GD NEWS / DECEMBER 2016

IN THIS EDITION

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An insurer claiming dual insurance from another insurer can rely on Section 54 of the *Insurance Contracts Act*

The legal principles involving a claim by one insurer against another insurer for dual insurance contribution have been settled since the late 1960s.

Two or more insurers with coordinate liabilities each have a right to claim contribution from the other insurer(s).

An insured may choose the policy under which to bring a claim. The insurer chosen by the insured then has a right to claim contribution against the other insurer(s).

The fundamental question is whether the obligations upon each insurer, pursuant to each contract of insurance, can be characterised as being of the same nature and to the same extent.

A common defence to a claim by one insurer against another insurer for dual insurance contribution is to contend that the policy would not respond had a claim been made by the insured.

An example is if the contract of insurance contains an exclusion clause that would defeat a claim, if made, by the insured.

The provisions of the *Insurance Contracts Act 1984* (Cth) ("ICA") govern claims made by an insured under contracts of general insurance.

In particular, Section 54 of the ICA mandates that an insurer may not refuse to pay claims by reason of certain acts or omissions of the insured.

However, a dual insurance claim for contribution is an equitable remedy available to insurers with coordinate liabilities to the same insured.

What if an insured makes a claim under one policy which responds to the claim, and that insurer seeks dual insurance contribution from the other insurer whose policy would not, but for the operation of Section 54 of the ICA, respond to the claim, if made?

The Full Court of the Federal Court of Australia recently considered this very question in *Watkins Syndicate 0457 at Lloyd's v Pantaenius Australia Pty Limited & Ors*.

In the above case the insured was the owner of a fibreglass yacht built in 2006. The yacht was insured with the appellant ("Watkins") which issued a contract of insurance via an Australian underwriting agency, Nautilus Marine Insurance Agency Pty Limited ("Nautilus").

Pursuant to the Nautilus policy, the sum insured for the vessel was $250,000. The Nautilus policy also provided cover for legal liability up to $10 million and personal accident cover up to $50,000.

The insured also entered a contract of insurance with the respondents via an insurance broker and agent ("Pantaenius").

Pursuant to the Pantaenius policy, the sum insured for the vessel was $275,000. The Panteanius policy also provided cover for personal liability and personal accident cover.

The insured effected the Pantaenius policy when it became clear to him that the Nautilus Policy may not cover the vessel for a Freemantle to Bali race in which the insured was about to participate.

As the vessel was a "pleasure craft" (one used for recreational and sporting activities and owned by an individual) the *Marine Insurance Act 1999* (Cth) did not apply by reason of Section 9A of the ICA.

The insured took the vessel on the Fremantle to Bali race which cleared customs on the outward voyage. The vessel then returned to Australian waters during the period of insurance governing both contracts of insurance and, when heading for Darwin (where the vessel was to clear customs on the inward voyage), the vessel ran aground.

There was no dispute about the fact that the Pantaenius policy responded to the loss. The insured's claim under the Pantaenius policy was paid.

The underwriters of the Pantaenius policy then sought dual insurance contribution from Watkins in respect of the Nautilus policy. Watkins denied liability for the claim.

Watkins contended that the insured could not bring his claim within the relevant insuring clause which stated:

> *"Cover is only provided under the policy in relation to events causing loss, damage or liability which occur:*
>
> - *within the geographic limits specified on your Certificate of Insurance. All cover provided by the policy will be automatically suspended when your boat clears Australian Customs and Immigration for the purpose of leaving Australian waters and will recommence when it clears Australian Customs and Immigration on return ..."* (emphasis added).

At first instance before Justice Foster of the Federal Court, Watkins argued that the claim for contribution was defeated as the Nautilus policy would not have responded to a claim by the insured had it been made.

It was argued on behalf of Watkins that the incident involving the vessel running aground occurred prior to the vessel having cleared Australian Customs and Immigration on return from the Fremantle to Bali yacht race.

It followed, so Watkins contended, that the occurrence took place whilst the insurance was suspended.

Pantaenius and others argued that, had the insured made a claim under the Nautilus policy, the insured would have had the benefit of Section 54 of the ICA to defeat the insurer's reliance upon the failure by the insured to bring the claim within the meaning of the insuring clause.

Foster J agreed with the contentions on behalf of Pantaenius and allowed the claim for dual insurance contribution.

Watkins appealed to the Full Federal Court of Australia.

By a unanimous judgment the Full Court comprising Chief Justice Allsop and Their Honours, Justices Rares and Besanko, dismissed the appeal.

Before the Full Court, it was argued for Watkins that Section 54 of the ICA was only for the benefit of an insured and not available to an insurer in a claim for dual insurance contribution.

Support for this argument, according to Watkins, was found in the wording of Section 54 itself which referred to *"a claim by the insured"*.

The Full Court rhetorically asked the following question:

> *"By way of example, could there be any doubt that contribution would lie between two insurers, to both of whose policies Section 54 applied, in circumstances where neither policy in its strict terms responded and the insured made a claim on one, but not the other, policy?"*

In arriving at that conclusion, the Full Court held that, in a claim for contribution between insurers where one policy would, but for the operation of Section 54, not respond to the claim, the question is whether the obligations between the insurers can be characterised as being of the same nature and to the same extent, following earlier authority of the High Court in *HIH Claims Support Limited v Insurance Australia Limited*.

The Full Court stated that:

> *"The process of characterisation and the judgment as to what is the essential character of the policy in a*

given case will be influenced, but not dictated, by the drafting of the wording of the policy, and will involve the identification of the nature and limits of the risks that are intended to be accepted, paid for, and covered."

Here, the Nautilus Policy was an occurrence based policy. The Full Court identified the essential character of the Nautilus policy to be the occurrence of an impugned event within the policy period.

In this case, the occurrence was in respect of damage to insured property within 250 nautical miles of Australia.

The Full Court agreed with the decision of the primary judge, Foster J, that the suspension clause in the Nautilus policy was not part of the essential character of the policy but was collateral to it.

As such, Section 54 of the ICA was triggered which meant that, had the claim been made by the insured under the Nautilus policy, the policy would have responded.

It followed that the underwriters of the Pantaenius Policy were entitled to dual insurance contribution from Watkins in respect of the Nautilus Policy.

The decision provides an excellent analysis of the authorities regarding the operation of Section 54 of the ICA.

However, the decision goes further to confirm that, in a claim for dual insurance contribution by one insurer against another insurer, the insurer claiming contribution can raise the operation of Section 54 in respect of the other insurer's policy.

The insurer claiming contribution bears the onus of proving that the essential character of both policies can be identified as being of the same nature and to the same extent.

Viewed in that context, Section 54 of the ICA is relevant to a claim for dual insurance contribution if the insurer from whom contribution is sought denies the liability on the basis that its policy would not have responded to a claim, if made, by the insured.

The decision will have wide ranging implications for insurers in the general insurance market where claims for contribution can and often do run into millions of dollars.

Section 54 of the ICA provides an insurer with an additional tool to ensure that the equitable principles of dual insurance are adhered to.

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The commercial purpose of an insurance contract as a whole

For several years Australian Courts have applied the legal principle emanating from the High Court which provides that the wording contained in a contract of insurance must be interpreted in a manner which gives effect to the commercial purpose of the insurance contract as a whole.

This principle is often relied upon by an aggrieved insured who institutes Court proceedings against the insurer in circumstances where the insurer has declined indemnity under the insurance contract.

Common examples involve an insured failing to bring the claim against it within the insuring clause or if the insurer raises the applicability of an exclusion clause in respect of the claim.

In a recent decision of the NSW Supreme Court, both examples arose for the Court's determination. This article focuses on the Court's interpretation of the insurance contract regarding whether or not the insured brought the claim against it within the insuring clause.

In *Malamit Pty Limited v WFI Insurance Limited & Ors*, His Honour Justice Sackar was asked to determine whether an insurer was entitled to decline indemnity under a professional indemnity policy of insurance on the basis that the claim brought against it was not a claim involving civil proceedings brought by a "third party" against the insured for compensation.

Court proceedings involving a claim for damages, interest and costs were brought against the insured and other parties as a result of property damage arising from a land slip in July 2010.

The property damage related to a development on the land. Various professionals were involved in the development including the insured.

The insurer raised four principal arguments supporting its decision to decline indemnity under the insurance contract, three of which related to the applicability of an exclusion clause which His Honour rejected.

However, Sackar J also considered the insurer's submissions regarding whether or not the claim against the insured was brought by a "third party" within the meaning of the insuring clauses of the insurance contract.

The relevant clause provided:

"Claim means any civil proceedings brought by a third party against the insured for compensation."

Sackar J referred to two earlier decisions, one in the Full Federal Court of Australia and one from the UK.

In both cases, a general definition was given to the meaning of "third party" within a directors and officers professional indemnity policy.

There was nothing controversial about those definitions.

The insured submitted that "third party" was not expressly defined in the policy and the named parties to the contract of insurance did not include the party who brought the claim against the insured.

It followed, according to the insured, that the claim was one by a third party to the contract of insurance.

The insurer accepted that the party who brought the claim against the insured did not fall within the definition of "insured" in the policy. However, the insurer submitted that the wording was to be construed in the same manner as any other commercial agreement, by giving primary effect to the language used by the parties, so as to give the policy a sensible commercial meaning.

Accordingly, the insurer submitted that, in resolving the meaning of the term "third party" the Court was obliged to look at the context in which that phrase appeared and to also construe those words according to their natural and ordinary meaning in the light of the policy as a whole.

Sackar J agreed and noted that this would involve taking into account the balance of the policy, including the various exclusions in the policy for claims "by, on behalf of or for the benefit of" any associates.

His Honour considered the plaintiff's interpretation to be "somewhat myopic". Sackar J stated:

> *"It is reasonable and commercially sensible, at least for the insuring clause, the definitions of claim and insured, together with what are the exclusions of 'associates', to be read together. In my view, that provides a more comprehensive and accurate guide to what is meant by 'third party'".*

In summary, Sackar J concluded that the meaning to be attributed to the term "third party" must be a person who is not a party to the contract, not an insured as defined and not an associate for the purposes of those clauses within the policy.

His Honour noted that the party bringing the claim against the insured was a "subsidiary" within the meaning of the policy. As such, the claim was brought by an insured, not by a third party.

Sackar J rejected the insured's submission that the definitions of "insured" and "subsidiary" referred to and contemplated the policy operating by reference to "entities" not possessed of legal personality, for example, partnerships and unincorporated associations.

His Honour considered this argument to be incorrect and artificial.

As the party bringing the claim against the insured could not be considered to be a "third party", Sackar J concluded the insurer was entitled to decline indemnity under the policy.

This timely judgment from the NSW Supreme Court illustrates the benefit for insurers when the Court interprets an insuring clause, not only with the intention of ensuring its consistency with the commercial purpose of the insurance contract, but also by reference to the insurance contract as a whole.

The last part of this legal principle cannot be overlooked.

The wording of a clause or clauses within an insurance contract must be interpreted by reference to their context within the contract and the remaining terms of the contract as a whole.

Here, such an interpretation enabled the insurer to successfully defend the claim for indemnity by its insured under the insurance contract.

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Workers Compensation & Breach of Contract Claims – is there a simple solution?

The NSW Supreme Court has recently declined to separate a claim for breach of contract from determination of the primary proceedings relating to a claim for personal injury (*Milne v Rocla Pty Limited* (2016)).

In New South Wales it has long been established law that a worker's compensation policy will respond only to a claim in negligence against an employer and will not respond to a claim for breach of contract, unless such a breach is a liability implied by law. Decisions such as *Multiplex Constructions Pty Limited v Irving* and *Nigel Watts Fashion Agencies Pty Limited v GIO General Limited* confirm that where there is a contractual indemnity, or a breach of contract for a failure to take out insurance, the worker's compensation policy will not respond to that claim.

So, what happens when a claim is made for both negligence and breach of contract? Contracts between the employer and the third party may contain a clause whereby the employer agrees to indemnify the third party and meet their obligations in relation to damages payable. This creates the issue as to who should act for the employer in the proceedings. Should it be the lawyers appointed by the workers compensation insurer? Or will the employer require separate legal representation? And how is this managed when there can only be one firm of solicitors on the record for a defendant, and there is an inherent

conflict if one set of solicitors act, with the insured possibly wanting to be negligent so their insurance covers the claim.

These issues have long troubled defendants and there is no easy solution.

In the decision of *Milne,* Russell Milne commenced proceedings in the Supreme Court in relation to injuries sustained at work on 11 April 2011. Milne commenced proceedings against two defendants, Rocla Pty Limited (described as the host employer) and his employer, Interstate Enterprises Pty Limited. Cross Claims were issued between the defendants including claims for breach of contract. It was alleged by both defendants that the other party had breached the terms of the labour hire agreement between them and was therefore contractually obliged to indemnify the other party.

Consistent with the authorities, the Nominal Insurer agreed to indemnify the employer in relation to the claim made by the plaintiff and also in relation to a claim for negligence by Rocla however would not indemnify Interstate Enterprises for any breach of contract claim.

In that particular proceeding, Interstate Enterprises engaged their own legal representatives who subsequently joined the Nominal Insurer by way of Cross Claim.

QBE Workers Compensation (NSW) Limited, the Scheme Agent for the Nominal Insurer, filed a Notice of Motion seeking an order that the contractual aspects of the Cross Claims be severed and decided after the other issues in the proceedings. Advantages of such an approach would be that it would save costs and also simplify the proceedings.

Justice Beech-Jones, who heard the application, noted that the application was made for practical reasons, as if such a severance was to occur QBE would conduct the defence on behalf of Interstate Enterprises.

Justice Beech-Jones in his judgment noted he was not persuaded that there would be any significant cost saving. Further, His Honour was of the view that it was not "realistically possible" to sever the issues from the trial. Justice Beech-Jones noted that an interlocutory order for separate determination of an issue is an exceptional measure and one that should not be taken in this particular case.

The end result is that the issues in relation to breach of contract will be ventilated at the same time as the primary proceedings.

The question as to how best to manage such claims for breach of contract remains. The Nominal Insurer cannot indemnify the employer for a claim for breach of contract and so the reality is there is no option but for an employer to obtain separate legal representation. In some cases the employer may be lucky and have other insurance that covers that aspect of the claim.

This is not only an issue confronting employers in NSW.

It is interesting to note that in Queensland in the decision of *Byrne v People Resourcing (QLD) Pty Limited & Anor*, WorkCover Qld (that State's equivalent of the Nominal Insurer) was ordered to indemnify the employer in relation to a claim for breach of contract (but only for those Heads of Damage for which WorkCover Qld may be liable to indemnify the employer). Legislative attempts to overcome that decision are unclear in their effect at this stage.

The problem therefore remains where there is a claim for a breach of contract in conjunction with a negligence claim, especially where the terms of the contract may be unclear.

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A Court does not need to consider a fraud defence if the insured fails to discharge his/her onus of proof

In a recent decision of a single judge of the NSW Supreme Court an insurer successfully defended an appeal by aggrieved insureds from a decision of a Local Court Magistrate who entered a judgment for the insurer following a 10 day hearing.

The principal defence raised by the insurer was that the insureds had engaged in fraud by staging a motor vehicle accident for the purpose of lodging a fraudulent claim.

In *Issa v Australian Alliance Insurance Company Limited t/as Shannons Insurance*, Peter and Eva Issa, who were husband and wife and owners of a Mercedes Benz motor vehicle, commenced proceedings at the Local Court, Downing Centre in Sydney seeking a declaration that they were entitled to be indemnified by the insurer in respect of loss and damage to their motor vehicle in the sum of $29,050.62 plus interest and costs.

The Issas alleged that on 27 November 2012 during peak hour traffic Mr Issa drove his dark blue Mercedes Benz along Woodville Road, Villawood behind a Corolla that was driven by Mr Odisho. Mrs Issa was allegedly a passenger in the Mercedes Benz when an unknown vehicle exited from a side street in front of the Corolla without giving way causing the Corolla to come to a sudden stop.

The Issas allege that Mr Issa was forced to brake suddenly to avoid colliding into the rear of the Corolla and came to a stop. However, a third vehicle following the Mercedes Benz, a Toyota Hi-Lux driven by Mr Andary collided into the rear of the Mercedes Benz

which forced the front of the Mercedes Benz to collide into the rear of the Corolla.

The Issas submitted a claim to their insurer under a motor vehicle policy of insurance to recover the value for which the Mercedes Benz was insured, namely $26,900.00.

The insurer rejected the claim, alleging that the collision was staged for the purposes of the Issas committing a fraud against the insurer.

The hearing at first instance proceeded before His Honour Magistrate Curran at the Downing Centre over 10 days. Evidence was adduced by both parties from lay and expert witnesses that was considered by the Learned Magistrate.

The insurer's primary defence was that Mr Issa was not driving nor was he in the interior of the Mercedes Benz at the time of the collision or collisions and that the engine of the Mercedes Benz was in fact turned off.

Further, the Toyota Corolla reversed into the Mercedes Benz rather than the Corolla sustaining a rear end collision.

All three drivers gave evidence before the Learned Magistrate that they did not know each other before the collisions but there were several inconsistencies regarding the manner in which the collisions allegedly occurred and their precise location.

The experts who gave evidence considered the event data recorder ("EDR") which had been retrieved from the Toyota Corolla which recorded details of six impacts but only the most recent three were kept in the records.

The experts also considered an hypothesis called "hot shock" in which some experts concluded that the tail lights of the Toyota Corolla were not illuminated at the time of the impact with the Mercedes Benz.

At first instance Magistrate Curran found, on the balance of probabilities, the EDR attached to the Corolla confirmed the nature of the damage to the Corolla and the Mercedes Benz as described by the drivers but that it also showed these events all occurred when the Corolla was in reverse. This evidence, His Honour stated, was also consistent with the expert evidence disputing the hot shock expert evidence. The Magistrate found the collision occurred when the reverse lights were illuminated.

Accordingly Magistrate Curran concluded that:

> *"It does not establish positively that there has been fraud or any deliberate dishonesty on the part of any of the three drivers in relation to the way in which the events occurred, even though I have misgivings about their evidence in this regard. In particular, I cannot conclude the plaintiffs have been involved in a fraudulent claim in a positive sense. However as I said much earlier in these reasons, I have to be satisfied on the balance of probabilities, that the event is one without intent."*

Further, the Magistrate went on to say:

> *" … the conclusions that I have reached in relation to the expert evidence are not consistent with the description of the events given by the drivers. Indeed, the conclusions I have reached in relation to the expert opinion are suggestive of possibly a staged event. But whilst I am not satisfied on the balance of probabilities that in fact this was a staged event, this is not something which I have to be satisfied of before the plaintiffs' claim fails. The plaintiffs' claim fails if I am not satisfied on the balance of probabilities that this was an event without intent."*

On this basis the Learned Magistrate entered a judgment for the insurer. The basis of His Honour's conclusion was that the plaintiffs had failed to discharge their onus of proof that they were entitled to indemnity under the policy, rather than a positive finding that they had engaged in fraud.

The Issas appealed to the NSW Supreme Court. The appeal proceeded pursuant to Sections 39, 40 and 41 of the *Local Court Act* before Her Honour, Associate Justice Harrison.

Before Her Honour the Issas essentially argued that the Magistrate should have found they had proven their case because he accepted parts of the evidence of the Issas and the lay witnesses.

In respect of this principal argument, Counsel for the Issas referred to legal principles enunciated by the NSW Court of Appeal in *Vidal v NRMA Insurance Limited* and *Hammoud Brothers Pty Limited v Insurance Australia Limited*. The Magistrate had summarised these principles as follows:

- The plaintiff bears the onus of proving all the elements of their case on the balance of probabilities.
- The plaintiff fails in this regard if the Court finds itself in the situation where the probabilities are equal.
- It is not for the insurer to positively disprove the plaintiff's allegations.

In dismissing the appeal Her Honour noted whilst Counsel for the plaintiffs had correctly referred to the legal principles, it did not follow that the Learned Magistrate was required to accept all of the evidence favourable to the Issas.

Harrison AsJ noted that the Magistrate carefully summarised each driver's version of how the accident occurred. The Magistrate highlighted significant inconsistencies and also commented on the credibility of each driver.

Her Honour recognised that the Magistrate's finding against the Issas was based on the insurer having put

the Issas to proof and, having done so, the Issas failed to discharge their onus which led the Magistrate to correctly reject their claim.

Further, Her Honour dealt with submissions on appeal on behalf of the Issas relating to alleged failures by the Magistrate on findings of fact and a failure to give adequate reasons, all of which were rejected by Her Honour.

In conclusion the appeal was dismissed.

This interesting case illustrates a not unusual situation where the insurer raises a defence of fraud but the fraud defence does not arise for the Court's consideration.

In this instance, the insureds were unable to discharge their onus of proving their case, including the manner in which the accident occurred was not without intent.

As such, the Court was not required to determine whether or not the fraud defence was made out even though there were strong suggestions in the evidence that this is precisely what had occurred.

In the event, this claim for $29,000.00 ended up being a costly exercise for the insureds noting the Local Court hearing proceeded over 10 days with a subsequent appeal to the Supreme Court.

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The legitimate forensic purpose of a subpoena to produce

Subpoenas to Produce are a common litigation tool used by all parties involved in the litigation of disputes in Australian Courts.

Generally, a relatively informal approach is adopted by the Courts in relation to the formalities associated with issuing a Subpoena, the production of documents to the Court and orders granting access to those documents.

However, the NSW Supreme Court recently provided a timely reminder of the important legal principles that are involved.

In *Glad Corporate Services v Demet Taskin*, His Honour Justice Slattery heard an application by Taskin and her daughter who were both named defendants ("Taskin parties") to set aside seven Subpoenas to Produce that were issued by the Supreme Court at the request of the Glad parties and served upon third party non litigants to produce documents.

All of the Subpoena recipients had produced the documents sought and the documents were held in the Court Registry.

The basis of the application by the Takin parties to set aside those Subpoenas was that the material produced was not relevant and could not be used for any legitimate forensic purpose in the substantive proceedings.

Justice Slattery summarised the nature of the proceedings before dealing with the legal principles with respect to an application to set aside a Subpoena.

Briefly, the Glad parties, in their substantive proceedings against the Taskin parties, alleged that they engaged in misconduct and impropriety during the course of their employment with the Glad Group including allegations of breach of their employment contracts, breaches of sections of the *Corporations Act 2001*, misappropriation of monies and breaches of their fiduciary duties to the Glad Group companies.

The particulars of these allegations included the following:

- The mother inappropriately appointing and promoting her daughter to a position within the Glad Group companies well above the daughter's experience and skills.
- Forging signatures on documents to misrepresent the nature of those documents.
- Encouraging another employee to make a sexual harassment claim against the Glad Group companies only to later advise the Glad parties to settle rather than contest the claim with moneys arising from that claim eventually ending up in the pockets of the mother and daughter.

The Taskin parties denied all liability in respect of the allegations made by the Glad parties. Further, the Taskin parties cross claimed against the Glad parties in which the Taskin parties alleged the Glad parties engaged in inappropriate and improper conduct such as trading whilst insolvent and directing payments in cash to subcontractors.

In addition, the Taskin parties alleged that the Glad parties repudiated their contracts of employment with each Taskin party claiming loss of income during a period of reasonable notice upon termination of their employment.

Slattery J therefore described these as "high stakes" proceedings.

At the time of the application to set aside the Subpoenas to Produce, the Glad parties had served their evidence in chief in the substantive proceedings but the Taskin parties had not yet served their evidence, both in respect of the plaintiffs' case and their cross claim.

The seven Subpoenas to Produce each required the production of documents relating to the employment history, her resumé and any prior complaints of fraudulent conduct and disciplinary complaints or

actions by or against the daughter in her previous employment.

Slattery J helpfully sets out in his judgment the three major steps in the process of having a third party bring documents into Court pursuant to a Subpoena and then to have those documents used in Court.

The first step involves the third party's obedience to the Subpoena and the determination by the Court of any objections by the third party as to the production of documents to the Court.

The second step involves the Court making a decision as to the preliminary use of the documents. Once the documents are within the control of the Court after production pursuant to a valid Subpoena, the Court must decide whether or not to allow inspection of the documents.

The third step is the forensic use of the documents. This step is enabled once an applicant has been granted access to the documents and seeks to use them at the hearing.

As His Honour stated:

> *"It may involve deploying them in cross examination without tender. The documents may even be used to secure admissions from the other side on relevant matters without the need for cross examination. But one of these legitimate forensic purposes will ordinarily need to be identified at stage two, in anticipation of the use of the documents in stage three."*

Further, His Honour stated:

> *"Access to documents is not to be restricted to enabling a party to have a document tendered in evidence. A party does not need to undertake to tender documents to which access is granted. The Court can give access to documents that are not themselves capable of being tendered in evidence, provided their use is justified by other legitimate forensic purposes."*

His Honour described the basis of the legitimate forensic purpose inquiry by reference to previous legal authority. He stated the test for the relevance of documents to be produced as follows:

> *" ... that it is on the cards that the documents will materially assist the case of the applicant or the resolution of the issues in the proceedings"*

or:

> *"…that the applicant must identify a legitimate forensic purpose for which access is sought."*

Slattery J proceeded to determine the application to set aside each of the seven Subpoenas to Produce by the Taskin parties. The application failed in its entirety.

His Honour granted access to all of the documents produced by each of the seven Subpoena recipients.

In determining the application the Court rejected the principal arguments made on behalf of the Taskin parties that the documents were irrelevant to the issues in the proceedings.

His Honour referred to each Subpoena Schedule and the documents sought which were substantially relevant to the daughter's employment history.

In particular, there were credit issues relating to the accuracy of her qualifications and her employment history that she conveyed to a recruiter.

The documents also included investigations undertaken by an employment recruiter and her salary with her current employer.

In each case his Honour identified the legitimate forensic purpose in granting access for the Glad parties to inspect the documents produced. His Honour defined the issues of credit that were likely to arise based on the allegations on the pleadings and the relevance of the documents to the pleadings and particulars outlined in the Statement of Claim, Defence and Cross Claim.

The significance of this decision is to highlight that although the issuing of Subpoenas to Produce and the production of documents to the Court has reached a rudimentary level of informality, the legal principles governing the Court's process should not be overlooked.

One of these important features is that it is unnecessary to prove that documents produced in answer to a Subpoena either must be tendered or capable of being tendered at a hearing. Slattery J reminds us there are several other legitimate forensic purposes for which documents produced under Subpoena may be used in litigation, some of which do not require the tender of those documents into evidence.

It is sufficient for documents produced in answer to a Subpoena to be utilised by a party to seek admissions under cross examination without those documents being tendered.

Further, those admissions may be sought prior to the hearing without the documents being tendered.

The common theme amongst all of these legitimate forensic purposes is that they must bear some relevance to the issues pleaded and particularised in the case.

The case acts as a timely reminder of these important legal principles.

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Christmas/New Year deadlines for construction security of payment claims and responses

The *Building and Construction Industry Security of Payment Act* 1999 (NSW) sets out a process under which persons carrying out construction work can issue claims for progress payments and, if the recipient of the claim does not respond within the time frames specified in the Act, be entitled to full payment of those claims. This is the case even if the owner, developer or head contractor disagrees that the person making the claim is actually entitled to the amount claimed.

As a strategic measure, it is quite common for such claims to be served during the Christmas and New Year break, when many people are away from their desks and may therefore miss responding within the specified time.

Accordingly, it is important to be aware of the deadlines that apply during this period and ensure that systems are in place to address any claims that are received.

The Act provides that once a payment claim is served, if the recipient of a claim does not intend to pay the full amount claimed he or she must issue a payment schedule within ten business days after the day that the claim was served. A business day is defined in the Act to exclude weekends, public holidays, and 27, 28, 29, 30 or 31 December in any year. During this season's break, the public holidays are on 26 December 2016, 27 December 2016, and 2 January 2017.

As a convenient reference, we set out below the timeframes within which a payment schedule must be served during the holiday period:

Date claim was served	Deadline for payment schedule to be served
Monday 5 December 2016	Monday 19 December 2016
Tuesday 6 December 2016	Tuesday 20 December 2016
Wednesday 7 December 2016	Wednesday 21 December 2016
Thursday 8 December 2016	Thursday 22 December 2016
Friday 9 December 2016	Friday 23 December 2016
Monday 12 December 2016	Tuesday 3 January 2017
Tuesday 13 December 2016	Wednesday 4 January 2017
Wednesday 14 December 2016	Thursday 5 January 2017
Thursday 15 December 2016	Friday 6 January 2017
Friday 16 December 2016	Monday 9 January 2017
Monday 19 December 2016	Tuesday 10 January 2017
Tuesday 20 December 2016	Wednesday 11 January 2017
Wednesday 21 December 2016	Thursday 12 January 2017
Thursday 22 December 2016	Friday 13 January 2017
Friday 23 December 2016	Monday 16 January 2017
Wednesday 28 December 2016	Tuesday 17 January 2017
Thursday 29 December 2016	Tuesday 17 January 2017
Friday 30 December 2016	Tuesday 17 January 2017
Tuesday 3 January 2017	Tuesday 17 January 2017
Wednesday 4 January 2017	Wednesday 18 January 2017

The Act also provides for a process for the adjudication of payment claims. Once an application for adjudication has been served, the recipient has a timeframe of five business days after service of the application or two days after appointment of the adjudicator (whichever is the later) within which to serve a formal response. Often, these two dates are the same. The adjudicator is not permitted to consider any response or further material submitted after the deadline. The timeframes that apply during the holiday period (assuming a five business day period within which to respond) are as follows:

Date adjudication application was served	Deadline for adjudication response to be served
Monday 5 December 2016	Monday 12 December 2016
Tuesday 6 December 2016	Tuesday 13 December 2016
Wednesday 7 December 2016	Wednesday 14 December 2016
Thursday 8 December 2016	Thursday 15 December 2016
Friday 9 December 2016	Friday 16 December 2016
Monday 12 December 2016	Monday 19 December 2016
Tuesday 13 December 2016	Tuesday 20 December 2016
Wednesday 14 December 2016	Wednesday 21 December 2016
Thursday 15 December 2016	Thursday 22 December 2016
Friday 16 December 2016	Friday 23 December 2016
Wednesday 28 December 2016	Tuesday 10 January 2017
Thursday 29 December 2016	Tuesday 10 January 2017
Friday 30 December 2016	Tuesday 10 January 2017
Tuesday 3 January 2017	Tuesday 10 January 2017
Wednesday 4 January 2017	Wednesday 11 January 2017

The date that a claim or adjudication application is deemed to have been served depends on the method of service and the particular circumstances of how the claim was served. Therefore, we recommend that recipients of a claim or adjudication application seek legal advice as quickly as possible to determine the applicable time frame within which to provide a response.

We are able to provide assistance to both claimants and recipients in preparing and responding to security of payment claims and applications.

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Changing the Class Action Rules

Rules of court have existed in Australia for many years now which allow for, and regulate, the bringing of class (or group) actions.

In recent years there has been a steady increase in the number of class actions commenced. This seems to be a result of a number of factors: a growing number of law firms willing to act in group proceedings; an increasing understanding of the law and procedure of litigating group claims; and a marked increase in the number and range of entities willing to fund group litigation.

Almost universally, significant class actions are supported by a litigation funder. Generally, the funder pays the legal costs of the representative applicant, provides any security for costs ordered by the court, and undertakes to meet any adverse costs order in the proceedings. In return, the funder seeks to be paid a commission (usually 30 – 40%) of any settlement or judgment amount.

Such arrangements apply to those members of the class who enter into a litigation funding agreement with the litigation funder.

Up until now, **funded class members** (those who have signed a funding agreement) bear the whole costs of the action by agreeing to repay the legal costs out of any settlement, and paying a funding commission.

Unfunded class members (those who do not sign a funding agreement with the funder, and who do not opt out of the proceedings) get the benefit of the funder paying for the proceedings, but are not liable to contribute to a percentage funding commission or a proportionate share of legal costs. This is seen as encouraging "free-riders".

This has meant that, until now, the task of "book building" sufficient funded class members was of critical importance for litigation funders. Unless it had signed enough members, a funder would be reluctant to commence proceedings, because the reward return for its risk would be too low.

The Full Federal Court has recently handed down an important judgment which will alter the landscape for litigation funders and class actions significantly - *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148.

The case concerned an application for a common fund order. Essentially, a common fund order seeks to apply litigation funding type terms to all class members (not just funded class members). Such orders are generally sought where – for one reason or another – there are thought to be insufficient funded class members to make pursuit of the litigation viable (at least from the litigation funder's point of view).

Until now, a common fund order had not been made. Last year, a single judge of the Federal Court (Wigney J in *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers and Managers Appointed) (in liq)* [2015] FCA 811) rejected an application for a common fund order in terms which held little promise for such applications ever succeeding.

The Full Court has now indicated, however, that it would make orders which will require all class members to pay the same pro rata share of legal costs and the funding commission out of the common fund they receive in settlement or judgment. This means the burden of the costs and commission is borne equally by all those who stand to benefit, not just funded class members.

This will have a huge impact for funders. It removes the economic driver for the preference for "closed" class actions - that is, those in which the "group" is defined as only such members who have signed a litigation funding agreement.

It will also largely remove the perceived "free-rider" problem - particularly institutional investors. For shareholder class actions in particular, it will encourage funders to commence even though they may not have much of a signed up "book", in the expectation that a common fund order will be made.

The decision also indicates an increased preparedness in the courts to take an active role in the oversight of class actions. Significantly, it spells a marked preference for "open class" representative proceedings as more consistent with the aims of the legislative provisions.

At least in the short term, the decision is likely to change the landscape by giving funders confidence to commence actions which might otherwise not have gone ahead. It is almost certain too that there will now be a flurry of applications in existing cases for a common fund order. It will be interesting to see how those applications fare.

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WORKERS COMPENSATION ROUNDUP

Reasonable actions by an employer – is perception relevant?

In last month's Newsletter we discussed reasonable actions of an employer pursuant to Section 11A of the *Workers Compensation Act 1987* (WCA). The Workers Compensation Commission Presidential Unit has now delivered a further decision in relation to reasonable actions in *Edwards v Secretary, Department of Education Communities* (2016) NSWWCCPD 45.

Ms Edwards was a science teacher who commenced her teaching career in North Richmond in 1984. She had difficulty controlling her students and between January 2008 and November 2011 she was subject to a number of performance improvement programs and was ultimately dismissed. The medical evidence revealed Ms Edwards had a "transient paranoid ideation" which was a condition affecting her day to day perceptions. This was not known to her employer at the time of the implementation of performance management and at the time of her ultimate dismissal from her employment. Ms Edwards claimed lump sum compensation for a psychiatric injury due to an aggravation of a pre-existing adjustment disorder as the result of her teaching duties between 2008 and 2011.

The employer obtained medical evidence that Ms Edwards may constitute "innocuous events as personal attacks" and her psychological reaction was in part due to the discipline performance appraisal and transfer in 2008. The medical evidence further revealed it was possible the stress of those events had caused Ms Edwards to misperceive the actions of others due to a transient paranoid ideation. That type of personality disorder would be aggravated by the scrutiny directed at Ms Edwards which was inherent in the performance appraisal and discipline processes.

The arbitrator originally determined although Ms Edwards suffered an injury, the employer had established a defence under Section 11A in that the employer took reasonable action in relation to performance appraisal, discipline and ultimate dismissal. On that basis Ms Edwards was not entitled to compensation.

On appeal, Deputy President Michael Snell affirmed the arbitrator's decision. It was correct for the Arbitrator to disregard Ms Edwards' perception of events when assessing the reasonableness of the employer's actions pursuant to Section 11A. In reaching his decision, Deputy President Snell commented that when determining what constitutes reasonable actions of an employer, the following should be examined:

- the test for reasonableness of actions of the employer is a factual issue to be assessed objectively rather than by reference to the parties' subjective perception of those events;
- in considering whether the actions or proposed actions of an employer are reasonable within the meaning of Section 11A(1), what is reasonable depends on the facts known to the employer at the time of the actions or what could have been ascertained at that time by reasonably diligent enquiries, not what may have become apparent at some later stage;
- whilst it is still necessary to consider the injured worker's rights in the circumstances and balance them against the employer's objectives in determining what is reasonable, the weight attached to those considerations depends on the facts of each case. The circumstances of the injured employee can include health considerations.

This decision can bring some comfort to employers in that they cannot be expected to know all of the personal health circumstances of an injured worker at the time of performance management and dismissal. Although medical information may come to light at a later date, if it could not be determined through reasonably diligent enquiries at the time of the performance appraisal was conducted, provided that the overall performance management and discipline or dismissal process was reasonable, the employer would have a valid defence. Although an injured worker's perception of events will be considered by the Workers Compensation Commission when determining whether there is a psychological injury, this perception of events will not ordinarily be relevant when determining whether the employer's actions were reasonable under Section 11A. Provided those actions are reasonable on an objective basis, the defence will succeed.

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Restriction on further claims for lump sum compensation

Section 66(1A) of the 1987 Act restricts a worker who made a claim for permanent impairment compensation before 19 June 2012 to one further claim. In limited circumstances this restriction may not apply. The recent Presidential determination in *Draca v Formtec Group* [2016] NSWWCCPD 53 examines a situation

where a worker can make more than one further claim albeit in limited circumstances

Draca suffered injury in the course of his employment on 28 November 2001. In 2006 he made a claim for lump sum compensation in respect of the back, neck, left arm and both legs and this was resolved by way of a Section 66A Complying Agreement providing for compensation in respect of permanent impairment of the back, left leg and left arm.

In 2007 Draca made a further claim for additional compensation in respect of the left arm and right leg. In 2008 proceedings in the Workers Compensation Commission claiming additional compensation in respect of the right leg were resolved by way of agreement to pay compensation for loss of use of the right leg.

In December 2011 further proceedings claimed additional lump sums. In 2012 there was a resolution by way of Complying Agreement for additional compensation for permanent impairment of the neck. On 27 July 2012 a Medical Assessment Certificate of Dr Beer certified an additional loss of use of the left leg of 1%.

In October 2012 another claim was made for lump sum compensation in respect of the bowel and digestive system and further proceedings were lodged in December 2012 claiming a lump sum for the bowel.

A further Medical Assessment Certificate in October 2013 found 0% bowel function. Those proceedings were finalised in May 2014 on the basis of 0% permanent loss of bowel function.

A further claim for additional lump sum compensation for the back, neck, left arm and both legs was made in April 2014. Proceedings were commenced on 15 April 2015 claiming compensation for further permanent impairment.

At a subsequent teleconference consent orders were made referring the matter for assessment by two Approved Medical Specialists of permanent impairment of the neck, right leg and bowel function. A further Medical Assessment Certificate dated 11 September 2015 assessed an additional 5% permanent impairment of the neck and 7% of the right leg at or above the knee. A Certificate of Determination awarded compensation in respect of the additional impairment of the right leg and neck.

The employer's solicitors sought a reconsideration of the Certificate of Determination on the basis that it did not take into account the prior settlement in respect of the neck and consistent with the decision in *Cram Fluid Power Pty Limited v Green* the proceedings could not be maintained by Draca.

At first instance the arbitrator noted that the claim in respect of bowel function had proceeded to finality with a Certificate of Determination reflecting the assessment by the approved medical specialist of zero per cent. This in her view constituted "one claim" for the purposes of Section 66(1A) and thus the further lump sum claim made in April 2014 offended Section 66(1A) and was not saved by the Regulations. Consequently an award was entered in favour of the employer.

The matter then proceeded on appeal before Deputy President Michael Snell. At issue was whether Draca had previously had his one further claim when he pursued the October 2012 claim which was resolved by way of a finding of 0% bowel function. In arguing that he was not precluded from another claim Draca relied upon Clause 11 of the Regulations which commenced on 13 November 2015, which relevantly provides:

"11. Lump Sum Compensation: Further Claim

(1) A further lump sum compensation claim may be made in respect of an existing impairment.

(2) Only one further lump sum compensation claim can be made in respect of the existing impairment.

(4) For the purposes of sub-clauses (1) and (2):

(a) a further lump sum claim made, and not withdrawn or otherwise finally dealt with, before the commencement of sub-clause (1) is to continue and be dealt with as if Section 66(1A) of the 1987 Act had never been enacted; and

(b) no regard is to be had to any further lump sum compensation claim made in respect of the existing impairment:

(i) that was withdrawn or otherwise finally dealt with before the commencement of sub-clause (1); and

(ii) in respect of which no compensation has been paid; and …."

Deputy President Snell determined the application of Clause 11(4)(b) meant that no regard was to be had to the October 2012 claim because no compensation had been paid for that claim. It therefore followed the claim made in April 2014 was available as if Section 66(1A) "had never been enacted".

Deputy President Snell commented the beneficial nature of the provision was plain and it permitted workers in certain circumstances to make one further lump sum compensation claim which would otherwise be precluded by Section 66(1A).

Consequently the Deputy President entered an award in Draca's favour for monetary compensation in respect of the additional impairment of the neck and right leg at or above the knee found by the Approved Medical Specialist.

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CTP ROUNDUP

Section 109 Applications and Vulnerable Plaintiffs – Bird BHNF Bird v Connell [2016]

The NSW District Court in *Bird BHNF Bird v Connell* [2016] NSWDC 276 has again ruled on an application for leave to extend the time to commence personal injury proceedings beyond the statutory time limit, provided for in Section 109 of the *Motor Accidents Compensation Act 1999* (NSW) (the "Act"). Perhaps unsurprisingly, her Honour Gibson DCJ found that the single parent tutor of an infant plaintiff with severe behavioural problems was justified in experiencing a delay in filing the Statement of Claim some 50 weeks past the statutory time limit, due to inadequate legal representation coupled with a "high degree of dependence and vulnerability" [at 63].

The infant plaintiff, the young Miss Bird, together with her tutor, Ms Bird, was involved in a motor vehicle accident on 30 May 2012. While Ms Bird suffered injuries to her neck that were immediately apparent, Miss Bird was seemingly not physically affected. It was alleged by Ms Bird that it only later became evident that her daughter had incurred psychological injuries as a result of the accident.

Miss Bird had been diagnosed pre-accident with numerous psychological and behavioural issues including attention deficit hyperactivity disorder and generalised anxiety disorder. She had also been under the care of a treating psychologist since 2011 or 2012. When seen again in January 2014 after the motor vehicle accident, Miss Bird's treating psychologist considered that she now displayed additional "learning and social skills difficulties", together with symptoms consistent with an exacerbation of her anxiety disorder and driving-related anxiety as a passenger].

There was also evidence before the Court that the solicitors for Miss Bird had been lax in taking the relevant steps to pursue her claim and informed Ms Bird of her relevant statutory time limit for commencing proceedings.

Whilst Miss Bird's paediatrician had completed the medical certificate on 4 April 2014, the personal injury claim form was not lodged until 2 June 2014. The CTP insurer had denied liability and requested a full and satisfactory explanation for the late lodgement of the claim pursuant to Section 72 and 73 of the Act by 11 June 2014. The CTP insurer issued a further Section 81 Notice admitting liability on 6 August 2014, once a statutory declaration had been prepared by Miss Bird's solicitors on 9 July 2014.

The only further step then taken by Miss Bird's solicitors was to arrange an examination by a child psychologist on 4 May 2015 which was not attended as Ms Bird was not informed it had been arranged.

Just before the Section 109 three year limitation period was about to expire on 30 May 2015, the CTP insurer forwarded a without prejudice offer for past medical expenses. On that same day, 26 May 2015, Ms Bird's claim against the CTP insurer in respect of the same motor vehicle accident settled. Miss Bird's solicitors then arranged an examination by a child psychologist in July and again in August – both of which were cancelled due to difficulties with attendance on the part of the Birds. The examination was not re-arranged a third time.

Indeed, her Honour found it was not until December 2015 that appropriate steps were taken by Miss Bird's solicitors to pursue the claim by way of a "flurry of activity" which appeared to suggest that a new solicitor had taken over carriage of the matter.

An exemption from the Claims Assessment & Resolution Services was obtained on 3 December 2015, one day after the application had been made by Miss Bird's solicitors. Miss Bird's solicitors then arranged a further examination with a child psychologist which took place on 12 January 2016. Counsel was also briefed and an informal settlement conference took place on 10 March 2016. In her affidavit, Ms Bird noted the informal settlement conference was the first point at which she had been advised of the Section 109 three year limitation period.

Following the informal settlement conference, Section 85A particulars were served on the CTP insurer on 14 March 2016. The proceedings were subsequently commenced on 17 May 2016, being almost one year outside the relevant limitation period.

In considering whether a full and satisfactory explanation for the delay had been provided in accordance with Section 109, her Honour noted pursuant to the decisions of *Walker v Howard* (2009) 78 NSWLR 161 and *Zraika (BNF Zraika) v Walsh* (2011) 60 MVR 17 that the relevant factors for consideration were:

- that Miss Bird was a minor suffering from a disability, being her "significant mental issues";
- which approach should be taken considering that the delay had been caused by the applicant for leave, or the applicant's solicitors, and
- whether it was reasonable to take account of the fact that Ms Bird had been unaware or unaware of the extent of Miss Bird's psychological symptoms as an explanation for the delay.

In respect of the last factor, her Honour took into account subjective elements such as that Ms Bird was a single parent on a pension and was "not only the carer for the plaintiff but also for an older child with

similar disabilities". Further, her Honour considered that the majority of the explanation for the delay in commencing proceedings was not the fault of Ms Bird, but rather the "incompetence and dilatoriness of the solicitors [Ms Bird] consulted".

In fact, it was the "incompetence" of the solicitors that the CTP insurer relied on when submitting that leave to commence the proceedings out of time should not be granted, as the explanation could not be found to be full in circumstances where the evidence tendered by Miss Bird's solicitors did not explain what was occurring between May and December 2015 at all.

Her Honour noted further that there was no reference to the identity of the solicitor with carriage at this time, and no explanation as to why there had been such prolonged inaction in respect of Miss Bird's claim. Further, there was no documentary evidence before her Honour as to what information was provided to Ms Bird at the initiation of the claim or what transpired in any of her meetings with her solicitors or Counsel.

Her Honour clearly considered the situation wholly unsatisfactory, but ultimately found that Ms Bird's reliance on her solicitors in her own claim "could provide a full as well as a satisfactory explanation for her failure to ensure the same solicitors, in the action for her daughter, delayed the commencement of proceedings". Given that Ms Bird was a single parent living in Housing Commission accommodation with two children suffering from seizures and Asperger's Syndrome, she lived a very difficult life and could not reasonably be expected to have knowledge of the limitation period.

When taken in light of the inaction of her solicitors, her Honour found that the delay in commencing proceedings could not reasonably have been avoided. Owing to the inadequacies of the evidence on behalf of Miss Bird's solicitors and conduct throughout the claim, a costs order was made in favour of the CTP insurer.

Consistently with the preponderance of existing case law on this issue, it is abundantly clear that the Courts do not consider inaction on the part of solicitors as a sufficient reason to penalise plaintiffs for late claims. Indeed, particularly where that plaintiff is an infant or vulnerable in some other manner, CTP insurers should be cautious when thinking about whether to oppose a Section 109 leave application.

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