GD News

Gillis Delaney Lawyers

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Bad Faith Claims - Fact Or Fiction For Insurers In Australia

Have you read any John Grisham novels? Did you read Rainmaker? If so, you probably have heard about claims made in America against insurers for acting in bad faith. Are such claims fact or fiction for insurers in Australia?

On 14 July 2006 a District Court Judge in NSW determined that an insurer owed a duty to act in good faith in dealing with claims under workers compensation insurance contracts. This was a novel tort which Australian Courts had previously shied away from. Other cases had considered that such claims were arguable but no judgments had been delivered confirming that such a tort existed in Australia. The decision of the District Court Judge in Garcia - v - CGU Workers Compensation (NSW) Limited established for the first time a novel tortuous liability. This inevitably led to an appeal.

The duty of utmost good faith is not a new concept to insurers in Australia.

The Insurance Contracts Act 1984 contains provisions which impute an implied term in an insurance contract which obliges parties to an insurance contract to act with utmost good faith. A breach of the implied condition in the contract will sound in damages. However, the Insurance Contracts Act, 1984 specifically excludes any application to the workers compensation regimes throughout Australia. So can a duty of utmost good faith be imputed into an insurance contract without the assistance of the Insurance Contracts Act, 1984?

Garcia, in his appeal before the Court of Appeal, was forced to argue that either the new tort of bad faith should exist in Australia or alternatively that there should be implied into the workers compensation contract of insurance an implied term requiring the insurer to deal fairly and act in good faith when dealing with claims. Garcia could not rely on the Insurance Contracts Act, 1984 to establish an implied term in the agreement requiring the insurer to act with utmost good faith.

The NSW Court of Appeal handed down a decision in Garcia's appeal on 10 August 2007.

The NSW Court of Appeal decision overturned the controversial decision of Garcia -v - CGU Workers Compensation (NSW) Limited where District Court Judge Goldring had held that a workers compensation insurer had acted in breach of good faith in failing to deal fairly with a workers compensation claim.

Garcia had been injured and a claim for workers compensation was accepted. The insurer obtained medical evidence which largely supported the claim. Further investigations were commissioned by the insurer, an investigator was appointed and a further medical examination arranged. The insurer subsequently decided to discontinue weekly payments.

Garcia commenced proceedings in the District Court claiming damages for an alleged breach of a novel tort which, according to Garcia, imposed a duty of good faith on the insurer which arose independent of the legislative scheme. The District Court Judge accepted Garcia's arguments which in essence introduced a novel tort to Australia - the tort of bad faith. Workers compensation insurers and insurers generally were then faced with a potential that claims could be made against the insurers if they did not act in good faith when dealing with claims.

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In Garcia's case the Trial Judge found that the insurer's actions in ceasing periodic payments and refusing to pay for surgery to the worker's spine at the time recommended by his doctor significantly aggravated the worker's major depressive illness. The Trial Judge described the approach of the insurer in the following terms:

> *"All the evidence is, however, that the insurer . . . was already predisposed, if not totally prejudiced, against the plaintiff and used the report of Dr Hughes, which was contrary to all other medical reports, as a pretext arbitrarily to cease paying the entitlement of the plaintiff. In my view the actions of the insurer could be described as contrary to all reasonable standards of commercial behaviour and malicious. . . . In this case I conclude that the insurer did not act in good faith. It certainly had no obligation to subordinate its legitimate interest to that of the plaintiff as some of the plaintiff's submissions seemed to suggest but it appeared to act contrary to all relevant evidence and to fail to obtain material which would have indicated that the plaintiff's claim was justified. In doing so it did not act honestly or regard properly the plaintiff's legitimate interests. . . . The insurer's actions in stopping the periodic payments to the plaintiff was done in bad faith. It was malicious, reprehensible and done in total disregard to the plaintiff's rights and of his health."*

The Trial Judge then went on to award damages which included $90,000.00 for pain and suffering, medical expenses, wage loss approximating at $155,000.00, domestic assistance in the vicinity of $100,000.00 and punitive damages of $50,000.00. Punitive damages effectively punished the malicious attitude of the insurer.

The NSW Court of Appeal has now overturned the Trial Judge's decision rejecting the notion of the novel tort of bad faith. In rejecting the concept, the Court of Appeal has noted that Australian law has not developed to the stage that there should be recognition of a new tort which imposes a duty of good faith on an insurer operating within a statutory workers compensation regime.

Garcia, in the Court of Appeal, argued that there should be an implied term in the workers compensation contract of insurance that the insurer should act in good faith in its dealing with claims. This argument was also rejected.

The Court of Appeal noted that the Insurance Contracts Act, 1984 contains provisions which impose duties on insurers to act with utmost good faith. However, the Insurance Contracts Act does not apply to workers compensation contracts of insurance.

The Court of Appeal confirmed that the statutory regime in NSW and the relationship between workers compensation insurers, employers and workers was not such that there should be imposed into a workers compensation insurance contract an implied obligation of good faith and reasonableness in the performance of contractual obligations.

The importance of the Court of Appeal's Judgment does not end there. The Court of Appeal also confirmed that Australia has thus far not accepted exemplary damages for breach of contract and even if it was an implied term in a workers compensation insurance contract that an insurer must act with utmost good faith, a breach of such a term would not sound in punitive damages.

The end result is that the Nominal Insurer in NSW and Scheme Agents can now rest easy when confronted with claims by claimants that they have acted in bad faith in their dealings with a compensation claim. Australia does not recognise the tort of acting in bad faith. Further, there is no term implied in a workers compensation insurance contract that the insurer must act in good faith.

But will the case go further? Will the High Court have an opportunity to consider Garcia's claim? We must wait and see but for now claims against insurers based on alleged bad faith on the part of a worker's compensation insurer in dealing with a claim will be rejected by the NSW Courts.

Parents Beware! You May Be Liable

You have young children. You need to drop one of your children off at care and the other at school. You need to get to work on time. The school has hours where the playground is supervised but you drop your child off early. An accident happens. Can you be held accountable for the injury?

The NSW Court of Appeal in *St Mark's Orthodox Coptic College - v - Abraham* has recently considered a claim brought by St Mark's College against a parent where a child was injured during pre-school activity.

Between 8.05 am and 8.08 am Christopher Abraham, a 9 year old Year 4 student fell from a second floor balustrade on the college premises and suffered significant injury.

Christopher's mother brought proceedings on his behalf against St Mark's College who were held liable in negligence. St Mark's cross-claimed against Christopher's father for contribution to the damages St Mark's was ultimately ordered to pay.

Classes at the college commenced at 8.35 am and students and teachers would begin arriving before 8.00 am. A significant number of students arrived between 8.00 am and 8.20 am. Supervision of the students was supposed to commence at 7.45 am but a formal system of supervision was implemented only from 8.30 am with informal supervision on an ad-hoc basis before that time. The Trial Judge held that the college owed a duty to the students to take reasonable care of them while they were on the college premises during the hours when the college was open for attendance. The Judge held there was a systematic failure of appropriate supervision in circumstances where it was accepted that a number of students would be on the premises at the time of the injury.

The original Trial Judge rejected the college's claim against the father. The Trial Judge found that the father did not owe his son a duty of care.

The Court of Appeal, however, disagreed.

The Court of Appeal noted the High Court has previously commented that, "Parents, like strangers, may become liable to a child if the child is led into danger by their actions."

The Court of Appeal noted that while the mere existence of a parent/child relationship does not bring about a duty of care on the part of a parent towards a child, the circumstances of a particular situation may give rise to such a duty. The Court noted that, "Australian law does not recognise any principle of parental immunity in tort".

As Justice Ipp noted, "Assume that parents, for reasons solely for convenience to themselves, leave their 9 year old at school alone at say 3.00 am in mid-winter, to fend for himself until the students and teachers arrive at 8.00 am, assume that in the darkness, in an attempt to find shelter, he injures himself. It could not be suggested that, in these circumstances, the parents did not owe a duty of care to their child."

The Court of Appeal held that taking a 9 year old child from his home environment and leaving him at school is conduct that will usually involve a potential risk of harm to the child. Any parent who performs such an act may owe a duty to the child to take reasonable care in not exposing the child to foreseeable harm in doing so. The duty arises from the particular situation, not the mere fact of the parent/child relationship.

As Justice Ipp noted:

> *"The duty may arise from the control the parent (as guardian of the child) exercises over the child, the dependence of the child on the parent, the vulnerability of the child, the foreseeability of harm and other facts that, according to modern law of negligence, are relevant."*

The end result was that Mr Abraham owed his son a duty to take reasonable care not to expose him to a risk of harm when he took his son to school.

So Mr Abraham owed a duty of care. Did he breach that duty? The Court of Appeal did not think so. Taking all the factors into account, the Court of Appeal reasoned Mr Abraham acted reasonably.

Christopher was told by his father, "Be a good boy. You know where you are supposed to be seated. Don't do silly stuff." Christopher was an obedient child and his parents thought he would behave properly and do nothing untoward. In addition, Christopher's father thought it would be in the best interests of his son to spend some brief time before school with his friends and it would be safe to do so. Unfortunately he was wrong and the question was whether his decision was reasonable.

As the Court of Appeal noted, the legal principles applicable to the law of negligence must accommodate practical realities of everyday living and one of those practical realities is that bringing up children cannot be made risk free. Justice Ipp noted, "It is inevitable that children, even in the most careful and ordered households, will be exposed from time to time to risks of harm. This is inherent in the process of growing up, undergoing new experiences and maturing in an appropriate way".

In determining that there was no breach of duty, the Court of Appeal noted that Christopher had to be incited to act mischievously by other students, he had to disobey express instructions given to him and this was completely out of character.

Further, his conduct was unnoticed by teachers present at the college (albeit from informal supervision) and Christopher had acted in such a way as to cause himself harm. Justice Ipp noted it was not likely that all of these factors would coincide. Taking account of all of those factors Justice Ipp concluded that the father acted reasonably.

This case serves as a warning to all parents that they do owe a duty of care to their children and can be held liable for any breach of that duty of care. Nevertheless, children will always be at risk. The activities of growing up are dangerous. A parent will not be liable for all injuries, however, the case serves as a reminder that parents must act reasonably when they know their children are exposed to a potential risk of harm.

Parents can not simply blame others for injuries to their children where the parents themselves fail to exercise reasonable care for their children.

Defendants can recover contribution towards damages payable where the parent breaches their duty of care owed to their child.

No Liability For Council For A Fall That Results In Paraplegia

Local councils in NSW act under discretionary statutory powers in connection with fire safety of buildings. A question arises as to whether or not a council is required by statute to apply the Building Code of Australia ("BCA") or to have regard to the BCA when issuing fire safety orders and whether or not a council is obliged to ensure that a stairway complies with the BCA.

These issues were recently considered by the NSW Supreme Court in *Randwick City Council - v - T & H Fatouros Pty Limited* ("Fatouros"). Mark Ward became a paraplegic when he fell through a railing on an external stairway or fire escape attached to a building in Coogee. Fatouros were the owners of the property. Fatouros settled Mr Ward's damages action. Fatouros subsequently sought contribution from the council for the damages it had to pay to Ward. Fatouros succeeded in its claim against the council before a Supreme Court Judge.

Ward slipped on a slippery wet surface and he slid through a large gap in a balustrade and he fell to the ground. The landing and the stairs were completely open and there was nothing such as mesh or other filling to prevent a person or an object from falling through the open face of the stairway. Expert evidence demonstrated the balustrades were too low and the top rails did not consistently follow the overall grading of the stairways and the opening through which Mr Ward fell was significant. The BCA requires that the maximum opening in a balustrade will prevent a sphere larger than 125 mm passing. The opening in this case was 640 mm by 890 mm.

Prior to the incident, the local council had issued three notices of an intention to issue a Fire Safety Order and three Fire Safety Orders pursuant to its discretionary statutory power. The notices were issued pursuant to the Environmental Planning and Assessment Act 1979 and the Local Government Act.

The building provided backpacker accommodation. The stairway was constructed in April 1998 and the first notice issued by the council required an Engineer's Certificate of Structural Adequacy or alternatively that the stairway complied with a specified clause of the BCA. It was noted the stairway was in a dilapidated state.

The Fatouros did not comply with the Fire Safety Order and the council wrote to Fatouros directing compliance and threatening the commencement of legal proceedings.

Approximately 15 months later the council issued a Notice of Intention to Issue a Fire Safety Order in almost identical terms to the first Notice.

The stairway was ultimately modified. It was common ground that the stairway was erected to comply with the Safety Order but only complied with the clause in the BCA referred to in the council's notice, not the entire BCA.

Subsequently, in a routine inspection by council, the council officer completed a "Place of Shared Accommodation and Inspection BCA Assessment". On the form was a question, "Are the handrails and balustrades satisfactory?" A tick had been placed indicating the answer "Yes".

At a later stage a further Notice of Intention to Issue a Fire Safety Order was provided by council in relation to the removal of rubbish and furniture.

The original Trial Judge found that the council had taken on the supervision of the building with respect to fire safety and had acknowledged that the stairway was adequate from a fire safety standpoint. The council was found to have failed in its duties by failing to exercise its powers over the entire safety of the stairway when it dealt with the rubbish and furniture issue and nothing else. The Trial Judge found that in approving an inherently unsafe structure the council failed in its duty to Fatouros.

The Court of Appeal did not agree. The Court of Appeal noted that Courts must be cautious in imposing affirmative common law duties of care on statutory authorities.

When examining the relationship between the council and its constituent, it is necessary to examine the totality of the relationship. It is necessary to examine the category of control that may contribute to the existence of a duty of care to exercise statutory powers. A duty does not arise merely because an authority has statutory powers, the exercise of which might prevent harm to others. The mere prior exercise of statutory powers from time to time without more does not create a duty to exercise those powers. Further, knowledge that harm may result from a failure to exercise statutory powers is not of itself sufficient to create such a duty.

If a duty of care is to be imposed on a public authority to take affirmative action, the measure of control must be significant. Knowledge of the risk on the part of an authority and the absence of knowledge on the part of persons whose benefit it is said that the statutory power should be exercised, is ordinarily, a critical feature of the inquiry.

Fatouros did not bring a claim against the council for indemnity or contribution as a joint tort feasor.

Ultimately, the Court of Appeal concluded that the council did not take on the supervision of the entire building with respect to fire safety. The Court of Appeal also held that the council did not have an obligation to deal with all fire safety issues. The Court noted that the important issue was that the danger constituted by the stairway was obvious and in particular was obvious to the owners. There was nothing preventing Fatouros from taking action to remedy the danger. It was noted Fatouros was not a vulnerable entity and was able to protect itself from the harm that ultimately eventuated. Fatouros failed to establish that it was unable to protect itself from the consequences of any want of reasonable care on the part of council. The failure to prove vulnerability in that sense was fatal to the contention that the council owed a duty of care to prevent Fatouros from suffering a loss.

The Court of Appeal confirmed that by issuing a Fire Safety Order or a Notice of Intention to Give a Fire Safety Order, the council does not take on supervision of the whole building with respect to fire safety. There was nothing in the legislation that requires a council to take on supervision of any part of a building with respect to fire safety. The Court of Appeal noted,

> *"Such an imposition would be an extraordinarily heavy and difficult burden to be placed on councils and would be a serious disincentive against councils exercising their discretion to issue fire safety orders".*

Accordingly, Fatouros was liable for the substantial damages awarded to a paraplegic without any recourse to the council.

The case demonstrates once again that where councils have discretionary statutory powers, the failure to properly exercise those powers does not necessarily result in liability on the part of the council. The vulnerability of the particular claimant is a real factor when weighing up whether or not the council owes a duty of care to exercise discretionary statutory powers.

Do You Owe A Different Duty Of Care To A Negligent Person?

Is the duty of care you owe reduced for a reckless person? Does the duty of care owed to a person acting unreasonably differ from the duty of care owed to someone acting reasonably? Not according to the Court of Appeal in *Sheather - v - Country Energy*.

Sheather sued Country Energy for damages for the loss of his helicopter caused by its crashing into one of Country Energy's power lines. The accident occurred at Chinaman's gap on a ridge in a hilly area. One of Country Energy's main power lines ran along the northern side of the road and at a point near the apex of the ridge a spur line crossed the road. The spur line was approximately 31 metres above road level and cleared the tree canopy on either side of the road by about 3 to 5 metres. The trees and bushes had been cleared from under the main power line but there was no clearing under the spur line. There were inexpensive commercially available markers that could be attached to power lines to draw their attention to them but no such markers were used. Sheather had lent his helicopter to his cousin, an inexperienced pilot who was flying his cousin to a

wedding at a property near Chinaman's Gap and en route the helicopter crashed into the spur line. Both the pilot and the passenger were killed and the helicopter destroyed. The pilot had been flying at low levels just above power lines and continued to fly the helicopter at low level as he approached Chinaman's Gap. The danger of power lines present to pilots flying at low levels was well known.

The owner of the aircraft initially succeeded in the claim with the Trial Judge finding that it was foreseeable that the spur line might cause injury or loss to Mr Sheather, a class of person to whom Country Energy owed a duty of care (pilots and aircraft owners, even to pilots and owners of carelessly flown aircraft). Nevertheless, the Trial Judge did not find that a reasonably prudent authority in Country Energy's position was required to do more than it did as the dangers of flying at low levels was well known. The aircraft was being flown contrary to Commonwealth Civil Aviation Regulations as it was being flown at below 500 feet. The pilot deliberately flew contrary to the Regulations. Effectively the Trial Judge found there was no breach of duty.

The Court of Appeal did not agree.

The circumstances that the pilot was deliberately engaging in unlawful low level flying could conceivably be relevant in a number of different ways:

- To the existence of a duty of care.
- To the content of a duty of care.
- To the question of breach.
- To the question of voluntary assumption of risk.
- To the question of contributory negligence.
- To the question of causation.

It was noted in the case that cases of negligence generally raise three broad issues, namely, the existence of a duty of care, the content of that duty and the question of breach of duty.

The Court of Appeal confirmed that the initial inquiry as to whether or not a duty of care is owed requires an inquiry as to whether or not it was foreseeable that there was a possible risk to a class of persons. Whether or not a duty is owed is a question of law and its formulation should be left in general terms as a duty to take reasonable care to avoid injury. The determination of what the duty requires in a particular case is a particular fact to be addressed when considering the question of breach.

Nevertheless, the deliberate or even negligent conduct of a particular person cannot narrow the scope of the duty of care owed. The actions and conduct of a particular claimant will go to issues of voluntary assumption of risk, causation of the loss or contributory negligence.

The content of the duty of care must be determined by having regard to the nature of what is being considered, namely, what is the class or what are the classes of persons, to which a reasonable person in the position of the defendant would have foreseen that its conduct involved a risk of injury.

In this case the Court determined that the extent of the duty of care was such that Country Energy should have taken reasonable care to avoid the risk of injury for pilots of aircraft and aircraft owners even where pilots act in a deliberately unlawful manner.

The Court of Appeal held that Country Energy had breached its duty of care by failing to place the markers on the power lines.

Although it was argued that the risk of injury from power lines for aircraft flying at low levels was an obvious one, it was still a risk which needed to be addressed. The conduct of the pilot went to issues of contributory negligence and voluntary assumption of risk in respect to a pilot's claim. However, that conduct was not relevant to the aircraft owner's claim in this case.

The Court of Appeal overturned the primary Judge's decision and awarded damages to the aircraft owner.

Country Energy owed a duty to aircraft owners and pilots, even those who were acting negligently and contrary to the Civil Aviation Regulations. Although the risk of the power lines was obvious, having regard to the foreseeable risk of danger, Country Energy owed a duty to take care to prevent injury. It failed to do so by neglecting to install the markers. It was liable

for the aircraft owner's damages.

Once again this case reveals that although a risk may be obvious, it does not necessarily follow that there is no duty of care owed. It is necessary to determine the facts in each case, the risk of harm and the foreseeability of risk to persons where reasonable conduct has the potential to eliminate the risk. The real issue in this case was what response was necessary to the risk. The appropriate response was the installation of the markers.

It may be reasonable for a statutory authority to take no action in respect to a raised lip in a footpath of approximately 25 mm as that is what a reasonable person confronted by the risk would do. However, a reasonable person in Country Energy's position should have acted in this case and installed the warning markers.

Is There A Three Year Limitation Period For Personal Injury Claims In NSW? Perhaps Not!

In NSW legislation that governs the different types of personal injury claims impose a three year limitation period on the commencement of proceedings for personal injury claims. The legislation also provides that in specified circumstances the limitation period can be extended.

An application to extend the limitation period is facilitated by an application to a Court for an extension of the limitation period. But are there ways for an injured person to step around the limitation period other than by seeking an order from the Court to extend the limitation period?

If a claimant commences proceedings, making a personal injury claim within the three year limitation period, they may be able to amend their claim to bring additional claims which would be statute barred.

The *Civil Procedure Act* provides the Court with a general power to grant leave to amend pleadings at any stage. The power to grant leave to amend permits the Court to ensure that all issues between the parties are properly ventilated.

The NSW Court of Appeal in *Greater Lithgow City Council - v - Mark Wolfenden* recently considered the extent of the Court's power to permit an amendment to a claim which effectively added a claim which would be statute barred.

Mark Wolfenden commenced proceedings in the District Court in September 2001. The original proceedings alleged that Wolfenden suffered epilepsy as a consequence of exposure to chemicals at work. Wolfenden suffered his first epileptic seizure in December 1998 and on that day he suffered a frank injury although the injury was not reported to the employer for 6 days. Further, Wolfenden did not make a claim under the Workers Compensation Act, 1987 for his epilepsy until 8 months after the frank injury and then identified his injury as post-traumatic epilepsy.

Despite this sequence of events, the lawyers originally engaged by Wolfenden filed a statement of claim which alleged that Wolfenden's epilepsy was solely caused by exposure to chemicals at work. There was no reference to the injury in December 1998.

Wolfenden ultimately changed solicitors. Fresh eyes resulted in an application to the Court to amend the claim to add the frank injury. Why amend the claim? If fresh proceedings were commenced, the claim would be statute barred. In addition, a fresh claim would be subject to the work injury damages regime introduced in 2002, however, if the frank injury claim was brought in the original proceedings that claim would be governed by the pre-2002 regime which would be far more advantageous to Wolfenden.

The original District Court Judge granted leave to amend the claim to add the frank injury despite the fact that injury had occurred more than three years before the application to amend the claim. The District Court Judge ruled that he had power to grant the amendment pursuant to the Civil Procedure Act which gives the Courts a general power to grant leave to amend pleadings at any stage.

The Court of Appeal agreed. The Court of Appeal confirmed that pursuant to the Civil Procedure Act a Court can grant leave to amend a claim and add additional claims even where the amendment of the claim takes place after the expiration of the limitation period for the claim. The Court of Appeal confirmed that the Civil Procedure Act provides the Court with the discretion to permit a claim being amended to add a statute barred claim without the need to make an application to extend the limitation period.

While the facts in each case will be considered by the Courts, before an amendment is permitted, there is an avenue for claimants to step around the limitation period where they have omitted to make claims which have become statute barred.

No doubt in this case the notice provided to the employer had a significant influence on the Trial Judge's approach to permit the amendment.

Judges must exercise their discretion judicially when determining whether or not leave to amend a claim should be granted. However, as seen in this case, the Courts may grant claimants leave to bring claims which ought normally be statute barred where claimants have commenced proceedings in relation to other claims within the relevant limitation period.

Perhaps the original lawyers for the claimant in this case should count themselves lucky that the claim was not statute barred despite the failure to bring the claim from the outset.

Employment Contracts Confidentiality And Restraint Of Trade Provisions

A company has located a unique product and imports that product into Australia. The source of the product is a carefully guarded secret. The company tries to conceal this information by giving it only to a few people in the organisation. Some employees who are privy to that information set up a new business to import the same product using the knowledge of the source of the material. What can the employer do? Are there claims available to the employer for breach of confidence, and/or breach of terms of an employment agreement and/or a share sales agreement with restraint and confidentiality provisions? Can the Corporations Act help?

These issues were recently considered by the NSW Court of Appeal in *Del Calsale & Ors - v - Artedomus*. Artedomus sued Mr Del Calsale, Mr Savine and Stone Arc (a company owned buy the two men) alleging misuse of confidential information. Del Calsale and Savine were employees, directors and shareholders of Artedomus and terminated their employment and directorship. Del Calsale also entered into an agreement for the sale of shares and contracted not to compete with Artedomus for three years and to keep confidential any commercially sensitive information he had learnt whilst employed. Savine also sold his shares to Artedomus related entities.

Artedomus had a turnover of approximately $10 million per year. Thirty percent of its sales came from the sale of the particular product. Artedomus was the sole importer of the product. Only directors of the company, the warehouse manager and those responsible for payments to supply were given information about the source of the stone. Both Del Calsale and Savine were directors of the corporation. In June 2002 Del Calsale's employment was terminated due to the closure of the company's manufacturing division and Mr Savine resigned as a director approximately 1 month later. Del Calsale and Savine owned shares in Artedomus through companies they owned. Savine resigned his employment approximately three months after he ceased to be a director. In October 2002 Savine and Del Calsale's company sold shares in Artedomus and associated shares in trust units to parties associated with Artedomus.

A Supreme Court Judge found that there had been a breach of confidence by Savine and Del Calsale and made orders permanently restraining the former employees and Stone Arc from using the confidential information and providing for an account of any profits that they had made arising from the use of the information.

The employees appealed.

Artedomus argued that the former directors had improperly used information to gain an advantage for themselves or for someone else or caused detriment to the corporation in breach of Section 183 of the Corporations Act 2001.

The Court of Appeal noted that it is clear that a contract of employment generally includes an implied term imposing a duty of good faith on an employee. That in turn carries with it an obligation on the employee not to divulge confidential information or to use it in a way that could be detrimental to the employer. The content of this duty varies according to the position of the employee. Generally more senior employees have access to more confidential information and will be subject to greater restraint than more junior employees. If this obligation is breached during employment, for example, by copying customer lists or even deliberately memorising them so they can be used after the employment comes to an end, that breach of contract may justify the grant of relief when employees seek to use that information after the employment has come to an end. The Court of Appeal noted there is authority for the proposition that this implied term imposing a duty of good faith continues to operate after the employment contract comes to an end although this is not the general rule.

The Court noted there can be terms of an employment contract that continue to operate after the employment comes to an end but generally that would require the terms to be express. Implied terms may operate that way if the nature of employment is such as to clearly require a term operating after the end of employment, as could be the case where a person is employed as an in-house professional adviser to whom confidential information is given for the purpose of obtaining professional advice, such as legal advice.

Justice Hodgson concluded that:

> *"Generally questions concerning an employee's obligation of confidentiality after employment has come to an end, in the absence of an express contract dealing with the matter, are best dealt with as part of the general law concerning confidentiality of information, because it is very doubtful what if any term can be implied in a contract …":*

Factors which help in determining whether information may be considered confidential are:

- the extent to which information is known outside the business;
- the extent to which the trade secret was known by employees and others involved in the business;
- the extent of measures taken to guard the secrecy of the information;
- the value of the information to the business and competitors;
- the amount of effort or money expended in developing the information;
- the ease or difficulty with which the information could be properly acquired or duplicated by others;
- whether it was plainly made known to employees that the material was confidential;
- the fact that the usage and practices of the industry support the assertions of confidentiality;
- the fact that the employee has been permitted to share the information only by reason of his or her seniority or high responsibility;
- that the owner believes these things to be true and that belief is reasonable;
- the greater the extent to which the confidential material is habitually handled by an employee, the greater the obligation of confidentiality is imposed;
- that information can be readily identified.

Justice Hodgson did not believe that the information in question was confidential to the extent that its use should be prohibited after cessation of employment. In essence Justice Hodgson found that the information acquired was information in relation to general know-how in relation to stone and the former director/employees would be entitled to go to a trade fair and to look for suppliers of stone at that fair including stone similar to the store in question and they could not blot out their knowledge of the particular product whilst undertaking their search for familiar stones and therefore, in this case, did not amount to confidential information, the use of which should be restrained after the employment ended. Although Justice Hodgson did not believe there had been a breach of confidentiality, he did conclude Del Calsale's contract for the sale of shares required him to keep confidential commercially sensitive information and not to compete with Artedomus for a period of three years. Justice Hodgson concluded that there was no breach of the provision of keeping confidential commercial sensitive information as it was Mr Savine who, on the evidence, located the suppliers of the product and there was no disclosure to other people by either of them. Nevertheless, it was held that Del Calsale was competing against Artedomus in breach of the non-compete provisions in the contract for the sale of shares.

Interestingly, Justice Hodgson concluded there was no breach of Section 183 of the Corporations Act as Justice Hodgson concluded that the use of information in breach of an equitable obligation of confidentiality would be improper use of the information but as there had been no obligation of confidentiality there was no breach. Further, there had been no breach of contract by Del Calsale in relation to the information and once again there was no improper use. In those circumstances Justice Hodgson concluded there was no breach of Section 183 of the Corporations Act.

Justice Hodgson concluded that a permanent injunction against the use of the information was excessive. Effectively the Court determined that Artedomus was entitled to an injunction restraining Del Calsale from competing for a period of three years.

The Court of Appeal in the case confirmed that during the course of employment, confidential information is protected by an implied term of good faith in the employment contract. Nevertheless, once employment ceases, in the absence of an express contract term dealing with confidentiality, the issue of confidentiality is generally best dealt with under general equitable principles and not through implied terms in the contract.

The Court recognised there are two classes of confidential information, one of which can not be used by ex-employees and one which can unless there is a valid contractual restraint. The Court drew a distinction between ex-employees disclosing information to others for use and actually using it themselves when determining whether or not there is a breach of confidentiality.

In this case the provisions of the Corporations Law did not provide a remedy. Further, the terms of the employment agreement did not assist as they were silent on issues of confidentiality. Nevertheless, the agreement for the sale of the shares entered into by Del Calsale contained a restraint provision which was effective.

The case demonstrates that employers need to ensure that care is taken in the drafting of confidentiality and restraint provisions in employment contracts. The absence of clear express terms identifying post employment obligations of confidentiality and restraints of trade will make it difficult for employers to successfully argue that there should be protection against breaches of confidentiality.

Difficulties Compromising Workers Compensation Claims

You receive a compensation claim and only part of the claim is substantiated. You would like to finalise the claim. Can you compromise the claim by paying the substantiated part on the understanding the entire claim is finalised?

The NSW Court of Appeal has recently considered an appeal from a Deputy President's decision that dismissed a claim for compensation on the basis that the claim had been resolved by agreement. The decision was overturned and an award of compensation was made by the Court of Appeal which serves as a reminder to case managers that an exchange of letters may not always finalise a claim.

In *Coyle - v - Department of Education and Training*, the worker made a claim for payments of compensation relating to a psychological injury suffered as a result of her employment by the Department of Education. Her claim was made on 18 September 2002 and payments were made until 22 October 2002. Thereafter the employer declined to make payments on the basis that her injury was wholly or predominantly caused by reasonable action taken by the principal of the school relying on an exemption provided in Section 11A of the Workers Compensation Act. There had been a breakdown in communications between the principal and the worker, each accusing the other of inappropriate behaviour.

The worker continued to press her claim for compensation. The employer arranged an examination with a psychiatrist on 12 June 2003. Despite the declinature the employer paid further compensation until 18 December 2002.

Solicitors for the worker requested in a letter that payments be made up until 31 January 2003 on the basis of a WorkCover Certificate provided.

A letter was again forwarded by the worker's solicitor to the worker's compensation insurer stating, "We refer to your letter dated 12 June 2003 and to our facsimile dated 1 July 2003 which enclosed a WorkCover Certificate up to 31 January 2003.

We understood from our discussion with you that it was likely you would meet the claim up to 31 January 2003 in view of the Certificate and in view of the fact that Dr Lovell did not see our client until 6 months after that period closed. We are instructed by our client that she will accept payment up to 31 January 2003 to resolve the dispute. Would you please advise within 7 days whether this is acceptable as alternatively we are instructed to commenced proceedings in the Workers Compensation Commission".

The insurer despatched a letter with a cheque confirming that payments had been made up to 31 January 2003 as agreed.

So did this effectively end the claim for compensation? It did, according to the Deputy President but the Court of Appeal did not agree.

The Court viewed the worker's solicitor's letter as not so much an offer as a threat to commence proceedings unless payments were made within 7 days. On that view there was no agreement to settle any unresolved claim for the period after 1 February 2003.

The worker argued that the letter simply meant that the dispute up to the period 31 January 2003 would be settled. The insurer argued the exchange of letters resulted in an agreement to settle the claim up to 12 September 2003 being the date

the cheque was forwarded or preferably a continuing liability extending beyond 12 September 2003.

The Court of Appeal in this case noted it was objectively unlikely that either the insurer or the worker intended to treat the claim as resolved in entirety.

One of the Judges in the Court of Appeal found that the effect of the agreement was to compromise liability to 12 June 2003, being the date of Dr Lovell's examination but the majority decision of the other Judges prevailed.

As the majority of the Court of Appeal decided there was no agreement it was not necessary for the Court of Appeal to decide whether or not any agreement reached was unenforceable due to Section 234 of the Act which provides that the Workers Compensation Act 1987 applies despite any contract to the contrary.

The Judgment demonstrates the need for clarity and precision in drafting correspondence which attempts to settle compensation claims which are ongoing.

In this case the worker has recovered additional compensation in excess of $15,000.00 when no doubt the case manager thought they had resolved the dispute.

The terms of a claim which are compromised in a settlement need to be clearly identified in correspondence to ensure that any compromise settlement effectively resolves the matters which the worker and the insurer intends to resolve but there are still problems. But there will always be the issue that a compromise agreement is not effective due to section 234 of the Workers Compensation Act.

There remains an issue as to whether the Workers Compensation Act 1987 permits a party to contract out of any ongoing liability. This issue was not determined in this case. The prohibition in the Act that prevents parties contracting out of liability will continue to present problems where a compromise is reached and the settlement cannot be effected by terms of settlement or a registered agreement in the Workers Compensation Commission (lump sum impairment or commutation) effect pursuant to the Act. Compromises of claims by an exchange of letters may not finalise a claim in all circumstances.

OH&S Roundup

Director escapes penalty

On 1 December 2004 Dasco Construction Pty Limited was the principal contractor on a building site. One of two managing directors was Daniel Nicholas. Dasco contracted United Admin Pty Limited to provide project management services for a development. A sub-contractor was engaged to erect a wall which collapsed. There was no adequate fall protection to protect adjacent property and persons inside those properties from damage in the event of a wall collapse. Dasco, Nicholas and United Admin all pleaded guilty to breaches of the OH&S Act. The bricklaying company and a director of that company had been previously prosecuted and convicted. United Admin was fined $45,000.00 and Dasco Construction $35,000.00. The director of Dasco, however, was found to have committed an offence but he was discharged without conviction or penalty on the basis that he entered into a good behaviour bond for a period of 18 months.

The *Crimes Sentencing (Procedure) Act* permits the Court to discharge a defendant without conviction when the offence is proven, however, this is done only in very special circumstances. The Court noted that the discretion is rarely available in significant offences against the OH&S legislation and any application for the benefit should be vigorously tested. The Court noted that in occupational health and safety offences before the Court exercises its discretion to not record a conviction, there must be extraordinarily and highly exceptional circumstances.

The Court accepted that Nicholas had put in a place a comprehensive occupational health and safety plan for the project site. He proceeded to appoint persons, namely United Admin and the bricklayer, to be wholly responsible for all aspects of safety on site. He engaged a contractor to monitor all sub-contractors and the quality of their work and their safety. Having regard to those facts, the Court determined it was appropriate to exercise its discretion and not record a conviction, primarily because it was clear in his role as a director of Dasco, Nicholas had taken steps to appoint two persons who would be directly responsible for supervising the work being undertaken on behalf of Dasco and by all accounts both of these persons were aware of Dasco's occupational health and safety plan for the site. Those responsible for safety were able to contact Nicholas if there were any problems. They did not do so and Nicholas was entitled to assume there were no problems.

The Court also noted only one director had been prosecuted, which should be taken into account as the Court noted "for the purposes of sentence, the culpability should not be visited upon Nicholas as one of two directors of the corporate defendant who has already pleaded guilty."

A lucky escape this time for a director. The actions of the director in engaging two persons to look after safety saved the director from a substantial fine but not the commission of an offence. The offence was proven but a conviction was not recorded.

$150,000.00 Fine

Star Track Express was recently fined $150,000.00 by the Industrial Relations Commission following an incident when an employee truck driver, reversing a semi-trailer at a freight distribution depot caused another employee to be caught between the rear of the reversing trailer and a dock. The prosecution arose as a consequence of an alleged failure to ensure a safe system of work in relation to traffic and pedestrian management and failing to conduct a risk assessment in relation to traffic and pedestrian management.

The evidence available demonstrated that the semi-trailer was fitted with a piece of equipment which was clearly designed to give a warning sound when the vehicle was in the process of reversing. There was evidence that this piece of equipment most likely malfunctioned at the time. It also noted there was no known operational reason for the employee who was fatally injured to be in the loading dock whilst the vehicle was reversing. It was noted that the risk would have been completely removed if Star Track Express had in place a system which precluded any persons being on the ground when a semi-trailer was reversing.

The Court warned that it cannot be assumed that because a worker or a contractor, as in this case, an experienced worker has received extensive training and instructions in relation to safety procedures, that such training and instruction cancels out the possibility that he will place himself or another worker at risk.

The obligations under the OHS Act require an employer to actively search out and where it is at all possible eliminate any risk to health and safety. In this case the Court determined there were simple and straightforward measures that could have been taken to avoid the incident. The Court determined there was a need for both general and specific deterrence when assessing the penalty. The fine was a substantial one having regard to the maximum penalty of $550,000.00 and the absence of prior conviction.

Fines of $50,000.00 for a director and $140,000.00 for a company

East Coast Contracting Services ("East Coast") was fined $140,000.00 by the Industrial Relations Commission for a breach of the Occupational Health and Safety Act for failing to ensure the safety at work of its employees and other persons exposed to risks due to the company's undertakings. Demolition works were being undertaken and it was alleged that there was an inadequate control of the demolition process, there was a failure to demolish the buildings by an appropriate sequential method and there was a failure to provide adequate overhead protection. There was also a failure to implement a site specific or adequate safe work method statement.

Demolition had progressed to the stage where the majority of the building had been removed with the exception of a portion of roof framing in the south east corner although the façade and attached awnings were still intact for the entire length of frontage. The order of demolition should have been pull down the awning, then the top of the façade before reducing and removing the supporting brickwork behind. There was no hoarding or overhead protective structure to protect the street adjoining the site as East Coast was relying on the existing façade to protect the public. There was movement in the awning which loosened the brickwork counter weighing the awning and as the brickwork collapsed it fell to the roadway. The awning became unstable, also collapsing onto the roadway onto an unoccupied motor vehicle. There were no pedestrians on the footpath at the time of the incident. The wind speed at the time of the accident was as high as 48 kilometres per hour. It was noted the defendant company no longer operated in demolition in the construction industry but had now undertaken major work tasks quarrying in Queensland and NSW. It was also noted the director was somewhat entrepreneurial.

In this case substantial penalties were imposed upon both the director and the company, particularly so for the director with fines totalling $50,000.00 for two offences as both employees and other persons were exposed to the risk from the company's activities.

Someone else's fault does not excuse another party

In the WorkCover Authority - v - Claude Van Bruggen t/as Dolphin Antenna Service, the Industrial Commission of NSW imposed a fine of $9,750.00 on a company for a breach of Section 9 of the OH&S Act. Mr Van Bruggen was installing a free-to-air television antenna at the east tower of the Telstra Towers located in Burwood. He was accompanied by Mr Paul Hunt who was assisting in the installation. Mr Hunt was a contractor. The men were working in the plant room and whilst attempting to feed the antenna cable from the plant room to level 7 of the site, Mr Hunt was electrocuted as a result of inserting an aluminium pole into a PVC conduit which contained an energised mains cable. He was fatally injured. The installation of the antenna was part of refurbishment works being carried out by Bovis Lend Lease. Van Bruggen was a sub-contractor to TA Eddisons who was a sub-contractor to Bovis Lend Lease. TA Eddisons' sole director, Mr Shirt, was a qualified electrician.

Unfortunately, unknown to Mr Hunt and Van Bruggen, at the time the disused PVC pipe was being used to feed the cable it contained a live electrical cable leading to the main switchboard.

The maximum penalty for this defendant was $55,000.00. Van Bruggen did not prepare a safe work method statement. Bovis and Mr Shirt did not provide Van Bruggen with an electrical circuity drawing of the building and the Court determined that Mr Van Bruggen should have asked for an electrical diagram.

The Court noted that the actions of Mr Shirt and the representatives of Bovis were also less than adequate as far as their responsibility was concerned

The Court noted that in all the circumstances as only one person was charged in relation to the incident the defendant could feel a sense of injustice. Nevertheless, whether or not that sense of injustice is sustainable was a matter for consideration, having regard to the facts and the circumstances. In this case Van Bruggen had not relied on other parties in such a way as he was misled as to the work circumstances prevailing. Mr Shirt and Bovis Lend Lease may have failed to ensure their respective responsibilities for a safe workplace were discharged but it was Van Bruggen's failure, as particularised, that gave rise to the risk to safety and the accident to Mr Hunt.

The penalty was a modest one for a fatality. The limited financial circumstances of the defendant played a significant role in the determination of the penalty. Notwithstanding, the case clearly demonstrates that despite the fact that when more than one party may have breached the Occupational Health & Safety Act, that will not allow the convicted defendant to scream of injustice and argue that a reduced penalty should be applied. It is the circumstances of an individual's breach which gives rise to the commission of the offence and determines the ultimate penalty.

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