GD NEWS / JUNE 2017

IN THIS EDITION

Actions Against Insurers rather than an Insured in NSW

In New South Wales Section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* permits a plaintiff to sue an insurer directly where an insured is unavailable to be sued, for example, the company has been deregistered or an insured is unlikely to be able to satisfy a judgment.

Section 6 in effect creates a statutory charge over the insurance proceeds payable to the insured in favour of the claimant who has a claim against the insured.

Section 6 applies to claims made and occurrence insurance policies. Essentially Section 6 permits a plaintiff to recover damages or compensation directly from a defendant's insurer.

In late 2016 the NSW Law Reform Commission published a report recommending changes to Section 6.

There has been long held concerns about the operation of Section 6 and the complexity that arises from applications under Section 6 to join insurers to proceedings.

The NSW Law Reform Commission recommended that Section 6 be amended to address the challenges that confronted claimants who made applications to join insurers direct. In response to those recommendations the NSW Government has now enacted the *Civil Liability (Third Party Claims Against Insurers) Act 2017*.

This legislation will reduce the complexity and uncertainty that Section 6 has created for more than 70 years.

The new legislation will simplify matters and make it easier for claimants to bring a direct action against an insurer.

It will still be necessary for an application to be made to the Court to seek leave to sue an insurer direct however the rules will be much clearer.

Editors:

David Newey

Amanda Bond

GILLIS DELANEY LAWYERS
LEVEL 40, ANZ TOWER
161 CASTLEREAGH STREET
SYDNEY NSW 2000
AUSTRALIA
T: + 61 2 9394 1144
F: + 61 2 9394 1100
www.gdlaw.com.au

The new legislation provides that:

- if an insured person has an insured liability to a claimant, the claimant may recover the amount of the insured liability from the insurer;
- the amount which can be recovered is limited to the amount properly payable under the contract of insurance.
- in any proceedings commenced against the insurer, the insurer stands in the place of an insured person as if the proceedings were proceedings to recover damages, compensation or costs from the insured person. The insurer has the same rights and liabilities as the insured;
- proceedings can only be commenced against the insurer with the leave of the Court;
- leave can be sought before or after proceedings against the insurer have been commenced;
- leave to commence proceedings must be refused if the insurer can establish that to disclaim liability under the contract it is entitled of insurance or under any Act or law;
- in proceedings the insurer is entitled to rely on any defence or any matter that the insurer would have been entitled to rely on in a claim e insured made by the insured person against it or that the person would have been entitled to rely on in proceedings against the claimant;
- a judgment obtained against an insured person does not prevent the claimant from recovering money from the insurer except to the extent that the judgment is already satisfied;
- any payment made by an insurer to a claimant in respect of an insured liability discharges, to the extent of the payment, the liability of the insurer to make a payment to the insured person;
- a payment by the insurer to the insured person by way of compromise or settlement does not reduce the insurer's liability to a claimant. This will protect claimants against compromises between an insurer and an insured which purportedly satisfies an insurer's obligations under a policy.

The legislation does not specify any preconditions that a claimant must satisfy in order to obtain a grant of leave from the Court to commence proceedings against the insurer. For example, the legislation does not specify that proceedings can only be commenced against an insurer where the insured person is unavailable to be used or is unable to satisfy any judgment or is insolvent.

The legislation does not seek to create additional rights to those that existed under Section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* and rather seeks to clarify and simplify the process of suing an insurer direct for its liability that attaches under a contract of insurance.

New South Wales is likely to remain the jurisdiction of choice in Australia for the commencement of proceedings by claimants against insurers to recover liabilities that have been insured under a contract of insurance.

David Newey
dtn@gdlaw.com.au

Fire & Emergency Services Levies in NSW – Government announces a change of plans

In late 2015 the NSW Government announced it would abolish the Emergency Services Levy on insurance policies in NSW and replace it with a Fire and Emergency Services Property Levy ("FESL") paid alongside Council rates to commence from 1 July 2017.

The proposed reform sought to distribute the funding for fire and emergency services across businesses and landowners so the burden would not only fall on those who had property insurance.

However on 30 May 2017 the NSW Government announced it will defer the introduction of the FESL to ensure small and medium businesses do not face an unreasonable burden in their contribution to the State's Fire & Emergency services.

The Government has noted that whilst the new system will produce fairer outcomes in the majority of cases, some people, particularly in the commercial and industrial sectors, would be worse off by too much under the proposed model which was not an intended consequence.

The NSW Government now plans to work with Local Government, Fire & Emergency Services and the insurance industry and other stakeholders to find a better and fairer path forward.

For now the Fire Emergency Services Levy will continue to be collected via insurance policies until the NSW Government has completed a further review.

David Newey
dtn@gdlaw.com.au

Reasonable actions by Councils – the power of section 43A

In previous issues of GD News we have discussed the statutory defences available to public authorities following the introduction of the *Civil Liability Act* 2002.

One such defence is that contained in section 43A of the legislation. That section applies where liability is based on a public authority's exercise, or failure to exercise, a special statutory power conferred on the

authority. Section 43A(3) provide that for the purpose of any such proceedings, any act or omission involving an exercise or failure to exercise a special statutory power does not result in liability, unless the act or omission was so unreasonable that no authority having the statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.

The Supreme Court of NSW has recently considered section 43A in the case of *Wells v Council of the City of Orange*.

At approximately 10.30 pm on 16 November 2009 Wells was riding his motorcycle along Jilba Street when he collided with a water filled barrier that had been placed across Jilba Street as part of roadworks being undertaken by the Council. Wells was thrown forward over the barrier and sustained serious injuries, including to his head. Wells commenced proceedings in the Supreme Court against the Council of the City of Orange. Wells alleged the Council had failed to provide adequate lighting and delineation and used a traffic control plan ("TCP") of which the barrier formed part, which failed to comply with Australian Standard AS1742.3.

The Court ordered there should be a separate hearing in relation to liability.

The matter proceeded to hearing before his Honour Hoeben, Chief Justice at Common Law, who handed down his judgment on 3 May 2017.

In their defence of the claim Council argued firstly that they were not negligent and secondly, that Council were entitled to rely on the defence in Section 43A of the *Civil Liability Act* 2002. The Court noted in this particular case Section 43A would apply as the Council was carrying out traffic control work pursuant to their power under the *Roads Act* 1993. Further, there was no issue that the barrier in question was a "traffic control facility".

Wells submitted the Council's exercise of the special statutory reasonable power was unreasonable as it had created the hazard and there was no risk management assessment which resulted in a needlessly dangerous situation. Further, Wells submitted the Traffic Control Plan ("TCP") should have been prepared by a properly qualified person, there should have been a check at night by Mr Swain to assess the adequacy of the lighting and delineation of the hazard, there was a failure to properly delineate the hazard by reflective materials and Council also failed to properly consider or apply the Australian Standard.

The plaintiff failed to establish negligence at first instance. In his judgment his Honour was of the view that it was not foreseeable such a collision would occur if a motorcyclist were taking reasonable care for his or her own safety.

However, his Honour went on to consider the application of section 43A in the event that there was an appeal.

In his consideration of the defence, his Honour considered the expert evidence and the joint report that had been provided by the engineers. His Honour was of the opinion that this case could clearly be distinguished from the decision of *Curtis v Harden Shire Council* where the defence was unsuccessful.

In this particular case there was clear evidence as to why the water-filled barriers were used.

Justice Hoeben stated:

"The factual issue being considered by the Court of Appeal in Curtis v Harden Shire Council was significantly different to that under consideration here. In Curtis, the most important sign of those required by the TCP had not been used, there was no explanation for why it had not been used and the failure to use it was described by the senior RTA person who gave evidence as "making no sense". In this case, Mr Swain gave evidence and explained why it was that he had used water-filled Triton barriers, ie. to prevent interference with the barriers by them being moved or taken. In the joint expert's report, far from being described as making "no sense", it was accepted that such a decision was a "potentially acceptable application of professional judgment noting that the alternative barricades (barrier boards or lightweight modules) may have been subject to interference and relocation (vandalism).

Whilst it is true that Mr Lawson, both in his report and in evidence, resiled from his apparent agreement to that proposition, both Messrs McDonald and Johnstone adhered to it.

It was accepted by the experts that the danger of interference and vandalism of the barriers was real. Not only was there evidence of Mr Swain to that effect but ... it was recorded that signs were vandalised and needed to be replaced on 21 November 2009.

The other matters dealing with the reasonableness of using the water filled Triton barriers have already been set out and referred to in the analysis of whether negligence against the defendant had been established. In essence, the evidence made clear that barriers were required to be in place for some time while construction proceeded. In those circumstances the lack of permanency and robustness of the barriers had the real prospect of becoming a continuous problem affecting the completion of the project. No doubt on each occasion that barriers were removed or interfered with, it would be necessary to replace them which would result in a direct cost but would also potentially stall work on the project until the barriers were replaced. It might also give rise to a further hazard if

the signs became confusing or unclear, or a particular barrier or sign were missing, which would most likely occur at night until its removal was discovered.

I found Mr Lawson's evidence on this issue to be unpersuasive. Apart from the fact that his agreement in the Joint Experts Report was in clear conflict with that part of his report, his justification for resiling from that agreement in evidence was at best unconvincing. Mr Lawson was simply not prepared to entertain the use of water filled barriers under any circumstances. This included the scenario where there was adequate lighting provided at the accident site which revealed their presence. As indicated earlier in this judgment, the failure on the part of the defendant to comply with the Australian Standard while potentially giving rise to a claim in negligence, was not determinative of that proposition. Such a finding depended upon the whole of the evidence, not just the question of whether the Australian Standard was complied with. ...

I am satisfied the defendant has made out the defence under Section 43A so that even if I am found to have erred in my assessment of negligence, the plaintiff's claim would still fail as a result of the application of Section 43A. The plaintiff has failed to establish that the use of the Triton water filled barriers was not a reasonable exercise of its special statutory power by the defendant."

Therefore, although the plaintiff would have failed at first instance, the Council had the protection of Section 43A of the *Civil Liability Act 2002.*

It is important to note that Section 43A does not provide an automatic defence where roadworks are being undertaken by a local Council. This is demonstrated by the fact that Harden Shire Council were not entitled to rely on the defence in the Curtis decision.

A local Council will still need to prove their actions were not so unreasonable that no reasonable Council would have undertaken them.

Amanda Bond
asb@gdlaw.com.au

Shining a light on obvious risk and an occupiers liability

The obvious risk provisions in the *Civil Liability Act 2002* provide there is no duty on occupiers to provide a warning in circumstances where a risk of harm was obvious to a reasonable person.

The defence has been relied on in a variety of circumstances for occupiers such as slippery stairs at an ice skating rink (*Liverpool Catholic Club Ltd v Moor [2014] NSWCA 394*) and an unsecured manhole along a footpath (*Ryde City Council v Smith [2003] NSWCA 57*).

The case of *Ratewave Pty Limited ("Ratewave") v BJ Illingby* saw the Court re-examine the issue of obvious risk in the context of a large decorative wooden platform in a hotel lobby.

Mr Illingby was walking through the lobby area of the Manly Pacific Hotel when he tripped on a raised wooden platform which ran alongside the hotel wall as a design feature. The wooden platform was approximately 1.77 metres wide, 2.62 metres long and 15.1 cm in height and was a dark wood which contrasted against the white marble hotel lobby floor. A strip of LED lighting was also present underneath the wood, illuminating the floor directly under the wooden platform. There were also several cylindrical sculptures placed on the platform.

Mr Illingby stated he failed to see the wooden platform due to an intense glare from a nearby window which obscured his view.

The case was first heard in the District Court before Judge Levy. The assertion that the plaintiff's vision had been affected by glare only arose at the hearing. Ratewave relied on liability evidence from Dr Cooke regarding the lighting in the lobby following an inspection of the premises. Dr Cooke gave evidence at the hearing that the glare was unlikely to have affected Mr Illingby's ability to see the raised platform. His Honour found the evidence of Dr Cooke unpersuasive noting that his inspection of the hotel lobby had taken place on a day that was slightly cloudy and his Honour ultimately made a finding that the plaintiff had been affected by the glare which had obscured his ability to see the platform.

His Honour found in the circumstances including the presence of glare, that there was a risk of people injuring themselves on the platform. His Honour found that such a risk was both foreseeable and not insignificant. His Honour also found the risk was not an obvious risk for the purpose of Section 5F (1) of the *Civil Liability Act 2002*. His Honour did not apply any discount for contributory negligence.

Ratewave appealed on the basis the primary judge had erred in finding Mr Illingby had been affected by the intense glare and in not placing sufficient weight on the evidence of Dr Cooke. Ratewave also argued in the absence of a finding that the plaintiff was affected by glare there was no explanation as to why the plaintiff did not see the platform and in those circumstances it was an obvious risk and no obligation arose for Ratewave to warn of its presence.

The Court of Appeal was comprised of Meagher JA, MacFarlan JA and Fagan J.

The Court held the evidence did not support a finding that the light or glare was "intense or debilitating". The

Court reviewed the evidence of Mr Burn on behalf of Mr Illingby and Dr Cooke for Ratewave. As the issue of intense glare had only arisen at the primary hearing neither expert had directly considered it in their reports however they had examined the lighting of the lobby and Dr Cooke, after considering the issue in particular depth, had concluded the lighting in the area was excellent and provided optimum lighting.

The Court held the primary judge was not justified in the limited weight he gave to Dr Cooke's evidence.

The Court found the presence of such a low platform in a lobby area was not likely to be expected by pedestrians. It would also be reasonably expected that users of the area may be distracted, inattentive or even less than careful. In those circumstances the risk of someone not seeing the platform and tripping was both foreseeable and not insignificant.

The Court looked at the following factors that would have led a reasonable occupier to provide warning signs:

- pedestrians in the hotel lobby would not expect to come across a low raised platform in that area;
- pedestrians in the lobby would include people who were using varying degrees of care and attention and potentially not looking where they were going;
- because of the nature of the platform and where it was located it would not be expected, such that someone who was exercising care for their safety would not necessarily see and avoid it;
- that a person who tripped on the platform could sustain serious injuries which could easily be avoided if there was a warning sign or some form of barrier cautioning off of the area;
- that these precautions could be taken without difficulty or expense and that there was little or no special utility in having the platform raised as it was.

Meagher JA and MacFarlan JA both found that based on the above factors the risk of harm was not an obvious risk. Their Honours held a reasonable occupier would have taken steps to warn pedestrians of the platform. Further, the primary judge had not erred in his finding of no reduction for contributory negligence and found on Mr Illingby's evidence that he was looking where he was going and did see various visual cues such as raised cylindrical sculptures on the platform, which he described in his evidence.

On the issue of causation Meagher JA and MacFarlan JA considered a warning sign would have been sufficient to prevent Mr Illingby from tripping.

Fagan J dissented on the issues of obvious risk and contributory negligence. Although his Honour agreed the risk was foreseeable and not insignificant, he considered it did constitute an obvious risk taking into account issues such as the dark colouring of the timber and light marble surrounding floor, LED lighting, the substantial size of the platform, reflectivity of the timber surface and the visual cue provided by the sculptures mounted on the floor.

His Honour noted:

> *"The presence and characteristics of the platform would have been obvious to a reasonable person in the position of [Mr Illingby] and once these facts were appreciated the risk of tripping over it was self evident."*

His Honour found that Mr Illingby had failed to take reasonable care for his own safety noting Dr Cooke's evidence that the platform would have been within a pedestrians "cone of vision" from approximately 20 meters away. His Honour found that Mr Illingby either failed to keep a reasonable lookout sufficient to identify the platform or did identify the platform and subsequently failed to navigate it as he did not look at it at reasonable intervals as he approached.

His Honour distinguished the case from the manhole cover which had not been properly closed in *Ryde City Council v Smith* [2003], noting that the platform was less hazardous and more discernible and that Mr Illingby's failure to take reasonable care was significantly greater than the plaintiff in that case. His Honour made a finding of a reduction of one third of damages for contributory negligence.

This case highlights the high standards occupiers are held to and the degree of care which needs to be taken by occupiers to manage all tripping hazards even those which appear obvious.

In this case the platform involved was a decorative design element and occupiers should ensure that the safety of pedestrians is held at the forefront of their mind when designing an area.

Where design elements are included risk assessments, warning signs and where necessary other precautions such as barriers can prevent design elements from becoming a risk to pedestrians and manage the risk for the occupier.

Victoria Upton
vmu@gdlaw.com.au

CONSTRUCTION ROUNDUP

Home Warranty Insurance and Indemnity Deeds

As part of the home warranty insurance scheme it is common for the insurer to require the directors of a building or development company to execute a Deed

of Indemnity under which the director is personally liable to repay the insurer for any amounts paid out under the policy.

If a claim is made under the policy, in many cases the insurer will undertake a cursory check of the alleged defects, negotiate a settlement with the owners corporation or homeowner and then claim repayment from the indemnifying director without involving the director in the settlement process.

However in the recent case of *AAI Limited t/as Vero Insurance v Kalnin Corporation Pty Limited* [2017] NSWSC 548, the insurer's failure to inform the director of its proposed settlement of a claim made under the policy and the resulting failure to give the director an opportunity to respond or to undertake his own work to mitigate the amount of the claim meant that the insurer was not entitled to recover under the indemnity the payments it had made on the policy.

In this case, the director was Mr Kalnin. Mr Kalnin owned a development company, Kalnin Corporation Pty Limited, which in the period from 2001 to 2004 developed a property it owned at Redfern, engaging a builder, Definite Dimensions Pty Limited, to undertake the construction work. As required by the *Home Building Act 1989* (NSW) the builder had applied to Vero Insurance (then known as Sun Alliance Limited) to be certified as eligible to obtain statutory home warranty insurance for the project. As a condition of providing such a policy, Vero had required both Kalnin Corporation as developer and Mr Kalnin as director to execute a Deed of Indemnity in its favour.

Under this deed, Kalnin indemnified Vero for all claims and payments etc that Vero reasonably and properly sustained or incurred resulting from the builder's act or omission or a claim made by an insured under the terms of the policy. The deed also required Vero to inform Kalnin promptly of the proposed settlement of any such claim.

Four years after completion of the construction work, the Owners Corporation that had been created by the development notified Vero of allegedly defective construction work and foreshadowed making a claim under the policy. By now, the builder had been placed into liquidation. It was common ground between Kalnin and Vero in the Court case that at the time of making the claim the Owners Corporation was only entitled to claim in relation to structural defects, since the statutory warranty for non-structural defects had expired two years after completion of the work.

Between May 2009 and February 2013 Vero, through its various consultants, evaluated and assessed the range of defects that had been alleged by the Owners Corporation and evaluated tenders from four remedial builders to carry out defect rectification works. Ultimately Vero paid around $4 million in respect of remedial works. It then sought to recover that sum from Mr Kalnin and Kalnin Corporation under the Deed of Indemnity.

There was some controversy between the parties as to whether the policy ultimately issued by Vero was the one contemplated by the Deed of Indemnity. Justice Stevenson applied the principles that had been laid down in *Simic v NSW Housing Corporation* and held that when the wording of the policy was considered objectively as it would be understood by a reasonable businessperson, taking into consideration the context of the policy being issued, it was clear the policy that was ultimately issued by Vero was intended to be caught by the indemnity.

The Court then turned to the issue of whether Vero had acted "reasonably and properly" when making payment to the Owners Corporation in circumstances where it was contended that Vero gave no consideration as to whether the defects of which the Owners Corporation had complained were structural or not. The Court held that if Vero had made a payment that was (as a matter of fact) a result of the builder's act or omission and was also caught by the terms of the policy, then that payment would be one that had been "reasonably and properly" sustained or incurred that - whether or not Vero had actually turned its mind to these questions when it made the payment.

However if Vero had made the payments without complying with its further obligations under the Deed of Indemnity, then it would not have acted reasonably or properly.

In this regard it was pertinent that Kalnin had argued that many of the defects complained of by the Owners Corporation were not "structural defects" within the meaning of the *Home Building Act*. Accordingly, Stevenson J gave detailed consideration as to what was in fact a structural defect within the meaning of this legislation.

Stevenson J held that a structural defect as defined in Regulation 57AC of the Home Building Regulation included:

- a "component" of a building (whether that component was a foundation, floor, wall, roof, column or beam or any other such component) which was "load bearing" such as to be "essential to the stability of the building" or any part of it; and
- a building element (such as a waterproofing membrane, tiling and the like) attached to such load bearing components to the extent that they are designed or intended to and in fact promote the bearing of the load.

Further, his Honour held the inclusion of "weather proofing" in the concept of a component was intended by the legislature to include any component forming part of the external walls or roof of a building that was intended or designed to contribute to the necessary supporting structure of the building but did not include

any component forming part of the external wall or roof of the building that had a purely cosmetic function (such as a cosmetic render, basketball hoop, letterbox or ventilation grill).

Importantly the deed had required Vero to inform Mr Kalnin and Kalnin Corporation of any proposed settlement of a claim. While Vero had initially informed Mr Kalnin of the fact that a claim had been made, a number of years elapsed in which Vero obtained experts' reports and tenders from remedial builders but during which Vero had not allowed Mr Kalnin an opportunity to consider those reports or tenders or to carry out remedial works himself. This was particularly relevant since Mr Kalnin had at an early stage in the correspondence between Vero and himself offered to carry out any remedial works for which he was liable. Instead, Vero informed Mr Kalnin at a late stage that a determination had already been made to settle the claim and they would be relying on the Deed of Indemnity to recover the amount paid from Mr Kalnin.

The Court held in the circumstances that the requirement to notify Mr Kalnin and Kalnin Corporation of the proposed settlement was a condition precedent to Vero's entitlement to recover the amount paid on the claim from Mr Kalnin and Kalnin Corporation under the Deed of Indemnity. By treating the determination of the claim as a *fait accompli*, Vero had not complied with the condition precedent. Accordingly Vero's claim for repayment from Mr Kalnin and Kalnin Corporation failed.

This case is likely to provide some comfort to builders and developers who often are required to enter into Deeds of Indemnity but lack the power to control or direct how a claim made under the policy is dealt with. This is particularly the case since most Deeds of Indemnity reserve the insurer's entitlement to determine how the claim should be settled without input from the indemnifier.

However insurers would be prudent to ensure they do inform the indemnifying party of what is happening and give that party an opportunity to respond to the claim so they are afforded every opportunity to mitigate the amount paid out under the claim and consequently the amount the insurer will seek to recover from them.

Linda Holland
lmh@gdlaw.com.au

Effect of contractual deeming provisions on security of payment claims

Many construction contracts include provision that if the contractor makes a claim for payment earlier than the monthly specified date, then that claim is deemed to have been served on that later specified date. This allows the principal under the contract to have some predictability as to when its liability to pay the contractor for its work will arise.

Recently the issue arose in the Courts as to whether such a deeming provision has an effect on a contractor's right to payment pursuant to the processes of the *Building & Construction Industry Security of Payment Act 1999* (NSW).

In *Regal Consulting Services Pty Limited v All Seasons Air Pty Limited* [2017] NSWSC 613 the contract provided that payment claims were to be made on the 20th of every month and any payment claim submitted earlier than the 20th of the month would be deemed to have not been served until the 20th and the contractor's entitlement to payment would thus not arise until then. The contractor, All Seasons, made a payment claim on 12 July 2016. Regal disputed any liability under the Act to pay the contractor on the basis that All Seasons had already served a payment claim on 20 June 2016, and thus the next reference date (20 July 2016) under the Act had not accrued at the time All Seasons had served the payment claim.

All Seasons' payment claim was referred to adjudication. The adjudicator determined that she had the jurisdiction to deal with the dispute and also that the contractor was entitled to the claimed amount.

All Seasons made an application to the Supreme Court for a declaration that the determination was void. They argued that since the payment claim was not a valid claim under the Act, the adjudicator did not have the jurisdiction to make any determination. In this regard All Seasons relied on *Southern Han Breakfast Point Pty Limited (In Liq) v Lewence Constructions Pty Limited* which had been handed down by the High Court in the meantime. (Our article on the High Court's decision in *Southern Han* was in our February 2017 newsletter.)

Before McDougall J, All Seasons argued that the effect of the relevant clause of the contract was that any progress claim made earlier than the 20th day of the month was deemed to have been made on the 20th and therefore even if (in chronological terms) the progress claim was made early, in contractual terms it was made on the required date.

McDougall J noted as a starting point that the Act did not seek to override or supplant contractual rights (except the extent that they are inconsistent with the provisions of the Act in which case they are void). Accordingly there can always exist two different mechanisms for a contractor (or subcontractor) to recover payment for its work (such as in this case). In this regard, his Honour noted that just because the contract deemed a certain state of affairs in order to make the processes of the contract as between the parties workable, this did not always create a fictitious state of affairs in relation to the implementation of a statutory process. In other words, it is simply used to create a contractual fiction but does not change the

basic facts upon which the legislation regulates the parties' rights and entitlements.

As a consequence, McDougall J held that in this particular case the contractor's payment claim had been made on the 12th, not the 20th, and at that time there was no further reference date available to it. Accordingly the claim was not a valid claim under the Act. As a consequence, the contractor was not entitled to submit that payment claim to adjudication and any determination made was invalid.

The High Court's decision in *Southern Han* made it clear that without a valid reference date, a contractor is not entitled to submit a payment claim for the work he has carried out. This case was one of the first of what is likely to be a large number of cases to go before the Supreme Court to examine the exact circumstances in which a reference date will arise. This case also provided some useful commentary on how the parallel entitlements to payment under the Act and under the contract work together.

Linda Holland
lmh@gdlaw.com.au

EMPLOYMENT ROUNDUP

Reduction of Redundancy Pay and Acceptable Employment

The *Fair Work Act 2009* introduced a statutory regime for payments to be made to employees if they were made redundant.

Section 119 of the Act provides that where an employee's employment is terminated at the employer's initiative because the employer no longer requires that job to be done by any other employee or because of the insolvency or bankruptcy of the employer, an employee becomes entitled to redundancy pay.

The entitlement to redundancy pay is in addition to any entitlement (either contractual or statutory) an employee has for notice of termination of their employment.

However Section 120 of the Act provides an employer may make an application to the Fair Work Commission to reduce the amount of redundancy pay an employee is entitled to if:

- the employer obtains other acceptable employment for the employee; or
- the employer cannot pay that amount.

The Fair Work Commission in a decision of Commissioner Williams on 10 March 2017 considered an employer's application to reduce the amount the employer was obligated to pay to 2 employees who were made redundant.

The employer was an electrical contracting company. It subcontracted to an engineering company that had a maintenance services contract. The employer provided eight employee electricians pursuant to the subcontract arrangement.

On 17 January 2017 the employer was notified by its client they should reduce the number of employees they were providing from eight to four by 23 January 2017.

A period of consultation took place with the affected employees together with a selection process based on a number of criteria. Four employees were advised by the employer they would not be continuing work on that project but instead would be returning to the employer's head office/workshop.

Subsequently the two employees were each issued a redeployment letter detailing their wages and position description. Both men were offered redeployment with the employer as full time permanent electricians. Ultimately the employees declined the offer of redeployment.

The employer accepted the working hours and remuneration was less than they would have earned in the project.

The Commissioner identified the differences between the project position and the employment that was now being offered as being:

- different work locations but only up to two kilometres difference between the new location and the project location;
- eight hours less per month; and
- a reduction in the hourly rate from $57.57 to $37.57 as the new position did not offer continuous shift work.

The Commissioner accepted the new employment involved in a reduction of annual income of over $40,000.00 per annum for each employee for the same hours.

The Commissioner considered Section 120(1)(b) that the employer found for the employees "other acceptable employment".

It was noted by the Commissioner that The Full Bench of the Fair Work Commission in *Australian Chamber of Manufacturers v Derolle Nominees Pty Limited* determined:

> *"What constitutes 'acceptable alternative employment' is a matter to be determined as we have said, on an objective basis. Alternative employment accepted by the employee (and its corollary, alternative employment acceptable to the employee) cannot be an appropriate application of the words*

because that meaning would give an employee an unreasonable and uncontrollable opportunity to reject the new employment in order to receive redundancy pay: the exemption provisions would be without practical effect.

Yet the use of a qualification 'acceptable' is a clear indication that it is not any employment which complies, but that which meets the relevant standard. In our opinion there are obvious elections of such a standard including the work being of like nature: the location being not unreasonably distant; the pay arrangements comply with the award requirements. There will probably be others".

The Commissioner noted the fact that the employment was rejected by the employees does not objectively make it "unacceptable".

The Commissioner considered that whilst a loss of annual income of around $40,000.00 was a significant negative difference between the project position and other employment offered, being a reduction in income of 33%, he accepted the employer had done all it reasonably could do in difficult circumstances to retain the employees within its workforce and provide them with ongoing employment.

The Commissioner accepted the immediate business realities were that the employer could only offer the employees other employment which involved significantly reduced earnings. Having regard to the significant difference in earnings, the Commissioner determined the positions offered were not "acceptable employment" for the purposes of Section 120 of the Act. Accordingly the employer's application to reduce the employees' entitlement to redundancy pay to zero was dismissed and the employees were entitled to the full benefits of the redundancy pay as provided by the Fair Work Commission.

Employers should be mindful that when looking to redeploy employees whose positions have been made redundant that the conditions of the redeployment position would be acceptable to the employees. As the Commissioner noted the travel time and hours worked difference in the redundant position and the new position were not of consequence, however a reduction in wages of 33% rendered the redeployment unacceptable in the circumstances of the employees' remuneration. Obviously a consideration would be whether the employees could do better on the open labour market as a factor of whether the new position was acceptable. If the remuneration that was offered in the redeployment position was comparable to what was available on the open labour market, it would make the redeployment position more "acceptable".

Michael Gillis
mjg@gdlaw.com.au

Qualifying period for Unfair Dismissal Protection

A recent Unfair Dismissal application in the Fair Work Commission highlights some key points for employers relating to qualifying periods of service.

Section 382 of the *Fair Work Act 2009* (Cth) says:

A person is ***protected from unfair dismissal*** at a time if, at that time:

(a) *the person is an employee who has completed a period of employment with his or her employer of at least the minimum employment period; and*
(b) *one or more of the following apply:*
  (i) a modern award covers the person;
  (ii) an enterprise agreement applies to the person in relation to the employment;
  (iii) the sum of the person's annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations, is less than the high income threshold.

Section 383 of the Act says:

The ***minimum employment period*** is:

(a) *if the employer is not a small business employer—6 months ending at the earlier of the following times:*
  (i) the time when the person is given notice of the dismissal, immediately before the dismissal; or
  (ii) if the employer is a small business employer—one year ending at that time.

That is, the unfair dismissal protections kick in after 6 or 12 months (depending on employer size) for award/enterprise agreement employees, and those who earn less than the high income threshold.

In *Cannington v Triple R Corporation Pty Ltd* [2017] FWC 2772, a dispute arose as to whether an employee had met the required 6 months minimum employment.

The first issue involved the start date of employment. The employee's letter of offer said *"Your employment will commence on or before 13th June 2016 according to allocated shift roster".*

The employer required the employee to attend induction training on 10 June, which the employee did. He asked to be paid in accordance with the terms of his employment agreement, but did not receive payment.

His first paid shift was on 13 June.

The employee argued that his employment commenced on 10 June, rather than 13 June as asserted by the employer.

The FWC took the view that the start date was 13 June –because the attendance at induction training was a precondition to his employment, and because he had not been paid. This seems unsound – it is difficult to see how attendance at a compulsory training session for which there was an entitlement to be paid could not constitute the commencement of employment.

The second issue concerned when the employment terminated.

The employee was told by telephone on 9 December that his employment was terminated and he worked no further shifts after that. He subsequently received a letter which said *"Your employment will cease on 13 December."*

On this issue the FWC found that that what was critical was when the employment relationship came to an end – and this was on 9 December, even if the employment contract ended later on 13 December.

So, the employee had not served 6 months and was not protected from unfair dismissal.

David Collinge
dec@gdlaw.com.au

WORKERS COMPENSATION ROUNDUP

Section 67 – Alive and Well

Almost five years have passed since introduction of the legislative changes in 2012 abolishing a worker's entitlement to lump sum compensation under Section 67 for pain and suffering. As a consequence of a number of appeal decisions including *Goudappel,* a worker's entitlement to compensation for pain and suffering in claims made prior to the amending legislation has survived in a number of limited circumstances.

A recent Presidential determination has confirmed entitlement to compensation for pain and suffering will remain in certain circumstances, even where there was no claim under Section 67 prior to the amendments and where there was aggravation of the original injury that was not notified until after the amendments commenced.

The worker suffered an injury to her right knee in the course of her employment as a delicatessen assistant in February 2008. In August 2010 the worker was assessed as suffering 7% whole person impairment and in September 2010 her solicitors made a claim for lump sum compensation under Section 66. The claim was not pursued as the worker had not reached maximum medical improvement. In September 2010 the worker suffered a further injury to her knee and The worker underwent further surgery in February 2011.

In January 2014 the worker was assessed as suffering 19% whole person impairment in respect of injury to the right knee and associated scarring. Her solicitors made a claim for lump sum compensation under Section 66 and Section 67 in February 2014.

The employer declined liability on the basis maximum medical improvement had not been reached and further surgery was required.

In August 2014 the worker underwent a total right knee replacement. She was further assessed in November 2015 with 20% whole person impairment. In the report her medico-legal specialist noted the worker suffered a further twisting injury to the right knee at work in September 2010.

A further permanent impairment claim was made on the employer in December 2015 again identifying the date of injury as January 2008 and making a claim for lump sum compensation under Sections 66 and 67 of the 1987 Act.

The employer relied upon a medical opinion wherein the worker was assessed with 18% whole person impairment as a consequence of the work injuries in January 2008 and September 2010 and the impairment was apportioned equally between the two injuries.

Proceedings were commenced in the Workers Compensation Commission and the employer placed in dispute the level of impairment, the aggregation of impairment for separate frank injuries and the entitlement to compensation pursuant to Section 67.

When the matter was listed for hearing in July 2016 there was an agreement between the parties that the worker was entitled to a total of 19% whole person impairment as a result of both injuries aggregated together. The parties were directed to file written submissions regarding the worker's entitlement to compensation pursuant to Section 67.

The arbitrator subsequently issued a Certificate of Determination in the worker's favour finding she was entitled to an award of lump sum compensation pursuant to Section 67.

An appeal was lodged by the employer.

In his determination of the appeal Judge Keating observed the arbitrator had correctly identified the matter was complicated because the claimant relied on two separate injurious events leading to the pathology which resulted in the agreed whole person impairment of 19%. Until the hearing in July 2016 no claim had

been made with respect to the injury in September 2010.

In the appeal the employer submitted the worker had no entitlement to claim compensation pursuant to Section 67 as she had not made a claim that specifically sought this compensation prior to enactment of the amending Act. It was argued any entitlement the worker may have did not crystallise until such time as she reached the necessary threshold which did not occur prior to the 2012 amendments. It was further argued the claim was a "new" claim rather than an amended claim and such a claim could not be made as all of relevant particulars required to make the claim did not occur until after the 2012 amendments.

His Honour Judge Keating relied on *Goudappel* to find that it was enough that the worker had made a claim that specifically sought compensation under Section 66 before the amendments and therefore the amendments did not apply to her and she was entitled to have her claim for Section 66 benefits determined without the restrictions imposed on lump sum compensation by the amending Act.

Judge Keating considered it was immaterial that the particulars of the 2010 injurious event were provided after the 2012 amendments. The particulars in respect of the injury to the right knee and the claim for lump sum compensation pursuant to Section 66 had been validly made before 2012. Whilst ever the claim in respect of the 2008 injury remained unresolved, it was capable of being amended and any amendment did not constitute a new claim because the claim related to the same "injury". It did not matter the amendment also sought Section 67 benefits for the first time.

The decision demonstrates the Commission's propensity to make a beneficial interpretation of a worker's entitlement to compensation for pain and suffering in relation to any claim that remains unresolved following the amendments in 2012.

Belinda Brown
bjb@gdlaw.com.au

'Injury' is the only factor to be determined

Pursuant to Section 65A(1) of the *Workers Compensation Act 1987* ("the 1987 Act") no compensation is payable in respect of permanent impairment that results from a secondary psychological injury.

An employee, to be entitled to permanent impairment for a primary psychological injury, must demonstrate the psychological injury is not secondary in nature.

A recent decision of the Workers Compensation Commission demonstrates an employee can have a primary psychological injury and a physical injury arising out of the same accident.

By way of background the worker was employed by the employer as a maintenance supervisor before suffering a physical injury on 23 March 2012 when a metal drum, alleged to weight 30-40kg, fell on him whilst he was working under it in the course of his employment.

The worker initially lodged a claim for physical injury which was accepted by the insurer. The worker then alleged as a consequence of the incident he had suffered a primary psychological injury within the meaning of Section 65A of the 1987 Act and claimed lump sum compensation of 54% whole person impairment for the primary psychological injury.

The employer disputed the fact the worker suffered a primary psychological injury on the basis that no such injury within the meaning of Section 4 of the 1987 Act had been suffered and employment was not a substantial contributing factor to such an injury within the meaning of Section 9A of the 1987 Act. Reliance was placed on medical evidence which suggested the worker was exaggerating, if not fabricating, his symptoms to a degree whereby his presentation could not be accepted as genuine.

Arbitrator Wardell had to determine whether the worker suffered a psychological injury within the meaning of Sections 4, 11A(3) and 65A of the 1987 Act as a result of the frank incident of 23 March 2012, in which the worker also suffered physical injury.

Arbitrator Wardell found in favour of the worker on the issue of whether he suffered a primary psychological injury as a result of the incident as the only claim before the Commission was for permanent impairment.

The case put forward by the employer was essentially that there was no immediate complaint consistent with a post traumatic stress disorder ("PTSD") as claimed and that the worker's bizarre conduct was such that his account of events could not be accepted and his presentation to doctors infected and undermined the medical opinion to such an extent that his presentation could not be accepted.

In his decision the arbitrator noted:

> *"Because the only claim made in the Application is for permanent impairment compensation resulting from a primary psychological injury, my jurisdiction is limited to determining the "liability" issue of whether the applicant suffered such injury: see section 65 of the 1987 Act, sections 293 and 321 of the 1998 Act and Jaffarie v Quality Castings Pty Ltd [2014] NSWWCCPD 79 and the cases referred to therein. Issues such as whether the applicant continues to suffer from such an injury, whether his current symptoms result from that injury and whether his current symptoms are genuine all form part of the "medical dispute" concerning the degree of*

impairment present as a result of an injury which falls within the exclusive jurisdiction of an Approved medical Specialist (AMS).

In the circumstances of the present case, in which the applicant's presentation has become increasingly bizarre and possibly suspect over time, it is necessary to bear the demarcation between the respective jurisdictions of arbitrator and AMS' carefully in mind. This is particularly so where I am asked by the respondent to find that the applicant has failed to discharge his onus of establishing that he ever had an "injury" on the basis of medical opinion concerning the unreliability of his current presentation rather than his presentation at any stage following the incident on 23 March 2012 in which he suffered physical injury."

The arbitrator determined the physical injury involved a sufficiently real risk of serious injury to cause PTSD and even though many aspects of the worker's presentation was not consistent with PTSD his only determination is that relating to injury. Even identifying the shortcomings in the medical evidence the arbitrator concluded in relation to diagnosis:

"Ultimately, and against a background of other experts to whom I have referred having diagnosed PTSD and depression, I have concluded that it is appropriate to place the greatest weight on the opinions of Dr Malik and Dr Samuell in his first report of 25 May 2012".

Dr Samuell provided an initial report dated 25 May 2012 wherein he diagnosed PTSD. The doctor subsequently altered his opinion when he was forwarded neuropsychological assessments which demonstrated possible feigning and inconsistency in presentation. In preferring the original opinion of Dr Samuell as at May 2012 and Dr Malik as at June 2013 the arbitrator approached the case on the basis that if there had been an injury in the nature of PTSD as a result of the incident then the worker's subsequent bizarre presentation does not mandate a different conclusion having regard to the limited issue which he was required to determine.

The arbitrator essentially concluded on the basis of the whole of the evidence and noting his jurisdiction is limited to the issue of injury only, he is only required to be satisfied on the balance of probabilities, rather than to a degree of absolute certainty that the worker suffered a psychological injury as a result of the accident of 23 March 2012. Whether and to what extent his alleged level of impairment is genuine and results from the subject injury is more a matter falling within the exclusion jurisdiction of an approved medical specialist ('AMS").

The appropriate standard of proof required of the worker in discharging his onus is the balance of probabilities, meaning the arbitrator must be satisfied to a degree of actual persuasion or affirmative satisfaction the case on injury has more probably than not been made out. It is not necessary for the arbitrator to be satisfied to a degree of medical or scientific certainty but on the other hand it would not be sufficient for the arbitrator to be merely satisfied the worker had suffered a psychological injury caused by the incident of 23 March 2012. The arbitrator must be satisfied on the balance of probabilities, which he was.

The case is a reminder that an arbitrator, when determining the limited question of injury, must only be satisfied that an injury in fact occurred. It is not for the arbitrator to determine whether any impairment arising from the injury is such that would provide an entitlement to benefits. Whether the worker's current symptoms result from the injury or whether his current symptoms are genuine all form part of a medical dispute concerning the degree of impairment as a result of the injury which falls within the exclusive jurisdiction of an AMS, not an arbitrator.

Accordingly the matter will be remitted for referral to an AMS who will undertake the task of assessing the degree of permanent impairment resulting from the injury taking into account the varied medical evidence presented by both parties.

Naomi Tancred
ndt@gdlaw.com.au

The difficulties in striking out a Pre Filing Statement in NSW

We have reviewed a number of decisions in our previous newsletters highlighting the difficulty striking out a Pre Filing Statement in a work injury damages claim. The striking out of a Pre Filing Statement has significant ramifications for the claimant and on that basis the jurisdiction to strike out a Pre Filing Statement rests solely with the President of the Workers Compensation Commission.

Recently, President Keating of the Workers Compensation Commission was again requested to determine whether a Pre Filing Statement should be struck out for want of prosecution.

The worker was employed as a cleaner and suffered an injury sufficient to result in a significant degree of permanent impairment. In fact, the worker had demonstrated to the satisfaction of the employer she had reached the 15% whole person impairment threshold in order to bring a claim for work injury damages.

On 7 June 2016 the worker served a Pre Filing Statement on her employer and an attempt was made to resolve the matter with an informal settlement conference. The matter failed to resolve and the Commission appointed a mediator on 25 July 2016 to mediate the matter.

Notwithstanding numerous attempts to contact the worker's solicitors there was no communication from her solicitors with either the mediator or Commission staff resulting in an abandonment of the mediation

On 9 February 2017 the employer made an application to strike out a Pre Filing Statement and the Commission issued a number of Directions to file a Notice of Opposition by 24 March 2017. That Direction was not complied with by the worker's solicitors. Numerous other attempts were made by the Commission to contact the worker and her solicitors and finally on 18 April 2017 the worker advised the Commission she had recently returned from overseas and had left a message for her legal representatives to contact her.

On 19 April 2017 Commission staff again contacted the worker's solicitor and advised them to request in writing an extension of time required to file a Notice of Opposition if the worker sought to oppose the application. No response was received to that email. No action was taken by the worker's solicitors until after a telephone conference with the President on 2 May 2017. The only explanation provided as to the failure to respond to the Commission's communications was that the worker had been overseas and had been unavailable to provide her solicitor with instructions.

The President commented that the legislative provisions to strike out a Pre Filing Statement for want of prosecution ensures there is a degree of certainty to the pre-litigation phase of proceedings and makes sure the parties explore resolution and/or mediation of the claim before embarking on litigation.

In the present claim no steps had been taken to pursue the work injury damages claim since the mediation application was filed on 15 July 2016. There were no reasons given as to why the matter did not advance in the seven months after the mediation application was filed and before the worker left for overseas, noting she was only away from 17 February 2017 to 17 April 2017.

Notwithstanding the unsatisfactory conduct of the proceedings by the worker's solicitor, President Keating was guided by the worker's submissions that she wished to pursue her claim for work injury damages. Furthermore, other than the delay, the employer had advanced no other reason why the Pre Filing Statement should be struck out, particularly in that no actual prejudice had been asserted. Exercising his discretion and in the President's words, *"but only by the barest of margins",* the application should not be dismissed thereby giving the worker the opportunity to pursue her claim for damages.

This decision reinforces the Commission's desire to afford claimants every opportunity to pursue their claim for work injury damages including granting significant latitude in regards to compliance with Directions issued by the Commission. In particular, the Commission does not wish to prejudice the rights of injured workers when the worker's solicitors have been tardy in failing to advance a claim. Provided a claimant wishes to pursue a claim for work injury damages, it is highly unlikely a Pre Filing Statement will be struck out purely on the grounds of delay, particularly if there is no prejudice to the employer.

Stephen Hodges
sbh@gdlaw.com.au