GD News

Gillis Delaney Lawyers

September 2009 Issue

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.

Home Warranty Insurance - Warning For Those Who Acquire Properties

The NSW Court of Appeal has recently sounded a warning to purchasers of property that home warranty insurance may not cover claims for defects due to defective building works when the purchaser has full knowledge of the defects when the property is purchased.

In *Allianz Australia Pty Limited v Waterbrook*, the Court of Appeal was called on to determine whether or not a policy of insurance issued by Allianz complied with the Home Building Act, 1989 and further, whether or not a purchaser of the property that acquired the property from the original developer could seek to make a claim on the home warranty insurance policy in relation to defects where the purchaser was aware of the defects at the time of the purchase.

Yowie Pty Limited, a developer, entered into a building contract for the construction of a retirement village. A builder, now in liquidation, constructed the village pursuant to a contract with the developer. The developer sold the village to Waterbrook. Some of the work carried out by the builder was defective. When Waterbrook acquired the village from the developer some of the defects were reasonably visible and were known to Waterbrook.

Waterbrook made a claim under the home warranty insurance policy for the cost of rectifying defects. Allianz disputed the claim and Waterbrook commenced proceedings in the Supreme Court contending it was entitled to indemnity under the home warranty policy. Waterbrook argued that the policy did not comply with the Home Building Act as it contained exclusions inconsistent with the requirements of the Home Building Act and Regulations made under the Act. Whilst the Court of Appeal found this was the case the more significant issue for Waterbrook was the argument raised by Allianz that Waterbrook did not have a valid claim as it did not suffer any loss. Allianz argued that if Waterbrook acquired the village in full knowledge of the existence of, and nature and extent of defects Waterbrook did not suffer any loss or damage by virtue of the existence of those defects and therefore had no valid claim on the policy.

Justice Ipp concluded:

> *"a successor in title who acquires a building in full knowledge of its defects, suffers no loss from the existence of those defects".*

The Court of Appeal held in those circumstances the builders' breach of a statutory warranty imposed by the Home Building Act could not be said to have diminished the successor's assets nor increased its liability. Any adverse impact to the successor's financial position, and any loss to the successor, would result from the successor knowingly and deliberately paying more for the building than it was worth. The loss would be caused by the successor's own decision to purchase at the agreed price.

Justice Ipp noted that his observations were predicated on the "full knowledge" of the defects being not only knowledge of the existence of the defects but also knowledge of their significance. Justice Ipp noted:

> *"a party may know of the existence of defects (because they are patent) but may not appreciate - even acting reasonably - that major expenditure would be required to remedy them."*

Inside

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The Court of Appeal determined that Allianz would not be liable under the policy for claims in respect of defects of which Waterbrook had full knowledge in the sense described by Justice Ipp. The Court of Appeal concluded on general causation principles that a home warranty insurance policy would not respond to a claim for defects from a successor in title who acquires a building in full knowledge of its defects.

The Court of Appeal's findings sounds a significant warning to purchasers of property. A building report obtained before the purchase of a property will sound the death knell for defect claims on home warranty insurance policies where the building report identifies the nature of the defects and the significance of the defects. The rational behind such a view is that the price paid for the property is the true value of the property and has factored in the repair costs.

Purchasers who take care to identify the costs of rectifying defects which are known or detectable on an inspection must ensure that the price they pay for a property takes into account the cost of repairing defects as the home warranty insurance will not be an answer. Purchasers run the risk of missing out on the right to make a home warranty insurance claim where they are fully aware of the extent of defects at the time they purchase the property so the only real protection is a hard bargain on the price. So what value does the home warranty insurance have? Its value is really directed to undetected defects for purchasers of property not those known to the prospective purchaser.

Late Amendments In Claims Can Prove Costly

Case management by the Courts can have an impact on the nature of claims which can be made as was recently seen by the High Court's judgement in *AON Risk Services Australia Ltd V Australian National University*.

The bushfires in and around Canberra in January 2003 destroyed property belonging to ANU at its Mt Stromlo complex. In December 2004, ANU commenced proceedings against three insurance companies claiming indemnity for the Mt Stromlo losses. It subsequently joined AON to the proceeding, claiming that it had acted negligently in failing to renew insurance over certain ANU properties. A four week trial was listed to commence on 13 November 2006.

On 15 November 2006, which was the third day of a four-week period which had been allocated for the trial of the action in the Supreme Court of the Australian Capital Territory, ANU reached a settlement with the insurers. The sums secured by way of settlement did not reflect the full replacement value of the property. ANU sought an adjournment of the trial of its claim against AON and foreshadowed an application for leave to amend that claim to allege a substantially different case. It now sought to allege that, under a different contract for services, AON had been obliged to ascertain and declare correct values to the insurers and provide certain advices to ANU regarding insurance. The adjournment was granted and leave to the amend was granted. An appeal on that decision was ultimately heard by the High Court and the High Court unanimously ruled that ANU should not in the circumstances have the right to amend the claim.

The majority of the High Court noted :

> *"An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. …..A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate. In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings."*

The High Court held that the primary judge and the majority in the Court of Appeal in their judgements did not have sufficient regard to salient features of ANU's application for leave to amend including that :

- it sought to introduce new and substantial claims which would require AON to prepare a new defence as if from the beginning;
- the application was brought during the time which had been set for trial and would result in the abandonment of the remaining scheduled weeks of trial;
- it was not clear that even an order for indemnity costs would overcome the prejudicial effects on AON;

- and ANU had offered no explanation about why the case had been allowed to proceed to trial in its existing form when the basis upon which it was now seeking to amend had been known to it for at least 12 months.

The High Court noted that Court procedural rules recognise that delay and costs are undesirable and that delay has deleterious effects, not only upon the party to the proceedings in question, but to other litigants. The objectives of the Procedural Rules in question was seen as the timely disposal of cases and the limitation of cost. The High Court concluded when these objectives were applied in considering ANU's application for amendment it was significant that the effect of ANU's delay in applying for an amendment would be that a trial was lost and litigation substantially recommenced. This would impact upon other litigants seeking a resolution of their cases.

The High Court noted what was a "just resolution" of ANU's claim required serious consideration of the objectives of the Rules and not merely whether ANU had an arguable claim to put forward. A just resolution of ANU's claim necessarily had to have regard to the position of AON in defending it. An assumption that costs will always be a sufficient compensation for the prejudice caused by amendment was not reflected in the Rules. The High Court noted:

> *"Critically, the matters relevant to a just resolution of ANU's claim required ANU to provide some explanation for its delay in seeking the amendment if the discretion under r 502(1) was to be exercised in its favour and to the disadvantage of AON. None was provided."*

The High Court determined that adjourning the trial date and granting ANU leave to amend was contrary to the case management objectives and should not have been permitted.

So be warned. It is not enough to have an arguable case to amend a claim. A claim must be brought in a timely fashion and where amendments to a claim are to be made they must be made at the earliest opportunity. Late amendments on the day of the hearing may not always be permitted as ANU found out hard way.

Plaintiff Has To Do More Than Turn Up

The NSW Court of Appeal has recently reminded injured persons they have to do more than simply give evidence that they have been injured to be successful in a claim.

In Penrith Rugby League Club Limited trading as Cardiff Panthers v Elliott, Cardiff Panthers occupied premises in which it operated a licensed club including a car parking area. Yvonne Elliott attended the Club on 4 September 2004 with her son and daughter. They had lunch and remained at the club until about 6.30pm. Elliott did not consume alcohol during the course of the afternoon. Elliott and her son (her daughter had left 5 minutes earlier) left the Club via the rear entrance/exit which led to the car park. Elliott fell in the car park and sustained injury.

Elliott's evidence at trial was that approximately 4.6 metres from the door through which she left the Club, she felt her feet move on something as if they were on a roller. There was evidence that there were twigs or sticks on the ground near where Elliott fell. Elliott argued that the car parking area where she fell was not adequately lit and the system of cleaning and maintenance was inadequate and it was this that caused her fall.

The trial judge found that if the lights had been functioning when Elliott fell, then the judge would not have regarded the presence of small twigs or sticks on the surface of the car park as a significant hazard and it was enough that the car park was cleaned daily. Elliott however succeeded at trial on the basis that the trial judge found that the Cardiff Panthers were negligent in that they failed to provide adequate lighting in the car park.

Significantly at trial, there had been no discussion in relation to the provisions of the Civil Liability Act 2002 despite the fact that this is currently the law in NSW.

The Court of Appeal also noted that the evidence before the trial judge did not address the following 5 important issues:

- There was no evidence as to why the two flood lights were inoperative when Elliott fell. There was no evidence as to whether the absence of external illumination was due to a failure of the sensor, vandalism, the use of an override switch, a power failure or some other cause.
- There was no evidence as to the precise risk of the failure of the flood lights against which the defendant might reasonably have been expected to take precautions. Elliott did not, for example, call expert evidence in relation to the likelihood of malfunction in the sensor or a power failure.

- There was no evidence as to whether the flood lights had failed to come on at any time after sunset on the day or whether one or both in fact had come on and ceased to function before 6.30pm.
- There was no evidence as to whether it was technically feasible to install a mechanism that would alert staff at the Club to the failure of both lights irrespective of the cause of failure and there was no evidence as to the cost of installing such a system.
- There was no evidence as to what measures the Club could reasonably have taken to remedy a failure of external lighting once this failure was discovered. Depending upon the cause of the failure, the exercise of reasonable care might have resolved the problem almost immediately after the failure was discovered. However, even the exercise of reasonable care might have involved a delay before the specific defect could be identified and rectified.

In these circumstances Elliott's claim failed. The evidence in the case was simply insufficient to justify a finding that a reasonable person in the position of Cardiff Panthers would have instituted a system of visual inspection of the floodlights at or shortly after sunset. The burden was upon Elliot to adduce evidence supporting such a finding, but she did not do so.

The case is again a reminder that a plaintiff must do more than simply turn up. It is not simply enough that an accident has happened and a person is injured for a Court to find negligence. In this case the plaintiff had to do more than simply demonstrate that the lights were not operative at the time of her fall to succeed in her claim and as she had not done so her claim could not succeed.

Aviation Accidents-No Need For Negligence

The recent High Court decision in *ACQ Pty Limited - v - Gregory Cook* highlights the claims that insurers of Aircraft can face in the aftermath of an aircraft accident and in particular the real impact that flows from the Damage by Aircraft Act 1999 which provides a regime to recover compensation from aircraft owners and operators even where there has been no negligence.

The Damage by Aircraft Act 1999 provides that damages in respect of an injury, loss, damage or destruction arising from specified circumstances involving an aircraft are recoverable against the owner or operator of an aircraft without proof of intention, negligence or other cause of action, as if the injury, loss, damage or destruction had been caused by the willful act, negligence or default of the defendant or defendants. The owner and operator are jointly and severally liable . The specified circumstances in which they are liable include:

(a) an impact with an aircraft that is in flight, or that was in flight immediately before the impact happened; or
(b) an impact with part of an aircraft that was damaged or destroyed while in flight; or
(c) an impact with a person, animal or thing that dropped or fell from an aircraft in flight; or
(d) something that is a result of an impact of a kind mentioned in paragraph (a), (b) or (c)."

So what were the facts in Cook's case. Mr Stubbs was flying a crop dusting aircraft when whilst flying low the tail fin of the aircraft brought down a high voltage power line into a cotton field. Mr Cook was called to the site by his employer, Northpower to affect repairs on the power line. Unfortunately the field in which the power line came down was particularly wet and difficult to traverse. As Mr Cook walked towards the downed power line he tripped and came within an unsafe distance to the downed power line. The subsequent electric shock caused serious injury to Mr Cook.

Mr Cook sued both ACQ and Aircair Moree Pty Ltd for damages pursuant sections 10 and 11 of the Damage by Aircraft Act and Northpower and the owner/operator of the aircraft for negligence. He was successful before the primary judge in the District Court of New South Wales, who awarded him damages of $953,141.00. An appeal followed.

The Court of Appeal when it considered the circumstances confirmed that the Damage by Aircraft Act 1999 applied as the conductor in the field was extremely dangerous in itself; the impact caused it to be in a position where people were at risk of getting dangerously close to it, and Cook was injured when he encountered that precise risk. However the Court of Appeal set aside the findings in relation to negligence.

In relation to Mr Stubbs the Court of Appeal discussed the extent of the duty of care he owed others when operating the aircraft. Whilst it was noted Mr Stubbs may well have owed a duty to people on the ground who might be injured if the plane or anything dropped from it struck them or caused them to injure themselves whilst taking evasive action, there was a limit to the duty. When Mr Stubbs knew he was flying in close proximity to high voltage electricity cables, he may well have owed a duty to people on the ground who might be struck or come in the immediate vicinity of the wire. This would include inexperienced people who approached too close to the fallen wire or people who might come near a fallen wire without realising it was there. However, this did not necessarily mean that Mr Stubbs owed a duty of care to anyone else.

The Court of Appeal noted it could be expected that a power worker sent to repair a damaged power pole would be properly trained and experienced. The power worker would be able to take care of himself so far as avoiding electric shock. Justice Campbell commented it would be a realistic possibility that a power authority would send a person who was properly trained, experienced and capable of protecting himself. In that circumstance the taking of reasonable care for the interests of the hypothetical power worker did not result in the imposition of a duty of care to that power worker on Mr Stubbs.

Despite loosing part of the appeal Cook retained his original judgement even though there was no negligence. But that was not the end of the matter. An appeal to the High Court followed . The appeal was limited to an argument that the Damage by Aircraft Act 1999 did not apply as the legislation was not designed to provide a universal comprehensive scheme to award damages to every person who sustained an injury that was in some way connected to the impact of an aircraft, part of an aircraft, or something which fell from an aircraft whilst in flight. In particular it was argued that "something that is a result of an impact" of those kinds should be construed as being a thing (for example, a fire or a collapse of a building) which "has an immediate (or reasonably immediate) temporal, geographical and relational connection with an impact."

The High Court considered it did not strain the language of the Damage by Aircraft Act to characterise the events following the impact of the aircraft with the conductor as having “caused” Mr Cook’s injuries. The High Court concluded that Mr Cook’s injuries were caused by the dangerous position of the conductor. The conductor was in a dangerous position because the aircraft had struck it. The High Court agreed with the NSW Court of Appeal findings in relation to the Damage by Aircraft Act .

So Cook keeps his damages and aviation insurers are now on notice that the Damage by Aircraft Act 1999 has a far reaching impact , perhaps one which was not originally contemplated by the insurers.

Construction Industry Security of Payment Update – The Dual Payment Claims of Dualcorp

The Court of Appeal recently handed down a significant decision in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWCA 69* which will have far reaching ramifications for the building industry. The upshot of the decision for contractors is that effectively you only get one shot to get your payment claim and Adjudication Application right. For Principals on the receiving end of payment claims, a new avenue has opened up for preventing a second payment claim that seeks amounts that have already been the subject of a previous adjudication determination.

The Court of Appeal has now given significantly greater status to adjudication determinations than previously thought. The background of this matter is as follows:

- On 29 January 2008 Dualcorp served a payment claim on Remo in the sum of $743,612.50 (the First Claim). Remo dually served a payment schedule and the matter was adjudicated on 11 March 2008 in the sum of $75,509.43.
- Dualcorp served a further payment claim on 3 March 2008 (“the Second Claim”) containing the same subject matter as the First Claim. Considering the matter had already been dealt with Remo did not respond to the Second Claim with a payment schedule.
- Dualcorp filed a Judgement Debt in respect of the First Claim on 3 April 2008.
- Obviously being dissatisfied with the outcome of the adjudication of the First Claim, Dualcorp then sought a summary judgment pursuant to s.15 of the SOP Act in respect of the Second Claim, on the basis that Remo had not provided a payment schedule.
- On appeal, the Court of Appeal held that the application for summary judgment must fail on the basis that Dualcorp should not be allowed to re-ignite a substantive claim that had already been determined on its merits by the Adjudicator.

What is not clear from the written decision, and a significant factor in Dualcorp’s complaint, was the fact that the Adjudicator had rejected a number of Dualcorp’s claims on the basis that not enough evidence had been provided. Dualcorp was of the view that given that the Adjudicator had not finally determined those items, it should be allowed to issue a further payment claim and have those items substantively determined.

Although on one view of it this seems fair, the Court of Appeal specifically rejected the submission. In reference to Dualcorp’s complaint that the Adjudicator had not determined substantive merits, and in response, the Court of Appeal noted:

> *“Dualcorp asserts that this approach could produce unfair outcomes where a claim has not been the subject of an adjudication on the merits but has been rejected for want of evidence. It was submitted that because of the unfairness that would flow from precluding a Claimant bolstering its evidence in another adjudication it (the Legislature) cannot*

have intended that adjudications would be conclusive.

I do not agree. It is not at all unusual that person seeking remedies or other forums have a once only opportunity to bring forward evidence and submissions in support of their claim. This is in fact the usual situation and consistent [with other Judgments]…it is a 'central and pervading' tenant of the Judicial system…that controversies once resolved are not to be reopened except in narrowly defined circumstances."

The Court of Appeal held 'issue estoppel' (the issue has been determined) applied and that it would be an abuse of process for the Claimant to rely on a later process to obtain Judgment that might conflict with an earlier determination.

In essence, the Court of Appeal held that Dualcorp should be prevented from reopening a dispute that had already been substantively determined, despite the fact that it had been determined on the basis of lack of evidence.

In doing so, the Court of Appeal held that adjudications and the Adjudicator, like other tribunals, are vested with significant judicial authority to finally determine a dispute in relation to a progress claim.

Accordingly, the only real process to revisit adjudication determinations, if a Claimant or Respondent is unsatisfied, is through section 32 of the Act, which is by referral of the entire contractual dispute back to the Court. Both parties still retain that basic right.

The message of Dualcorp is that once an Adjudication has been determined, a Claimant cannot seek to revisit the dispute and engage in 'forum shopping' or 'Adjudicator shopping'.

Interestingly, the minority decision of the Court of Appeal achieved the same result by a much more straight forward mechanism. That is, that the second payment claim and the first payment claim of Dualcorp had the same reference date under the Contract and therefore the second payment claim was invalid in any event.

However, it is far more significant that the Court of Appeal has now given clear judicial sanction to the finality of Adjudications and this is a clear message to the construction industry who must now recognise that you have one shot to get a payment claim and an adjudication correct in terms of evidence and submissions.

For Claimants, it is absolutely imperative that you seek legal advice from a construction specialist at the time you are preparing a payment claim and well prior to the preparation of adjudication submissions.

For Respondents or Principals, where multiple claims are being received it is now possible to seek an injunction to prevent a Claimant from proceeding with multiple payment claims where a previous claim has been determined on the same issue(s).

It should also be remembered that in any subsequent Adjudication, the subsequent Adjudicator has to accept any value given by a previous Adjudication unless one or other of the parties can show that the value has changed due to further circumstances.

The decisions of *Perform (NSW) Pty Limited v Nev-Aust Pty Limited t/aw Novatech Construction Systems [2009] NSW SC 416* and the *University of Sydney v Cadence Australia Pty Limited & Anor [2009] NSW SC 635* have recently reaffirmed the decision of Dualcorp and gone one-step further by confirming that injunctions are available restraining subsequent payment claims where the 'Dualcorp principle' applies.

The clear message is that Adjudication, albeit a very fast method of dispute resolution, still requires the same level of diligence in terms of proper evidence and submissions as any other Court proceeding. If a claim fails for want of evidence there is no opportunity to have those items re-adjudicated and the Claimant will be forced to revisit the claim by fully contested Court proceedings as opposed to going back to Adjudication, in order to avoid the possibility of an injunction application.

For Principals, the threat of an injunction is now a very potent defence if the relevant circumstances exist.

We would suggest to all clients in the construction industry that the adjudication process is significantly complex and a very technical area of construction law and should not be approached without specialist legal support, particularly in light of Dualcorp and other significant decisions. If you are considering preparing SOP payment claims or responding to them, contact us.

Union Official's Rights Of Entry For OH&S Purposes

The Federal Magistrate's Court in *Hogan v Riley & Ors* has recently considered whether or not Union officials who seek to exercise rights of entry for OH&S purposes must provide particulars of alleged safety breaches in order to exercise their rights of entry under the Workplace Relations Act, 1996.

An Australian building and construction inspector brought civil remedy proceedings against a subcontractor, a project manager, an employee-general foreman and a director of a company for obstructing or delaying the entry of two Union officials to the site of the National Convention Centre in Canberra. The Union officials both of whom were members employed by the CFMEU had allegedly formed a reasonable suspicion that their had been a possible breach of the OH&S Act and in turn the *Workplace Relations Act*. The Union officials were permit holders authorised to exercise rights of entry. No details of the alleged OH&S breach were provided by the Union officials other than a bold statement or assertion that there had been a breach. The Court noted that when the Union officials explained their intention to a number of workers at the entrance of the site, among other things they were quickly, and directly advised that they needed to speak to the project manager and they could contact the person by telephone and the persons to whom the Union officials spoke knew nothing about any suspected breach of the *Occupational Health & Safety Act,* questioned if there had been such a breach and asked generally what was the safety breach. The Union officials were also told they could not come onto the building site. The Union officials then spoke to the project manager by telephone and did not pursue their attempt to enter the site any further. At no time during their brief attempt to enter the work site did the Union officials provide any details of the alleged breach of the OH&S legislation.

The Federal Magistrate held that because the officials did not provide details of the alleged breaches they acted contrary to Section 767(1) of the *Workplace Relations Act* which prescribes that a permit holder must not act in an improper manner. It was noted that there was no statutory requirement to provide particulars of the breach however the Union officials conduct in not providing the most basic information about the alleged safety breaches, constituted improper conduct. It was noted that simply to insist, without more, that there has been a safety breach was on the facts insufficient and offended Section 767(1) of the *Workplace Relations Act*. The Court noted that doubtlessly there will be times and circumstances when minimal information is necessary. However on the facts of this case, not to provide basic information about the alleged breach had the effect of significantly restricting the capacity of the Union officials from undertaking let alone pursuing the very investigations they in fact sought. The actions of the Union officials hampered everyone.

The Court held that the failure to provide particulars of the alleged safety breaches took the Union officials outside the right of entry provisions. The Federal Magistrate noted that even if he was wrong in his views in this regard he would not have imposed a penalty on the defendants having regard to the circumstances. The Magistrate also noted that on the very limited information available to them at the time when the Union officials attempted to exercise their rights they did not have sufficient basis upon which to form a reasonable suspicion that there had been a safety breach as they alleged.

Union officials will need to provide proper information to businesses about "suspicions" concerning breaches of the Occupational Health and Safety Act otherwise their rights of entry under the Fair Work legislation may well be adversely affected.

OH&S Roundup

Investigations Following An Accident Maybe Subject To Legal Professional Privilege

The Industrial Court of NSW has recently confirmed that investigations carried out by a Company at the request of their lawyers following an accident and reports relating to those investigations were subject to legal professional privilege and did not have to be provided to WorkCover. In the case of *Inspector Nicholson v Waco Kwikform Limited* WorkCover sought to obtain copies of 4 documents from Waco Kwikform which were created after Waco Kwikform consulted its lawyers following an incident which resulted in the death of a worker.

Waco Kwikform contacted its lawyers who then advised in a letter:

> *"We refer to legal advice Waco Kwikform has sought in relation to the matter.*
>
> *As you are aware there is a possibility that this incident will give rise to proceedings under the Occupational Health & Safety Act 2000 (NSW). So that we may provide Waco Kwikform Limited with advice concerning all aspects of this matter it would be appreciated if you could co-ordinate the preparation of a report concerning this matter and forward the report to us. Please mark the original version of any report (and any documentation produced for the purposes of*

preparing the report) to our attention and clearly indicate on its cover that it is a document prepared for the purpose of obtaining legal advice. The appropriate form of wording is as follows:

"Privileged and confidential - prepared solely for the purpose of obtaining legal advice."

Any copies of the report should be carefully limited and should all bear the same notation on the cover."

Waco Kwikform subsequently created 4 documents, a handwritten statement from the project supervisor, investigation notes prepared by the National OH&S manager as part of the preparation of the report into the incident, a statement from a sales representative and an investigation report prepared by the National OH&S manager.

Waco Kwikform claimed legal professional privilege over the documents and declined to produce the documents to WorkCover. WorkCover applied to the Industrial Relations Court for access to the documents however the Court upheld the claim of legal professional privilege.

The Court noted that legal professional privilege protects the confidentiality of certain communications made in connection with giving or obtaining legal advice or the provision of legal services including representation and proceedings in Court. The test for claiming legal professional privilege is the dominant purpose test. It is necessary to determine the dominant purpose for the document. That test is an objective test however the subjective intention of the person responsible for the document coming into existence is also a relevant factor.

It is was noted that consideration of "dominant purpose" requires not only the purpose or intended use be characterised but attention to the question "whose purpose". In the ordinary case the purpose would be that of the person who brings the document into existence. However where the document is commissioned by an external solicitor then the relevant intention would be that of the solicitor.

Although WorkCover argued that there were multiple purposes for the documents including compliance with the Occupational Health & Safety System which required a report into an incident to be prepared and further the report would be used to assist the Board to decide whether there was a need to revise safety and operational procedures and to obtain legal advice, the Court noted the reports were commissioned by solicitors and matters of accident and injury reporting were therefore unlikely to be of more than peripheral concern.

The Court held that the dominant if not the only purpose for the production of the reports and documents was for obtaining legal advice. It was also noted that a serious accident would warrant the anticipation of legal proceedings. For those reasons the legal professional privilege was upheld in relation to the four documents which did not have to be provided to WorkCover.

Employers should consider consulting their lawyers at an early stage to ensure there is protection over documents produced in relation to investigations concerning accidents.

Residential Building Works Results In Substantial Fines

The Industrial Relations Court of NSW has recently imposed fines aggregating nearly $200,000.00 in relation to breaches of the OH&S Act flowing from an accident at a construction site during the erection of wall frames in a duplex.

At the time of the offence the principal contractors at the site, S&M Halabi had subcontracted the supply and installation of wall and roof frames to C&J Carpentry. C&J Carpentry employed an apprentice carpenter who was 15 years of age and had approximately 4 weeks experience as a first year apprentice. During the course of the construction of a two storey duplex the first level wall frames were being erected and voids were present in the first floor in order to accommodate staircases which were to be built to connect the two floors. The apprentice whilst manoeuvring a 6 metre long length of timber fell through the void falling about 3.5 metres. He was not using any fall protection equipment and at the time there was no guarding or railing around the void. Temporary guarding and railing which had been in place earlier had been removed prior to the accident. Significant injuries resulted to the worker.

The apprentice had received no safety training apart from a direction to be careful and the Court noted that given the youth and inexperience of the worker he required close supervision and adequate training. It was noted the defendants had no effective safety system in place on the day of the offence and the nominated supervisor was absent from the site when the apprentice fell through the void. The carpentry company had not inspected or conducted, a risk assessment nor did it undertake a risk assessment in respect to the apprentices work.

The principal contractor and the carpentry company and a director of each of those companies were prosecuted for breaches of the OH&S legislation. The Court noted that having regard to the level of culpability and the respective roles of each defendant their responsibilities were broadly equal. The Court imposed fines of $90,000.00 on each company and $9,000.00 on each director.

Substantial Fine Despite Defective Work Being The Fault Of Others

Trinity Catholic College Lismore was recently fined $80,000.00 by the Industrial Relations Court of NSW for a breach of the Occupational Health and Safety Act, arising from the death of a child at the school.

The school was charged with failing to ensure a gate system at the College entrance was safe. WorkCover asserted that the school failed to adequately maintain a proper system for the reporting and rectification of defects with respect to the school gates at its entrance. It was also argued the school failed to carry out a risk assessment of the gate system to ensure the gate system was safe and secure.

The evidence demonstrated that there had been problems with the gate in the past. The Court was satisfied that the school was well aware the gate system which made up part of its fencing was not in good working order. Some rectifications had been carried out to the gate given complaints which had been received and there was evidence that at least on one previous occasion the gate had been sighted off its runner and on the ground.

The Court noted the College was aware the gate system had faults and some defects had been recognised and resolved, either through rectification by outside contractors or through the skilled endeavours of the head of maintenance. A particular problem relating to stopper plates failing to hold the gate on track went unrecognised. No rectification was made to this fault in the gate system. The Court noted that the College entered a plea of guilty but submitted there was a defect in the metal stopper concerned which was not adequate to restrain a gate leaf and this was not an obvious risk.

The College asserted the gate had operated without apparent problem by opening and closing each day for some years and submitted the Court would not find there was a foreseeable element to the risk. The Court disagreed noting the unsatisfactory operation of the gate system in the past. The Court noted that had there been a proper risk assessment of the gate system after notice was given of its unreliability the particular faults as to the ineffectiveness of the stopper plate may have been recognised.

The Court noted the design of the gates by Northern Rivers Fencing was faulty and the installation revealed faulty workmanship. Therefore there had been a contribution to the risk from a third party. This was given consideration in assessing the penalty to be imposed, however, as there were obvious steps that could have been taken to address the risk and there was a high risk to the safety of any person required to walk through the gate, a substantial penalty was required.

In this case, the College's failure to adequately deal with the defects in the gate or carry out a proper assessment of the repairs needed ultimately resulted in a penalty of $80,000.00.

Arbitrator Or Doctor - Jurisdictional Limits In The Workers Compensation Commission

The current hot issue in the NSW Workers Compensation Commission (WCC) is the jurisdictional limits of Arbitrators and doctors. The WCC have Arbitrators to deal with legal/ factual issues and also maintain a panel of doctors known as Approved Medical Specialists (AMS) to provide binding opinions on the level of permanent impairment. The last 18 months have seen a number of decisions focusing on this issue.

In *Total Steel of Australia Pty Limited v Warentini (2007)* Deputy President Snell found that once an Arbitrator had determined the effects of injury there was no longer any medical dispute to refer to AMS for assessment. In Harroun v Rail Corporation NSW (2008) the Court of Appeal examined the situation where the findings of a Medical Appeal Panel (resulting from a medical appeal from an AMS) were inconsistent with the consent findings made by an Arbitrator. The NSW Court of Appeal accepted that factual legal issues had to be resolved by an Arbitrator but medical issues such as permanent impairment were to be decided by an Approved Medical Specialist or Medical Appeal Panel. Arbitrators had no jurisdiction to determine the issue of permanent impairment and any Arbitrator findings on this point were not binding on an AMS.

In 2009 Deputy President O'Grady provided further commentary in *Peric v Pure & Delicious Health & Anor (2009)*. The

medical evidence was that the effects of the injury suffered by the worker had resolved and the Arbitrator declined to refer the worker for AMS assessment. On appeal, Deputy President O'Grady commented that findings in relation to the pathological consequences of injury are within the exclusive jurisdiction of the Arbitrator and that once the Arbitrator had found the effects of injury had resolved there was no longer any medical dispute to be referred to an AMS for assessment.

The most recent decision is *WorkCover NSW v Evans (2009)* which was decided on 11 August 2009. In Evans, the Arbitrator had originally determined that the Applicant should be referred to an AMS for assessment of permanent impairment in relation to the back, loss of sexual organs and right leg. This was despite a finding made originally by an Arbitrator that the back injury which occurred in 1999 (and the subsequent loss of sexual function) were of a "minor and transient nature". The factual findings by the Arbitrator was that the aggravation had ceased by 1 July 2002. Deputy President Snell commented that once a finding that the effects of an injury had ceased was made, a worker could not be referred to an Approved Medical Specialist for determination of permanent impairment. Deputy President Snell only referred the worker to an AMS for permanent impairment assessment for the parts of the body that the Arbitrator had determined were still ongoing injuries.

These decisions will focus both scheme agents and the legal profession on the importance of the medical evidence relied upon in proceedings. All parties must carefully examine the nature and extent of the current pathology at the time the matter is determined by the Commission. Irrespective of whether an injury originally occurred, if there is sufficient evidence to support a finding that the effects of the injury have ceased, the issue as to whether the injury has resolved must be determined by an Arbitrator prior to any referral to an AMS for the level of permanent impairment. In short it is the exclusive jurisdiction of Arbitrators to determine questions of causation and liability. Questions of permanent impairment remain the sole domain of the Approved Medical Specialist and subsequent appeals to the Medical Appeal Panel.

Noisy Employer

If an injured worker lodges a claim for industrial deafness under the Workers Compensation Act, 1987, their last "noisy employer" is liable to pay compensation benefits to the injured worker. The employer then has a right of recovery from any previous noisy employers in the five years preceding the date of injury.

An important point to note is that the injured worker must still prove that the employer against whom they have made the claim is a "noisy employer" otherwise the claim will fail as was seen in the recent Workers Compensation Commission judgement in Salama - v - Q Catering Limited.

Salama was employed by Q Catering Limited in their catering facility. In the first five years of his employment he worked in the wash up area and claimed he was exposed to the noise of large washing machines. Thereafter he worked in the transport section. His duties included driving a high lift truck from the catering facility to the aircraft and back. He claimed he was exposed to noise from aircraft engines, generator noise and other incidental noise such as that of aircraft taking off and landing.

It is often seen in industrial deafness claims that workers simply rely on a medical report from an ear, nose and throat specialist to support the claim. Often there is no expert evidence concerning the nature and level of noise during the employment as the employer concedes that they are a noisy employer. However this was not the case in Salama, as an acoustic expert, Mr Stuart McLachlan gave extensive evidence on behalf of the employer disputing exposure to a noisy environment. Q Catering also relied on a report from an ear, nose and throat surgeons which conceded Salama had a noise induced deafness although disputed that any component was due to his employment with Q Catering.

Salama simply relied upon the evidence from the ear, nose and throat specialist that supported his claim. The arbitrator found that Salama failed to discharge the onus which he bears in proving that an employer was a "noisy employer".

An injured worker must prove that the volume and duration of the noise exposure was sufficient to give rise to industrial deafness. The arbitrator in this case found the evidence of Mr McLachlan and his noise survey was sound, consistent and compelling compared to the evidence provided by Salama and the ENT specialist in the report. The arbitrator was therefore not satisfied Q Catering was a noisy employer or that Salama's binaural hearing loss arose out of or in the course of his employment with Q Catering.

Injured workers bear the onus of proving their employment was noisy and the level of noise to which they were exposed was sufficient to cause industrial deafness. This is not evidence that can be given by a lay person. An injured worker must provide detailed evidence of the nature (volume) and extent (duration) of the noise exposure and that evidence should be provided to

an expert for his or her opinion as to whether the "tendency, incidence or characteristics" of that employment are such as to give rise to a real risk of industrial deafness. Of course if the employer does not dispute that they are a noisy employer there is no need for additional evidence on this issue.

An injured worker's subjective account of noise does not suffice to prove a claim when faced with compelling expert evidence that the employment was not noisy. There has to be acceptable evidence to support the injured worker's claim that the employment was noisy.

Salama simply failed to discharge the onus upon him and there was no expert evidence to support his assertions. The report of the ENT specialist was not enough.

Claims for industrial deafness must be properly prepared by injured workers to succeed. It is not enough to have the evidence of an injured worker together with the report of a specialist. There must be more compelling evidence to support such a submission. There has to be some evidentiary basis for the assertions raised by injured workers in this regard.

One-Off Outburst - Not Cause For Termination

Inappropriate and threatening behaviour towards another employee will be grounds for disciplinary action however may not be sufficient to justify termination of employment as was seen in the recent decision of the Industrial Relations Commission of NSW, in Cockayne - v - Hurstville City Council.

Cockayne was 39 years of age. He had been employed by Hurstville City Council for over 14 years. He had an exemplary work record.

On 24 July 2008 Cockayne was involved in a verbal altercation and physical confrontation with his supervisor concerning the availability of a Council truck to assist his work that day. After the altercation Cockayne returned to the office where he proceeded to smash an office chair into the floor, breaking the chair and causing some slight damage to a table.

The Council suspended the worker and conducted a review into the incident. When the review was completed, the Council terminated the worker's employment.

The worker brought an Application Seeking Reinstatement on the grounds the termination was unfair.

The Commission determined:

- The worker had lost his temper and as a result had behaved in a totally unacceptable way towards his supervisor.
- However, the Commission found his actions were not malicious or deliberate but were the result of a build up of stress.
- The stress that was occasioned to the worker on the day of the incident came from two sources, being the anniversary of the death of his brother, who died in his arms following a scuba diving accident; and being overworked. Cockayne was responsible for obtaining significant grants for the benefit of the Council and at the time of the incident, he was working without assistance in preparing the grants as well as his normal duties.

Commissioner Bishop noted that a good and efficient manager should be aware of what is going on with regards to workloads that he/she manages and should be mindful if any particular employee appears to have taken on too much (or more than is expected/required, especially work related matters carried on out of work hours).

The Commissioner noted this may impact on an employee's ability to carry out their designated duties effectively. The Commissioner accepted Cockayne was overworked during the week of the incident, whilst some of the overload was caused by Cockayne's own enthusiasm and dedication to his work.

The Commissioner accepted Cockayne was under personal stress and that the Council were not to know of that personal stress. He noted Cockayne needed to appreciate his employer could only assist him if they were aware of the problem.

However, the Commissioner noted the investigative procedures followed by the Council, whilst appropriate and fair, were hampered and flawed by the absence of proper minutes/notes being taken at the first two meetings and also the failure to then provide such minutes/notes for verification. The Commissioner noted this was generally a standard part of

disciplinary/investigative procedures in the Public/Local Government and perhaps to a lesser extent, in the private sector. This, in the Commissioner's view, did not allow for there to be a proper informed decision to be made or a decision that could be arrived at beyond doubt.

The Commission ordered:

- Cockayne to be reinstated.
- Cockayne provide a written apology to his supervisor for his behaviour.
- A first and final warning to be placed on Cockayne's file.
- Cockayne to provide evidence of his attendance/participation in anger management counselling.
- Cockayne was to attend further training as is deemed appropriate by the Council.

Employers should be aware that whilst behaviour that is both clearly inappropriate and threatening behaviour towards another employee will be grounds for disciplinary action such conduct must be viewed in light of the worker's personal circumstances and the work history prior to any incident. The factors must be balanced before any conclusion is reached as to whether or not the employee should be terminated.

Further, notes of investigations and interviews should be kept and provided to any review committees to ensure an accurate record of the investigation and interviews is maintained which is available to decision makers when it comes time to consider all relevant factors.

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