reasonable care. It is the person who makes the claim against the architect who must also bring the claim against the engineer as the damages recoverable from each wrongdoer are limited by the architect limited to reflect the extent of the wrongdoer's responsibility for the damage or loss.

However it must be remembered that in NSW it is possible to contract out of the proportionate liability regime. A contract between a principal, architect and engineer may contain provisions that exclude the operation of the proportionate liability regime and in this case claims between the architect and the engineer will not be governed by the proportionate liability regime and damages payable by each wrongdoer will not be limited to reflect the extent of the wrongdoer's responsibility for the damage or loss.

Victorian Government Moves To Limit The Application Of Indemnity Clauses

The Victorian Government has recently passed legislation which seeks to limit the effect of indemnity provisions found in contracts.

It is not uncommon for contracts to contain clauses which provide that a contractor must indemnify a principal for any liability that the principal may have for injuries sustained by the contractor's employees. Clauses of this type are commonly found in agreements in the construction industry and labour hire agreements.

By amending the *Accidents Compensation Act* the Victorian Government has effectively restricted the effect of indemnity clauses which deal with obligations arising out of injuries to workers. The changes take effect from 5 April 2010.

Section 138 in the *Accidents Compensation Act* now contains a provision that provides:

> "*4(A) A term of any contract that requires the employer or has the effect of requiring the employer to indemnify the third party in respect of any liability that the third party has or may have under this section is void.*"

Section 138 provides that where an injury or a death to a worker gives rise to a liability on the part of the WorkCover Authority, a self insurer or an employer to pay workers compensation under the Accident Compensation Act and the injury was caused under circumstances creating a liability in a third party to pay damages, the third party is liable to indemnify the employer/self insurer/Authority for compensation payments paid or payable in accordance with a formula set out in the Section.

As the various State and Territory Governments cooperate in the development of occupational health and safety laws, workers compensation issues will no doubt form part of those discussions. It could be in the cards that similar amendments will find their way into workers compensation legislation in all States and Territories.

Businesses operating in Victoria will need to take heed of Section 138 and note that indemnity provisions that seek to impose

an obligation on an employer to indemnify a person in respect to damages which would ordinarily be payable by that third party to the employer's employee will be void.

Will Rescuers Be Owed A Duty?

In New South Wales the law as it currently stands is that rescuers are not entitled to bring claims for nervous shock. Police, paramedics, firemen and passersby who attend accident scenes are not owed a duty of care by the negligent party that caused the accident.

But will this change shortly?

David Wicks and Peter Sheehan were both Police Officers who attended the Waterfall train derailment aftermath on 31 January 2003. Wick and Sheehan were both involved in assisting injured passengers and moving bodies of the deceased. Wicks had an ongoing involvement in that he had to return personal items to passengers. Wicks and Sheehan both brought claims for nervous shock as a consequence of their involvement and commenced proceedings against Railcorp and the State Rail Authority of NSW.

In New South Wales personal injury claims (excluding work accidents and motor vehicle accidents) are governed by the *Civil Liability Act, 2002*. Section 30 of the Act specifies who can bring a claim for nervous shock and provides that a claimant is not entitled to bring a claim for damages unless:

- the claimant witnessed, at the scene, the victim being killed, injured or put in peril; or
- the claimant is a close member of the family of the victim;

Section 32 of the Act sets out when the duty of care is owed in claims for pure mental harm and provides that no duty of care is owed *"unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken."* The "circumstances of the case" include whether or not the mental harm was suffered as a result of a sudden shock, or whether the plaintiff witnessed, at the scene, a person being killed, injured or put in peril.

Wicks and Sheehan commenced proceedings in the Supreme Court of NSW. The Supreme Court of NSW found that neither Wicks nor Sheehan were entitled to bring a claim for damages. Wicks and Sheehan appealed to the Court of Appeal who also found that neither Wicks nor Sheehan had an entitlement to bring a claim for damages as no duty of care was owed.

Wicks and Sheehan subsequently sought special leave to appeal to the High Court. Special leave was granted and on 13 April 2010 the hearing before the High Court proceeded.

Wicks and Sheehan argued that the words "put in peril" do not mean that there is an instantaneous occurrence and it can be a continuing state. Wicks and Sheehan also argued that the words being "put in peril" was something that is of an adverse physical or mental nature. Wicks and Sheehan did not however argue that the interpretation of the section was so wide that a television viewer would be owed a duty; there would have to be a sighting of or direct perception which combined the scene and the victim.

Railcorp argued that the relevant act or omission, the failure to ensure there were proper brakes installed in the cabin, had occurred a long time before Wicks and Sheehan arrived at the scene.

The High Court reserved their decision.

It will be interesting to see whether or not the High Court determines that a duty of care is owed to Wicks and Sheehan and they are entitled to bring claims for nervous shock. Such a finding, depending on its nature, may significantly open the floodgates for nervous shock claims.

Can A Corporation Be A Shadow Director – D & O Liability

The *Corporations Act* contains provisions that impose obligations on directors. In particular Section 588G provides that a director of a company that incurs a debt at the time that the company is insolvent may be personally liable for the debt.

The Corporations Act also contains definitions including a definition of a "director" which includes shadow directors who are

the persons who control the directors in that the director of the company or body are accustomed to act in accordance with that person's instructions or wishes. The extended definition does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity or the person's business relationship with the directors of the company.

A director of a company is defined to be a person who:

- is appointed to the position of a director; or
- is appointed to the position of an alternate director and is acting in that capacity; or
- the directors of the company are accustomed to act in accordance with the person's instructions or wishes.

Sometimes a question will arise as to whether a corporation can be a shadow director where only individuals can be appointed as directors.

The NSW Supreme Court in *Buzzle Operations Pty Ltd (In Liq) v Apple Computers Australia Pty Ltd* has recently concluded that the Corporations Act definition of directors which is intended to catch shadow directors can catch a company and therefore a company can be a director for the purpose of the obligations imposed on directors by the Corporations Act.

Buzzle Operations Pty Ltd ("Buzzle") acquired the stock and business of six retailers (Apple Resellers of Apple Computer Products). The Apple resellers took shares in Buzzle's holding company. It was intended that a short time after Buzzle had established the merged business its holding company would be floated on the Australian Securities Exchange and the shares issued to members of the public. Each Apple reseller had entered into reseller agreements with Apple Computers Australia Pty Limited and as part of the merger the Apple resellers transferred their stock, plant and equipment and goodwill to Buzzle. Apple Computers' consent was needed to the merger because Apple had a charge over the assets to be transferred to Buzzle. Apple Computers' consent was also required for the assignment or transfer of the reseller agreement. The proposed float did not proceed. Buzzle's business failed. Apple Computers appointed receivers pursuant to their charge and an application was filed to wind up Buzzle.

A liquidator was appointed to Buzzle. The liquidator commenced proceedings against Apple Computers and others alleging that Apple Computers was an officer of Buzzle.

Buzzle alleged that upon merger of the Apple reseller businesses Apple Computers issued invoices in excess of $6 million for the stock that was transferred from the Apple resellers to Buzzle.

Buzzle made a number of payments to Apple Computers on behalf of the resellers. The liquidator argued that when those payments were made Buzzle was insolvent and the transactions were uncommercial transactions and sought an order directing Apple to repay the monies to Buzzle. In addition the liquidator sought to recover the monies from Apple Computers arguing that it was a shadow director and liable for insolvent trading.

Justice White, in considering the definition of director in the Corporations Act grappled with Apple Computers' argument that only an individual can be a shadow director as it is only an individual that can be appointed as a director of a company. Justice White concluded that the definition of director did not require that for a person to be a shadow or de facto director that person must be capable of being validly appointed as a director. The definition simply refers to a person who is not validly appointed as a director. It contains no implication that a person could be appointed but was not.

It was held that a company can be a shadow director. Whilst it is necessary for an individual to be appointed as a director in Australia it is possible for a body corporate to be a de facto or shadow director.

Justice White concluded:

> *"for the definition to be satisfied the directors of the company must be accustomed to act as directors of the company in accordance with the person's instructions or wishes as to how they should so act. Thus the plaintiffs (Buzzle) do not establish that the directors of Buzzle were accustomed to act on the instructions of Apple by demonstrating that when they conducted their business as resellers prior to the merger, Apple had significant control over important decisions of the resellers which the directors of the resellers felt constrained to make to meet targets needed to obtain rebates, which in turn were necessary to achieve realistic margins. That is for two reasons. First, the directors were not then acting as directors of Buzzle. Secondly, a person or a company is not within the definition (of director) in paragraph (b)(ii) merely because that party imposes conditions on his or her commercial dealings with the company*

with which the directors feel obliged to comply. A lender who is entitled to demand repayment of a loan and appoint a receiver can say, eg. that it will stay its hand only if the borrowing company sells certain assets. A supplier or buyer might impose conditions and because of its superior bargaining power, the directors of the company with whom it deals might feel they have no choice but to comply with the conditions imposed. It has been uniformly held that this is not sufficient to make a third party who exercises such powers in his dealings with the company a shadow director, even though the directors of the company are accustomed to comply with its demands."

Justice White also noted:

"In my view the reason that third parties having commercial dealings with a company who are able to insist on certain terms if their support for the company is to continue, and are successful in procuring the company's compliance with those terms over an extended period, are not thereby to be treated as shadow directors within the definition, is because to insist on such terms as a commercial dealing between a third party and the company is not ipso facto to give an instruction or express a wish as to how the directors are to exercise their powers. Unless something more intrudes, the directors are free and would be expected to exercise their own judgment as to whether it is in the interests of the company to comply with the terms upon which the third party insists, or reject those terms. If in the exercise of their own judgment, they habitually comply with the third party's terms, it does not follow that the third party has given instructions or expressed a wish as to how they should exercise their functions as directors."

Justice White noted that it was sufficient for the majority of directors to act in accordance with the instructions or wishes of another in order to trigger the shadow director provisions. It was concluded that it is the director's acting in the exercise of their powers of management who must be accustomed to act on the instructions or wishes of the putative director for the definition to be satisfied.

In this case, Apple Computers was not a shadow director.

So at the end of the day companies may be shadow directors within the terms of the Corporations Act. Commercial arrangements between the companies will not be enough to trigger the shadow director provisions even where a company has significant influence over the conduct of business by virtue of those commercial arrangements. However, habitual compliance over a period of time with wishes or instructions of a company can result in a finding that a company is a shadow director. Acting in a particular way in light of commercial ramifications will not be sufficient. There must be a causal connection between the instructions or wishes of the shadow director and the act taken by the directors.

The Lehman Brothers Litigation – DOs Cannot Release Third Parties, And Doubt Remains About Whether Schemes Of Arrangement Can Release Third Parties

In this article we examine the High Court of Australia's reasons for judgment given on 14 April 2010 in relation to the Lehman Brothers Australia Limited (Lehman Australia) deed of company arrangement (DOCA). The High Court's decision upheld the Full Federal Court of Australia decision of 25 September 2009 that the Lehman Australia DOCA is void, including because it purported to release third parties from claims against them by creditors of Lehman Australia.

We also examine the reasoning of the Full Federal Court and the High Court, statements of principle concerning DOCAs and schemes of arrangement and implications of the decisions for insolvency practitioners.

The plaintiffs in the litigation were local Councils which had purchased financial products from Lehman Australia. The defendants were Lehman Australia, its Administrators, Lehman Brothers Asia Holdings Limited (Lehman Asia) and Lehman Brothers Holdings Inc. (Lehman Brothers) (a corporation registered in the United States).

Problem clauses in the Lehman Australia DOCA

Certain clauses in the DOCA:

- gave to the deed administrators the sole conduct of any claim for insurance proceeds relating to a creditor's claim against the company or any of its related entities;
- imposed a moratorium on proceedings by a creditor not only against the company but also against any company in which its parent had a direct or indirect shareholding and their insurers; and
- on payment of a final dividend, released from any liability to any creditor not only Lehman Australia but the main proponent of the deed, Lehman Asia and the parent company of Lehman Australia and Lehman Asia, being Lehman Brothers, as well as all of their insurers.

The main issue in the litigation

The substantial question was whether there was any power for a majority of creditors to resolve under section 439C of the *Corporations Act* (the Act) that a company execute a DOCA that, by force of section 444D(1) of the Act, will have the effect of requiring all other creditors of the company to give up their rights in respect of persons other than the company.

Chronology of relevant events

On 15 September 2008, Lehman Brothers filed for Chapter 11 Bankruptcy in the US.

On 17 September 2008, partners in KPMG were appointed as the provisional liquidators of Lehman Asia.

On 26 September 2008, Administrators were appointed to Lehman Australia.

On 19 March 2009, the Administrators published a report to the creditors of Lehman Australia under section 439A of the Act (March Report). The March Report included some details of a proposed DOCA that had been put forward by Lehman Asia (March Proposal).

The March Report placed creditors of Lehman Australia into 2 categories, namely:

- ordinary creditors (ie secured creditors, unsecured creditors and employees as well as trade creditors and so on); and
- Contingent Claimant Creditors (being creditors who had unliquidated claims). The March Report defined "Contingent Claimant Creditors" as those who had commenced, or were contemplating commencing, proceedings against Lehman Australia for, among other things, misleading or deceptive conduct in relation to the sale of financial products (Litigation Creditors). There were 308 Litigation Creditors of Lehman Australia that held collateralised debt obligations (CDOs) which Lehman Australia had acquired for them or on their behalf. Those CDOs had a face value of $AUS1,283,878,000.

The March Proposal consisted of the following terms:

1. The Administrators would close out Lehman Australia's proprietary book of investments (which was all of the assets of the company) in an orderly manner;
2. the realisation of Lehman Australia's proprietary book of investments would comprise the Deed Fund available for distribution to ordinary creditors (namely, those who had a quantifiable crystallised non-litigation claim) on a pari passu basis;
3. the (then) provisional liquidators of Lehman Asia agreed to subordinate the first $AU35,000,000 of the dividend entitlement to fund the Contingent Creditor deed pool in which litigation creditors would be entitled to claim;
4. each Litigation Creditor would recover 5.6 cents in the dollar; and
5. the Litigation Creditors would be required to provide releases to:
   (a) Lehman Australia;
   (b) all other Australian domiciled Lehman Brothers entities;
   (c) all other Lehman global entities;
   (d) the directors, officers and employees of all Lehman companies.

On 18 May 2009, the Administrators issued a supplementary report to the creditors of Lehman Australia (Supplementary Report). The Supplementary Report contained a more detailed proposal for a DOCA that Lehman Asia had proposed (May Proposal).

The May Proposal contemplated:

1. a separate litigants fund be created, comprising an amount of $AU35,000,000.00 and the proceeds of any insurance policy;
2. the Litigation Creditors would receive the full amount of their claims on a pari passu basis;
3. if a Litigation Creditor elected to pursue claims against a third party, that creditor would grant certain indemnities to third parties;
4. the claims of a Litigation Creditor against Lehman Australia and a Lehman entity which were not preserved contractual rights would forever be released when they received a dividend; and
5. Lehman Australia would release its directors, all Lehman entities and their directors and officers from any claim arising before the execution of the May Proposal (a Lehman entity was, put simply, a related body corporate, as that term is defined in the Act, of Lehman Australia including in a defined period).

The Administrators recommended in a supplementary report that creditors of Lehman Australia not execute the May Proposal, including because they were concerned about the enforceability of the required releases and indemnities to third parties by Lehman Australia's creditors.

On 27 May 2009, the second meeting of the creditors of Lehman Australia was held pursuant to section 439A of the Act (Second Meeting). At the Second Meeting, Lehman Asia circulated a revised proposal for a DOCA (Revised May Proposal). The second meeting of creditors was adjourned until 4.00pm on 28 May 2009 to enable the Administrators time in which to draft a revised report.

On 28 May 2009 at about 11 am, the Administrators published a further report to the creditors of Lehman Australia (Further Report). In the Further Report, the Administrators recommended that creditors of Lehman Australia execute a DOCA in the form of the Revised May Proposal.

On 28 May 2009 at the resumed second meeting of creditors of Lehman Australia, a resolution was passed that Lehman Australia execute a DOCA giving effect to the Revised May Proposal, and subsequently such a DOCA was executed.

The Courts' reasoning – useful statements of principle re DOCAs and Pt 5.1 schemes

The reasoning of the Full Federal Court (Justices Stone, Rares and Perram) contains useful statements of principle governing DOCAs and schemes of arrangement. To the extent that the High Court either affirmed or left undisturbed those statements of principle, we set them out below.

- A DOCA binds not only those creditors who vote in favour of the company entering into it but also those who voted against it. The binding force of a deed of company arrangement is not contractual. A deed of company arrangement has such force as Part 5.3A of the Corporations Act provides, and no more;
- A DOCA can only deal with the company's property;
- A DOCA sets out terms binding on all creditors of the company "so far as concerns claims arising on or before the day specified in the deed under paragraph 444A(4)(i)" (and in addition, in the High Court joint judgment of French CJ, Gummow, Hayne and Keifel JJ.) it was held that other provisions of Part 5.3A and the Regulations which demonstrate that a DOCA can only effect a release of the company from the claims of its creditors but not third parties, are as follows:-
  - section 444A(4)(d) – which prescribes the extent to which the company is to be released from its debts;
  - section 444A(4)(i) – requires identification of the "cut off date" for claims to have arisen if they are to be admissible to proof against the company under the DOCA;
  - Schedule 8A clause 5 – provides that creditors must accept their entitlements under a DOCA in full satisfaction and complete discharge of the debts or claims which they have against the company; and
  - Schedule 8A clause 6 – provides for the extinguishment of debts or claims of the company as a result of anything up to the date of appointment upon the Deed Administrator paying creditors their full entitlements under the DOCA.
- There is room to correct minor errors in a DOCA after its execution, by application to the Court under section 447A of the Act. It is not possible to seek an order in equity that a DOCA be rectified as if it were a contract;
- Case law and concepts relating to schemes of arrangement under Part 5.1 of the Corporations Act are not analogous to Part 5.3A and case law on DOCAs;
- The Full Federal Court judgments contain an overview of the authorities on the question of whether schemes of arrangement under Part 5.1 of the Act can be used to give releases by a company's creditors in favour of third parties. Because of the judgment of Rares J. in the Full Federal Court and the joint High Court judgment, there is still some doubt that, in a scheme of arrangement under section 411 of the Act, the majority of creditors, or Part 5.1 of the Act itself, could affect or cause to be released rights of the minority against third parties or other scheme participants in their relationship outside the company. By corollary, a side deed that third parties are required to sign may be needed to bind them to implement a scheme of arrangement;
- Until the Court exercises its power to declare a DOCA void a DOCA that has been executed in accordance with section 444B is valid, even if voidable;
- There is considerable flexibility in section 445G of the Act in that the Court has the power to declare a DOCA valid if there has been a substantial compliance with the statutory provisions and there will be no injustice consequent on the contraventions of the provisions – section 445G(3)(b). The Court may also vary a DOCA in those circumstances but

only with the consent of the Deed Administrator – section 445G(4);

- There is no express provision in Part 5.3A of the Act that either permits or forbids a DOCA to interfere with creditors' rights against an entity that is not the company. Throughout Part 5.3A of the Act creditors are referred to in their capacity as creditors of the company. Part 5.3A does not contain any provision which expressly diminishes a creditor's rights against entities other than the company.

Outcome of the High Court Appeal

The High Court joint judgment and also the separate judgment of Heydon J. held that the Lehman Australia DOCA was void. The problem clauses could not be severed from it, and therefore the whole DOCA failed. Lehman Australia is to be wound up.

Implications of the Lehman Brothers litigation for insolvency practitioners

When working on a reconstruction under Part 5.3A of the Act, to avoid costly and protracted litigation of the kind seen in the Lehman Australia matter, insolvency practitioners should do the following:

- Consider who is to be released under the DOCA on payment to creditors of the final dividend from the Deed Fund.
- If those to be released include persons other than the company, consider whether:-
  - Those persons should be parties to the DOCA to avoid a situation where they remain as third parties who will not be bound;
  - The DOCA should contain releases to those persons;
  - In a situation where it is impractical to include as parties to the DOCA those who are to be released, the DOCA should include as a condition precedent to its operation the execution of a side deed between creditors (or the Deed Administrators on their behalf) and the parties to be released; and
  - Annexing a copy of any side deed to the DOCA itself.

When working on a reconstruction under Part 5.1 of the Act where third parties are to be released, insolvency practitioners should do the following to avoid potentially expensive and protracted litigation:
ensure that a side deed side between creditors (or the Scheme Administrator on their behalf) and the parties to be released is prepared and signed;

- ensure that the side deed contains as a condition precedent to its operation creditor and Court approval of the scheme of arrangement, and the execution of and lodgment with ASIC, of the scheme documents;
- ensure that ASIC, creditors and the Court have sufficient opportunity to review the explanatory statement and proposed scheme documents, including the side deed.

Insurers need to take heed of the fact that a deed of company arrangement can only be utilised to release claims against a company not third party. Where the settlement of an insurance claim is to be effected by way of a contribution to the deed fund, subject to a release from all creditors, the release will only be effective against the company propounding the deed of company arrangement. Insurers must ensure that a side deed providing for any releases of additional parties is utilised.

OH&S Roundup

Union Paid $215,000.00 Fine By NSW Government For OH&S Breach

The Industrial Court of NSW has recently imposed a fine of $215,000.00 on the State of NSW and ordered that the fine be paid to the Public Services Association and Professional Officers Association Amalgamated Union of NSW after a prosecution was brought by the Union against State of NSW for a breach of the Occupational Health & Safety Act by the Department of Corrective Services.

Inmate Little was housed at the Silverwater Men's Correctional Centre. He was classified as a C1, that is a person who should be confined by a physical barrier unless in the company of an officer. He had an extensive history of violence and assaults both within custody and in the community. He had previously been listed as a high security inmate. He had many breaches of discipline both regards to intimidation and fighting. In October 2005 he had been placed in segregation due to the stabbing of an inmate in the neck. He had a large number of recorded assault related offences – 5 assault police, 2 resist police officers, 1 malicious injury, 3 assault occasioning bodily harm, 2 maliciously inflict grievous bodily harm and 1 assault.

The prosecution concerned an incident when inmate Little was in the company of two correctional officers and he attacked one officer striking him which knocked him unconscious causing him to fall down stairs and Little subsequently repeatedly kicked

the unconscious officer in the head, face and chest and stomped his foot on his head. The other correctional officer, a female of small stature was then threatened by Little but he refrained from striking her. Inmate Little then returned to kick and stomp the other officer. Little was subsequently restrained by other officers and led away by one officer however whilst being led away he threatened the officer, grabbed him, wiped blood off his hands on to the officer's shirt and pushed the officer away and threatened him. Inmate Little then walked into the prison basketball court followed by the prison officer and then there were a number of altercations involving other inmates and some prisoners officers were injured in the fracas.

The State of NSW was prosecuted for a breach of the Occupational Health & Safety Act. It pleaded guilty. The Court accepted that the Department of Corrective Services could not be said to have been on notice that Little would have engaged in the extreme conduct that occurred when he attacked the officer. However, the Department of Corrective Services should have taken appropriate measures to counter against some form of physical violence from Little. There was a plan for the management of Little although that was not executed as envisaged. It was held that Little should have been appropriately escorted by two correctional officers and handcuffed at the time.

A fine of $215,000.00 was imposed. WorkCover had declined to prosecute the State of NSW and the prosecution was brought by the Union and the Court determined it was appropriate in those circumstances to require the fine to be paid to the Union together with an order that the State of NSW pay the Union's costs of the prosecution.

Injury To Apprentice Leads To $50,000 Fine

M J Baker Constructions Pty Limited and its director were recently fined $50,000.00 and $5,000.00 respectively for breaches of the Occupational Health and Safety Act following an injury to an apprentice when he fell into a stairwell void.

M J Baker performed carpentry work in small to medium residential sub-divisions and home renovations in the Wollongong area. An apprentice carpenter was injured when attempting to install joist hangars when he fell through an open penetration onto the concrete floor approximately three and a half metres below. The apprentice suffered a fracture of the skull and other injuries and was hospitalised for four weeks.
Penetrations in a ground floor level of Unit 2 of a dual occupancy duplex were not guarded or secured and there were no handrails around the open penetrations however there was some timber wall frames around two sides of the penetration. The apprentice fell whilst standing on a plank of a trestle scaffold using an air gun. The defendant conceded that if scaffolding had been installed properly at the site there would have been a scaffold under the void which would have prevented the fall. The defendant gave evidence that it had asked the head contractor for scaffolding and was advised it was coming. The Court noted the defendant had contracted on a labour only basis and the apprentice had not been advised to wear or required to wear fall protection or a safety harness while working in the vicinity of the penetration. The absence of any safety measures around the void created an obvious and foreseeable risk. In addition, the apprentice had not participated in the company's safe work method safety review activity process. It was noted there was a complete lack of attention to safety on the day. In light of the guilty plea a discount of 20% was applied to the penalty and taking into account the small size of the company, a fine of $50,000.00 was imposed on the company and $5,000.00 on the director.

Worker Or Independent Contractor?

The recent decision NSW Workers Compensation Commission decision of Djuric v Kia Ceilings Pty Limited (2010) NSWWCCPD 20 is a reminder that determining whether a worker is an independent contractor or not is not an easy task Despite the beneficial nature of the New South Wales Workers Compensation legislation including deeming provisions contained within that legislation, the changing nature of the modern workforce requires a careful examination of the facts of the purported employment arrangement to assess the existence of an employer/employee relationship. There has to be a balancing of factors and indicators as each issue of fact may point to a different conclusion when considering the status of the worker. Generally, the real issues are the extent of control over the worker, the method of payment, the contractual relationship and the liability of the contractor for remedying defects/losses that are caused at their own cost.

Other factors were also closely examined in Djuric. In this case, the worker was not carrying on a trade of business in his own name, he did not advertise, did not pay workers compensation insurance or superannuation, was provided with and used tools owned by the contractor and clothing was provided to the worker by the contractor. Balanced against this was that the claimed worker derived considerable financial advantage from the way he was able to make deductions from his income for taxation purposes. The substantial "business" deductions for the years in which he worked often represented more than his gross earnings. From the tax returns that were provided, the worker had never been in receipt of wages as an employee and all of his earnings had been as a sub-contractor .The worker also could have taken on another worker to assist him but chose not to do so. He was free to work such hours as he chose and worked longer on occasions than others on the work site.

Deputy President Candy commented that although he was provided with the clothing, the worker was not obliged to wear the clothing. Even if he had been required to wear the clothing with the alleged employer's logo this would not have been conclusive in determining the existence of an employer/employee relationship. The Deputy President focused on indicia such as the worker being able to and did renegotiate the basis of his payment by the alleged employer.

In answer to the allegation in the claim he was a "deemed worker" in that the work he carried out was not incidental to a trade or business regularly carried out by the contractor for a value in excess of $10.00 (the legislative provisions), the Deputy President noted the concept of the deeming provisions were now rather superfluous. The amount of $10.00 as a value of work referred to in the Act has not changed since 1926. Although this may have represented a substantial sum in earlier times, it is difficult to imagine any work now having a value of less than $10.00. The $10.00 test now bears little relevance when determining whether the worker is either an independent contractor or a deemed worker.

As a final passing comment, we note the worker made submissions that his lack of formal qualifications as a gyprocker were indicative he was not carrying on a trade of business. Deputy President Candy indicated this was not a conclusive indicia. The other factors evidencing an independent contractor relationship should be preferred.

It should not be forgotten that the onus of proof in establishing that a claimant is not an independent contractor and is a deemed worker still rests with the claimant. This will need to be established on the balance of probabilities. Although it appears to be a cliché, the determination of the employment relationship should always be examined on the peculiar circumstances of the situation and all indicia closely examined.

Section 151Z – The Confusion Continues

In New South Wales personal injury claims involving employees are governed by the provisions of the *Workers Compensation Act, 1987*. Section 151Z of the Workers Compensation Act, 1987 deals with situations where there is negligence by a third party. This can involve simple situations such as a motor vehicle accident during the course of employment, or more complex scenarios where there is negligence by more than one third party as well as the employer. An accident on a construction site is a common example of where this occurs.

Section 151Z provides that if injury for which compensation is payable under the *Workers Compensation Act, 1987* was caused under circumstances creating a liability in the person other than the worker's employer:

- the worker can commence proceedings both against the negligent third party and the employer but is not entitled to retain both damages and compensation (that is, payments under the Worker's Compensation Act 1987);
- if the worker recovers compensation under the Workers Compensation Act, 1987 and then damages then the worker must repay out of those damages the compensation which he has been paid under the Workers Compensation Act, 1987 and any entitlement to workers compensation ceases;
- if the worker first recovers damages then he is not entitled to recover compensation;
- if the worker has recovered compensation the person by whom the compensation was paid is entitled to be indemnified as the person liable to pay those damages (an indemnity limited to the amount of those damages);
- if any payment is made under the indemnity and at the time of payment and the worker has not obtained judgment for damages against the person paying under the indemnity then the payment is, to the extent of its amount, a defence to proceedings by the worker against that person for damages;
- if any payment is made under the indemnity and at the time of the payment the worker has obtained judgment for damages against the person paying under the indemnity but the judgment has not been satisfied then the payment to the extent of its amount satisfies the judgment;

Section 151Z(2) provides that if a worker commences or is entitled to commence proceedings against a third party and also the employer then damages that may be recovered from the third party are to be reduced by the amount by which the contribution that the third party would be entitled to recover from the employer as joint tortfeasor.

Over the years the provisions of Section 151Z and their operation have been the subject of a number of decisions and a source of confusion amongst tortfeasors and the Courts alike.

The Court of Appeal has recently considered the operation of Section 151Z of the Workers Compensation Act, 1987 in the decision of *Abdiaziz Abdulle v QBE Insurance (Australia) Limited*.

On 3 February 2004 Abdulle sustained injury during the course of his employment as a labourer. On 27 May 2008 Abdulle

received judgment in his favour against his employer in the sum of $105,000.00. At the date of judgment Abdulle had received payments from his employer's workers compensation insurer totalling $96,726.80. Abdulle's solicitors provided instructions that the full judgment amount was to be paid to them but only $8,000.00 was paid to the solicitors with the bulk paid to the employer's worker's compensation insurer. Abdulle then commenced proceedings in the District Court against the employer's worker's compensation insurer seeking judgment for converting the amount said to be payable to Abdulle, by paying it without authority to the worker's compensation insurer.

In the District Court the trial judge dismissed the claim following which Abdulle sought leave to appeal.

The Court of Appeal dismissed the appeal. The Court of Appeal determined that by virtue of the payment to the worker's compensation insurer the judgment was satisfied. There had been no conversion.

So the end result was that Abdulle was unsuccessful and most of his judgment had to be repaid to the worker's compensation insurer consistent with section 151Z. There is no double dipping for a claimant.

Breach Of Alcohol Policy Means Worker Loses Entitlement To A Redundancy Payout

The recent decision of *Smith v BHP Billiton Petroleum Pty Ltd [2010] FWA 3349* illustrates the far-reaching consequences of breaching an employer's policy.

Doug Smith was employed as a product technician on the Griffin Venture Floating Production Storage and Off Take Facility. He had worked for BHP since September 2001. The only way to reach the facility was by helicopter at the beginning and end of a shift.

Smith had previously been notified that he would be made redundant effective 3 November 2009. He was to receive a significant payout as a result. The facility ceased operating in mid November 2009.

BHP had a comprehensive drug and alcohol policy in place. The policy provided that failure of an alcohol test could result in summary termination.

On 27 October 2009, three shifts before his employment was to come to an end Smith returned a positive alcohol test conducted as he was about to board the helicopter as a passenger. Smith returned two "breath alcohol readings" of 0.05 and 0.046. To be compliant with the policy Smith needed to return a second reading of 0.04. Smith's employment was summarily terminated on 30 October 2009.

The legal effect of the summary termination of Smith's employment was that BHP were not obliged to and did not make either a payment to Smith in lieu of notice or the redundancy payment which it had previously planned to make.

Smith, who had an otherwise unblemished disciplinary record, argued that the summary termination of his employment in circumstances where he became disentitled to an upcoming redundancy payout was harsh, unjust or unreasonable. That argument was not accepted.

BHP argued that its response in terminating the Smith was in proportion with his conduct. Deputy President McCarthy found that Smith's conduct was serious and it was not unreasonable for the employer to treat the conduct as they did.

Vice President McCarthy found as follows:

> "*The Respondent appears to have decided it was not prepared to compromise their safety policies because of the personal consequences for the Applicant. I do not consider the Respondent's approach in that regard is outside the band of reasonableness or harshness that a reasonable employer would have taken".*

Drug and Alcohol polices are important documents which employers can and should enforce. Breaches of those policies can be a valid reason to terminate employment. In unfair dismissal claims, the Tribunal will often be asked to consider the impact of termination upon the personal circumstances of an Applicant. Adverse economic consequences of termination such as those suffered by Smith may not be enough to result in a finding that an employee was unfairly dismissed particularly if those consequences stem from the enforcement of reasonable policies.

For over 40 years, Gillis Delaney Lawyers has delivered legal solutions to businesses operating in Australia. We specialise in the provision of legal services in insurance law, workplace relations, employer liability, commercial law, finance, insolvency and construction law. Our clients include Government agencies, public and privately listed companies, insurers and underwriters, insurance broking groups and insurance brokers, underwriting agencies, third party claims administrators, insolvency practitioners and financial institutions. We deliver quality legal services with commercially focused advice. We will make it easier for you to face challenges and ensure you are 'fit for business'.

We listen

We listen to you and understand. We answer your questions and deliver a service that will meet all of your needs. We invest in lasting relationships and take the time to develop closer relationships focused on better legal outcomes through expert advice. Its simple - its about respect and taking the time to understand what you need.

We understand

Good or bad, you need to know where you are before you can determine where you need to be. We tell it like it is. We won't sugar coat the issues. We see the early warning signs and will warn you before it's too late. We will arm you with informed answers to tough questions and keep you on top of the facts that matter.

We are proactive

Prevention is better than a cure. We strive to identify issues before they become problems. Early intervention, proactive management and negotiated outcomes form the cornerstones of our service.

Our service is personal

Our service is personal and 'hands on' and our mix of professionals ensures that you enjoy high level partner contact at all times. Our people are accessible and responsive and provide creative and innovative solutions cost effectively. We have 24/7 accessibility to lawyers.

We communicate effectively

You need the best service and information at your finger tips. We provide the best of both worlds, proven technology delivering internet access to all of your information and a serious focus on communication in plain English. With our personal service, simpler communication and easy access to information you spend more time doing business and less time chasing down problems.

We deliver results

You need practical ideas that deliver real results. Our people and our ideas can make a difference and we thrive on the opportunity to think creatively and deliver innovative solutions. We listen, understand, provide the best information and deliver value for money. We embrace ideas and use creativity to find better ways to do things.

We are Different !

We set ourselves apart from other lawyers by:

- identifying your needs and responding with the most cost effective solution;
- providing practical expert advice;
- meeting deadlines, building relationships and delivering value for money;
- supporting creativity and diversity of thought and bringing excellence to all that we develop, deliver and achieve;
- utilising a team approach that maximises efficiencies and minimises duplication;
- identifying the right legal strategy for the best commercial outcome;

…and having fun whilst doing it.

Contact Us

You can contact Gillis Delaney Lawyers on 9394 1144 and speak to David Newey or email to dtn@gdlaw.com.au. Why not visit our website at www.gdlaw.com.au.