Gillis Delaney Lawyers

GD NEWS / MARCH 2019

IN THIS EDITION

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

Death of Insurance for WHS Fines

Father time is fast approaching for insurance on work health and safety fines with the completion of the 2018 review into the Model WHS Laws and the release of the final report of Marie Boland who was appointed to carry out that review.

Safe Work Australia released the final report noting it is committed to ensuring the Model WHS Laws are as effective as possible to keep Australian workers healthy and safe and will continue to conduct regular reviews.

In total the report makes 34 recommendations. One of those recommendations is that there should be a prohibition on access to insurance for payment of fines for breaches of work health and safety legislation. In addition, it was recommended there be the introduction of a new industrial manslaughter offence.

WHS legislation in Australia is driven at a State level and for the recommended changes to be implemented across Australia, State and Territory regulators will need to adopt any new Model WHS Laws sanctioned by the Commonwealth.

We will have to wait and see whether or not Marie Boland's recommendations are adopted at both the Commonwealth and State and Territory levels.

However, one thing for certain is that insurance for WHS fines is on the nose.

The review observed:

> *"Insurance policies which cover the fines of those found guilty of breaching the Model WHS Act have the potential to reduce compliance with the laws and undermine community confidence"*.

The report recommends that persons or organisations that are required to pay penalties under the Model WHS Laws be unable to recover that cost through insurance or indemnification.

The report recommends the *Model WHS Act* be amended to make it an offence to:

- enter into a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the *Model WHS Act*;
- provide insurance or a grant of indemnity for liability for a monetary penalty under the Model *WHS Act*; and
- take the benefit of such insurance or such an indemnity.

The findings in the report make it plain that insurers would be prohibited from offering insurance which covers fines for breaches of the *Work Health Safety Act* and insureds would be prohibited from entering into such insurance.

This will present an interesting conundrum for management liability and statutory liability insurers.

Whilst there has been debate over the years over the ability to insure fines, insurance products in the Australian market have provided cover for fines. Offerings in the future may need to change.

However insuring legal costs incurred defending prosecutions was not seen as an issue.

Boland in the report notes that:

"I am not suggesting that companies and officers should be precluded from accessing insurance or indemnity for legal costs incurred in defending a prosecution".

Boland's recommendations that will effect insurance are limited to a recommendation that insuring fines should be made illegal.

The report advocates the New Zealand position and suggests provisions similar to those found in New Zealand law should be applied to prevent individuals and businesses from recovering a penalty under a contract of insurance or an indemnification.

The report observed there are avenues available for Courts to make personal payment orders which would prevent an individual or business from seeking indemnification in respect of a fine. Section 272 of the *Model WHS Act* provides that a term of a contract or agreement seeking to contract out a duty owed under the *Model WHS Act* ought to transfer the duty to another person is of no effect, and that arguably interacts with the indemnification provided by insurance arrangements.

However, clear provisions that prohibit insurance or indemnity agreements in respect of fines would make it plain that insurance for fines cannot be offered.

WHS regulators can seek personal payment orders in proceedings where individuals and businesses are convicted for breaches of the WHS Act to ensure that those convicted cannot be indemnified buy others for fines however that strategy has not been adopted to date. The adoption of the report's recommendation to prohibit insurance for fines and penalties for WHS Act breaches would make it unnecessary for regulators to go down that track.

Interesting times are ahead.

Management liability and statutory fine insurers need to have a close think about the terms of their policies and the benefits they will offer moving forward as the storm clouds are fast approaching and we wait to see if insurance cover for WHS penalties will become a thing of the past in Australia.

David Newey
dtn@gdlaw.com.au

Is It Ever Too Late To Challenge An Insurer Who Has Not Paid A Claim

Property and industrial special risk insurance provides cover for damage to property. The basis of settlement provisions in a policy usually give an insurer the option to reinstate, replace or repair the property. However they are obliged to indemnify for damage happening during the period of damage. However the damage in some cases may not be detected for some time, for example damage to footings in a property from subsidence resulting in a claim being made after the policy period expires.

It is often the case that additional costs are also covered by the policy over and above costs that would cover the reinstatement of the property to the state it was in before the damage, for example additional costs of reinstating property to comply with changed legislative requirements. Further business interruption losses are also covered which run for a period and may not be ascertained until the end of the indemnity period.

An insurer confronted with property damage needs time to investigate and assess the claim and determine an appropriate strategy for the management of the claim. If that claim is made years after the policy lapses investigations are necessary to determine when the damage occurred.

If an insurer determines cover is not available or that only part of the damage is covered, an insured if not satisfied with that decision will need to commence legal proceedings to challenge the determination.

Actions against an insurer that fails to indemnify an insured are based on an alleged breach of contract, that is, a failure on the part of an insurer to meet the claim in accordance with the terms of the contract of insurance.

Legislation in the States and Territories impose limitation periods for claims for breach of contract.

For example, in New South Wales there is a six year limitation period to bring a claim for a breach of

contract.

Whilst it is unusual for property damage claims to be made more than 6 years after damage first occurred or for legal proceedings bringing an indemnity dispute to be filed more than six years after the damage occurs, the possibility of that occurring is real.

That is precisely what happened in a recent claim involving Globe Church Incorporated and Allianz Australia Insurance Limited and Ansvar which was considered by the NSW Court of Appeal in November 2018 with a judgment delivered on 26 February 2019.

The Court of Appeal comprised five judges as it was necessary to examine previous appellate judgments which were argued to be wrong.

Globe Church Incorporated commenced proceedings against Allianz Australia and Ansvar in connection with a claim under an industrial special risks insurance policy taken out in 2008. The property damage occurred to a Church building in Gateshead, New South Wales and its contents.

The damage allegedly included the undermining of pier footings to the Church hall and car park as a result of rainwater and flooding.

The damage occurred between 8 June 2007 and 31 March 2008. Further damage of a similar type was alleged to have occurred from 31 March 2008 to 31 March 2009 and from 31 March 2009 to 31 March 2010 and 31 March 2010 to 31 March 2013.

Allianz and Ansvar were on risk in respect of a policy taken out in 2008.

Globe Church first made a claim under the 2008 policy on 29 September 2009. Liability was denied by Ansvar on 5 April 2011 and by Allianz on 30 September 2011.

Globe Church however did not commence proceedings until November 2016. The Statement of Claim in the proceedings was filed on 4 November 2016.

The insurers raised a limitation defence arguing that in respect of damage which occurred between 8 June 2007 and 31 March 2008 the limitation period to bring a claim commenced on the happening of damage rather than upon any decision being made by the insurer to refuse to pay the claim. If that was the case Globe Church would be precluded from making any claim in respect of damage that occurred before November 2010.

This issue was ultimately referred to the Court of Appeal for determination as a separate issue in the proceedings. The Court of Appeal's judgment is certainly an interesting one for those who had thought the limitation period commenced when the insurer refused to pay the claim.

Whilst the Court of Appeal was not unanimous in its determination, the majority of the Court determined the cause of action against the insurer accrues when the damage occurs. The cause of action does not accrue for breach of contract at the time the insurer refuses to pay a claim.

The Court of Appeal observed:

> *"Absent of provision in an indemnity insurance policy that makes lodgement of a claim a condition precedent to liability, the concept of a promise to indemnify (to make good the loss (or to hold harm against loss) in the context of a property damage insurance policy is such that the promise is enlivened when the property damage is suffered. Unless it be necessary for there to be a claim made on the insurer to give rise to the liability, it is at the point of property damage that the insured has not been held harmless against the loss and (leaving aside defences that might be raised on such a claim) would be entitled to sue to enforce the promise to indemnify. Such a claim is recognised as being a claim for unliquidated damages (albeit that the amount necessary to make good the loss is to be calculated in accordance with the basis of settlement clause in the policy).*
>
> *Thus unless the making of a demand is a condition precedent to liability, all the essential facts required to be established by the insured to enforce the indemnity will by then have occurred and accordingly the cause of action for unliquidated damages will be complete. It follows that the cause of action accrues on the happening of the property damage (the insured event).*
>
> *That it might seem unfair for the insurer to be in breach of a contract at a time when it may have no notice of the occurrence of the insured event ...; or that this might seem a surprising result or commercially inconceivable ... or even that it might stand on shaking reasoning, ... does not seem to be the point. ... it should be remembered that it is open to the parties to a contract of insurance to negotiate for clauses to protect against concerns of that kind (from the insurer's perspective, say, to make clear that the making of a claim is a condition precedent to liability; from the insured's perspective, say, to make clear that the obligation to indemnify arises on the occurrence of property damage that is reasonably ascertained by the insured). As a matter of principle, however, the state of the authorities in this country (and in England) supports the contention for which defendants here advocate and in our opinion it is important to have consistency of interpretation of such policies (subject of course to the particular wording of the policy in question)."*

In this case the policy did not provide that making a claim was a pre-condition to liability to indemnify.

Meagher JA and Leeming JA who did not agree with that approach concluded that the insurer's indemnity obligation was not breached on the happening of the damage.

Leeming JA observed that the insurer submitted it was a term of their contract that they indemnify their

insured immediately upon the happening of the damage, before any claim was made and indeed before either the insured or insurer was aware of the damage. On settled principles of construction Leeming JA could not agree that there could be a breach by the insurer at the time damage occurred.

This judgment presents a conundrum for insurers and brokers.

The Court of Appeal has confirmed that the law in Australia is that unless the making of a demand is a condition precedent to liability under an insurance contract, all the essential facts required to be established by the insured to enforce the indemnity will have occurred when damage happens and a cause of action for unliquidated damages will be complete at this time and the limitation period for legal proceedings against the insurer commences when the damage happens. If damage is not detected for many years that could become a problem for an insured.

Whilst it is unusual to see property damage claims develop many years after damage first occurs, that is certainly a possibility.

If the time to bring a claim against an insurer starts when damage happens insurance brokers need to be particularly vigilant to advise insureds that there is a limitation period running if there is an indemnity dispute that arises.

No doubt insurers will now review property and ISR policies to determine whether or not conditions need to be included specifying that the making of a claim is an inherent requirement of liability. This would aid insureds and ensure in cases where damage is detected after the policy expires limitation periods do not begin until claims are made. If insurers do not do so then prudent insurance brokers should ensure they protect their insured's interests by requiring provisions in contracts of insurance providing that the making of a claim is a pre-condition to liability and in this way extending commencement of any limitation period to pursue an insurer in Court to the date of making a claim.

Interesting times are ahead and we will see how property insurance and ISR policies develop in light of this recent decision. Watch out for that endorsement to the policy. "It is a condition precedent to the insurers liability under the policy that the insured make a claim for any Damage to Property.

David Newey
dtn@gdlaw.com.au

No Cover for Trailer Under Liability Policy where Defectively Loaded Container Causes Death and Damage

If an injured person wishes to bring a claim for damages against a company that is under external administration or liquidation an application can be made to a Court seeking leave to bring the claim directly against an insurer of the company.

To persuade a Court to exercise its discretion to grant leave to proceed against an insurer, it is necessary for the applicant for leave to establish s/he has a fairly arguable case that:

- the company under administration or liquidation would be found liable for the claim; and
- at the time of the event giving rise to the claim, the company held a valid insurance policy which provided cover to the company in respect of that liability.

Once leave is granted, the injured person is not relieved of his/her onus of proving these elements at trial.

Therefore, it is common for insurers, sued directly, to defend the claim on both fronts, namely its insured was not liable for the claim and that, if liability is so found, the policy does not respond.

In a recent first instance decision of the NSW Supreme Court, an insurer defeated claims for contribution by two defendants where it was held that, although the insured was liable for the claim, the insurance policy did not respond by reason of a policy exclusion.

In *Le v Brown; Nguyen v Brown; Tran v Brown; Monica v Brown; Huggett v Brown (No.2)*, his Honour Justice Garling presided over a four day hearing at the NSW Supreme Court which involved a consideration of these issues.

On 28 June 2012, Edwin Brown was driving a freightliner motor truck comprising a prime mover and side loading trailer upon which was secured a shipping container, packed with wood and plastic products.

The total weight of the container including the products loaded inside it, weighed approximately 22 tonnes.

The combined weight of the vehicles and container was just under 44 tonnes which exceeded the maximum permitted general limit of 42.5 tonnes for this type of freightliner.

As the freightliner was negotiating a left hand turn from the Hume Highway onto the Cumberland Highway at Liverpool it rolled onto its side, crushing a nearby vehicle and colliding with several others. The driver of the crushed vehicle was killed instantly and several others were injured.

Five plaintiffs brought separate claims for damages against Brown and Futurewood Pty Limited ("Futurewood"), the company that was the consignee of the container that was loaded with wood and plastic products in China and shipped to Australia.

One of the plaintiffs was the wife of the deceased who was crushed by the freightliner. She brought a claim for damages pursuant to the *Compensation to*

Relatives Act and also in respect of damages for pure mental harm / nervous shock. The remaining four plaintiffs brought claims for damages in respect of their personal injuries.

At the time of the rollover, the prime mover was owned by Shark Group Pty Limited ("Shark Group"). The trailer was owned by ENG Haulage Contracting Pty Limited ("ENG"). Brown was an employee of ENG.

Futurewood contracted with ENG to transport the container upon its arrival in Port Botany to premises in Moorebank and subsequently to Wetherill Park.

ENG contracted with Shark Group to supply the prime mover.

ENG was responsible for allocating the trailer, which it owned, to be attached to the prime mover for transportation of the container.

Each of the plaintiffs alleged Brown was negligent by reason of driving at an excessive speed around the corner. The expert evidence concluded he was driving at 45kph which was deemed unsafe given the topography of the roadway and the dimensions and weight of the freightliner. A more safe speed was about 30kph.

The plaintiffs also alleged Futurewood was negligent by reason of its agent in China having failed to properly secure the load in the container. It was contended that an insufficient number of dunnage bags was used or that they were not fixed correctly.

The experts all agreed that this caused the load to shift in the container when Brown took the corner at excessive speed, causing the vehicles to rollover.

None of the plaintiffs alleged ENG was negligent.

However, by cross claims brought by Brown and Futurewood, it was alleged that ENG's liability arose, not by reason of ENG's vicarious liability for Brown's negligent driving. Rather, it was contended ENG was negligent by reason of the following:

- failing to allocate the correct trailer to transport the container;
- failing to give instructions to Brown he ought to exercise caution when driving the prime mover as a result of ENG's knowledge, based on past experience with containers provided by Futurewood, that the load inside the container may not be secure.

As ENG was under external administration, Brown and Futurewood applied for and were granted leave pursuant to Section 6 of the *Law Reform (Miscellanous Provisions) Act 1946* ("LRMPA") to bring cross claims against QBE as the public liability insurer of ENG.

Each of the plaintiffs' claims against Brown were governed by the *Motor Accidents Compensation Act 1999* (NSW) by reason of the CTP policy issued to Shark Group as owner of the prime mover, driven by Brown.

The claims against Futurewood were governed by the CLA.

Brown and Futurewood filed a Defence in each of the five plaintiff claims denying liability. In addition to the cross claims against QBE, Brown and Futurewood also sought contribution from each other.

The five matters were initially listed for a five day hearing before Justice Garling, limited to liability. At the commencement of the hearing, Counsel for Brown and Futurewood announced that the defendants had admitted breach of duty of care in respect of each of the plaintiff claims.

Further, it was announced the contribution cross claims between Brown and Futurewood were to be dismissed with no order as to costs as those parties had reached an agreement on apportionment.

Accordingly, the five plaintiffs did not participate in the liability hearing. The Court noted they would be listed for a separate hearing on damages at a later date.

The remaining issues to be determined by the Court were in respect of the cross claims by Brown and Futurewood against QBE regarding ENG's alleged liability for the accident in the five claims.

His Honour identified separate questions for determination involving whether or not Brown, Futurewood and ENG were each a tortfeasor liable to each plaintiff and how liability against each of them should be apportioned.

Further, if ENG were held to be so liable, were Brown and Futurewood entitled a charge on insurance moneys held by QBE under Section 6 of the LRMPA.

QBE contended ENG was not liable and further, if liability was found against ENG, the QBE policy did not provide indemnity to ENG by reason of the "motor vehicle" exclusion.

QBE argued the sole cause of the accident was the speed and manner in which Brown drove the freightliner.

Further, QBE argued Futurewood was not a tortfeasor and therefore could not bring a cross claim against QBE seeking contribution.

Although his Honour accepted ENG was not responsible for packing Futurewood's containers, he found that ENG had prior experience with several containers of Futurewood's product, all of which were packed in the same way, which meant a reasonable person in ENG's position would have assumed the container involved in the rollover accident was likely to be packed in that same (possibly inadequate) manner.

The Court held ENG should have made contact with Futurewood to ascertain how the container's load had

been restrained and to obtain assurances it was properly packed and secured.

As ENG had failed to do this, his Honour held ENG was negligent. Further, ENG was negligent by failing to give instructions to Brown for which Brown and Futurewood contended.

Garling J therefore found Brown, Futurewood and ENG were each liable to the plaintiffs for the accident and apportioned liability as follows:

- Brown: 70%;
- Futurewood: 20%;
- ENG: 10%.

In respect of ENG's liability, however, his Honour found ENG was not entitled to indemnity under the QBE policy by reason of the "motor vehicle" exclusion.

Relevantly, the exclusion clause was in the following terms:

> *"This policy does not cover liability in respect of personal injury ... arising out of the ownership, possession, or use by you of any vehicle:*
>
> *(a) which is registered or which is required under any legislation to be registered; or*
>
> *(b) in respect of which compulsory liability insurance or statutory indemnity is required by virtue of any legislation (whether or not that insurance is effected)."*

The clause went on to say the exclusions did not apply to claims:

> *"For personal injury where:*
>
> *(i) that compulsory liability insurance or statutory indemnity does not provide indemnity; and*
> *(ii) the reason or reasons why that compulsory liability insurance or statutory indemnity does not provide indemnity do not involve a breach by you of legislation relating to vehicles."*

QBE submitted the first part of the exclusion clearly applied because the trailer was registered. ENG was the registered owner of the trailer.

His Honour agreed with QBE's argument and held the policy did not respond.

However, his Honour also found that ENG's liability which did not arise out of Brown's negligent driving of the freightliner, but by reason of ENG's failure to make enquiries of Futurewood regarding whether the load was secured, was a liability which fell for cover under the insuring clause.

In these circumstances, his Honour applied the "Wayne Tank" principle in accordance with the principles enunciated in *Wayne Tank & Pump Co Limited v Employers Liability Assurance Corporation* which provides that where damage results from two causes, one of which is covered under the policy and other is excluded, the policy does not respond.

His Honour concluded that the claims in this case arose from the conduct of both Brown and ENG as tortfeasors and that each caused the rollover giving rise to the claims.

However, one of those causes was covered by the policy and the other was excluded.

Garling J applied the Wayne Tank principle and held that QBE was not required to provide indemnity for the claims.

Accordingly, the cross claims by Brown and Futurewood against QBE did not succeed.

This interesting decision emphasises the need to establish indemnity under an insurance policy even in circumstances where the insured company under external administration has been found liable.

The decision also considered the application of the *Wayne Tank* principle in favour of the insurer.

In such a case the application of an exclusion clause will defeat a claim against an insurer for a charge on insurance moneys under Section 6 of the LRMPA.

Darren King
dwk@gdlaw.com.au

Managing Agent Entirely Liable for Fall

In a recent decision in the District Court His Honour Judge Levy has determined that the managing agent is wholly liable for a fall at a rental property.

Karen Than commenced proceedings in the District Court as a consequence of a fall down internal stairs in a common area at premises at Bondi at around 6.00 am on 2 August 2015. Than contends she was holding onto a handrail when she fell however the staircase was not illuminated and so she missed her step. As a consequence she fell down the stairs and sustained a fracture to her left foot.

Than commenced proceedings in the District Court against the owners of the premises, Sheila Galletta, Joan Ghisla, Margaret Stanton, Catherine Calabrese and Josephine Lombardo, who owned the premises as tenants in common in equal shares. The managing agents Adrian Tesoriero and Angelo Tesoriero who traded as LJ Hooker Bondi Beach were also defendants to the proceedings. LJ Hooker Bondi Beach had managed the premises since the Managing Agency Agreement was entered into on 26 February 1999.

For about eight months prior to the accident Than was sharing one of the flats located on the first floor of the premises. Her flatmate had entered into the lease with

the owners of the premises. The floors were linked by an internal stairway. During the day natural light would come through a skylight. However, when it was dark the stairway would normally be lit by overhead fluorescent lighting that, when the lights were working, would stay on for a minute or two.

However, prior to Than's injury and since around May 2015 the light fittings in the stairwell had periodically malfunctioned. The reason for this had not been investigated. The managing agent was advised of the issues with the lighting by emails from tenants dated 12 May 2015 and 10 July 2015.

Following receipt of the email of 12 May 2015 the managing agent had arranged for an electrician, Mr Jacobson to attend the premises. However the issue did not resolve and a further email was sent to the managing agent in July 2015. There was no evidence that after receipt of that email an electrician was asked to attend the premises to look at the issues with the lighting. In fact Jacobson's evidence was that he had not attended the premises between May and August 2015.

Following Than's fall the managing agent sent an email to the owners indicating he had been advised on 12 May 2015 the lights were not working and they were repaired the same day. The managing agent also referred to the fact they did not receive any further complaints until 3 August 2015, after Than's fall. That was clearly incorrect in light of the 10 July 2015 email.

Pursuant to the managing agency agreement the agent was authorised to arrange and pay for repairs. Ms Galletta gave evidence and her evidence was to the effect she thought that after the electrician attended to the lights in May 2015 the issue had been fixed.

Than did not have any prior knowledge of the lighting issues.

In their defence, the managing agent sought to rely on Clause 12 of the agreement with the owners which potentially provided an indemnity to the managing agent. The clause provided:

> *"The Principal undertakes to indemnify and keep indemnified the Agent against all actions, suits, proceedings, claims, demands, costs and expenses whatsoever which may be taken or made against the Agent in the course of or arising out of the proper performance or exercise of any of the powers, duties or authorities of the Agent under this Agreement."*

His Honour Judge Levy found in favour of Than and concluded that:

> *"Following receipt of the email dated 10 July 2015 from the tenant of Flat 4, the agents took no steps to undertake their own contemporaneous inspection of the problem even though it was a short walking distance from their office. This was in circumstances where the problem needed urgent remedial attention, or at least the consideration of issuing suitable warnings, before the next nightfall if immediate remedial attention was not possible before nightfall. Instead, Mr Tesoriero said he simply contacted the electrician to seek to have the problem addressed.*
>
> *In those circumstances, he did not investigate with the electrician the nature or cause of the problem, which was a recurrent problem rather than an isolated incident. He did not bring the problem to the attention of the owners for the purpose of them deciding what they wished to have done in the circumstances. He did not appear to have responded to the tenant's email reporting the problem. He did not appear to have followed the issue up with the electrician in order to ascertain the cause of the problem and to ascertain what remedial steps had been taken in circumstances where the problem had been a recurrent one.*
>
> *In my opinion, the series of omissions identified in the preceding paragraph were not in conformity with the contractual pre-condition of "proper performance" that would otherwise engage the indemnity contemplated by Clause 12 of the management agency agreement. Accordingly, in this case that clause is inapplicable and does not operate to provide the agents with the protection of an indemnity that they seek to enforce as against the owners. A failure on the part of the agents to properly perform the identified aspect of their contractual duty renders the indemnity clause inoperative: Laresu Pty Limited v Clark."*

Therefore, not only did the managing agent not have the benefit of the indemnity clause, the managing agent was also found to be entirely responsible for the plaintiff's accident. Judge Levy found that although the owners had also breached their duty of care, in the circumstances the managing agents ought to indemnify the owners in entirety, including in relation to the plaintiff's costs.

His Honour Judge awarded judgment in the sum of $333,006.65.

In this particular case the managing agents were aware of issues with the lighting but failed to take appropriate action. The managing agents therefore find themselves entirely liable for the plaintiff's claim. If the owner had been advised of the ongoing issues and the managing agent had taken action after receipt of the email in July 2015 the result may have been very different.

Amanda Bond
asb@gdlaw.com.au

Police Liable for Psychiatric Injury After All

There is no doubt that work as a police officer is a stressful job where officers are exposed to horrendous

situations. Sometimes that will result in psychiatric injury and the Courts may have to determine whether a particular situation will result in liability for damages on the part of the State of NSW.

What is often the complex issue in these cases is whether there has been a breach of the duty of care.

The NSW Court of Appeal has recently overturned a judgment of the District Court in the Police's favour and awarded damages in the sum of $1,405,000.00.

Melanie Sills was previously employed as a general duties officer with the NSW Police Force. She contended that between May 2003 and June 2012 she was exposed to numerous traumatic incidents and sustained psychological injury. Sills started in the Police Force at the age of 26 and was medically discharged on 7 June 2012 having been diagnosed with post traumatic stress disorder. She was based at the Tuggerah Lakes Local Area Command. From her first day at work to early 2004 Sills had to attend a number of traumatic incidents including suicides, fatal motor vehicle accidents as well as a domestic dispute involving a firearm. On 26 July 2004 for example, she had to attend a house fire where a child was burnt to death and a fire officer was also fatally injured. At the time Sills was instructed by Acting Superintendent Mitchell to attend the Employee Assistance Program however she did not find this to be of any benefit and did not return.

Sills continued with normal duties and in November 2004 attended a cot death. On 17 May 2005 her general practitioner prescribed her anti-depressants. In December 2005 she attended a swimming pool drowning and on 11 March 2006 had to remove the body of a man who set fire to himself in a motor vehicle. Following that incident she suffered heart palpitations and other physical symptoms.

In around August 2006 Sills asked to be transferred from general duties to another area however that application was not successful. On 17 August 2006 she suffered a panic attack whilst driving to work. Her general practitioner diagnosed post traumatic stress disorder.

Sills completed an accident/incident notification form. A return to work plan was prepared by a rehabilitation provider.

Sills returned to work on 26 September 2006 when she found she had been placed on restricted duties. On 9 October 2006 she attended the Police medical officer who recommended a return to full operational duties although recommendations were made in relation to further counselling and treatment. Sills returned to full duties on 20 October 2006.

In November 2006 Sills was interviewed by Mr Briggs, psychologist, on behalf of the worker's compensation insurer, who prepared a "psychological pre-liability assessment – claims summary" which assessed Sills as being fit for pre-injury duties. Mr Briggs suggested the claim raised questions about her motivation and also attitude to work. Weekly payments were discontinued based on Mr Briggs' report.

Sills continued to observe traumatic incidents. On 2 February 2007 she attended a fatal work accident and received a standard letter offering a session with a counsellor. She subsequently attended a fatal accident before going on maternity leave.

In August 2007 Dr Gertler prepared a report at the request of Sills' solicitors indicating Sills would remain at risk for worsening symptoms if she were exposed to a full range of duties. The Police were aware of that report.

In March 2009 Sills attended a motor vehicle accident in which two people died. After that her nightmares and flashbacks began to increase to the point where they were as severe as they had been in 2006. Further, in April 2009 she attended a fatal motor accident in which a 17 year old girl was killed and she had to advise the parents of her death. On 11 May 2009 she attended a suicide where the person had been deceased for some time. In June 2009 she attended another suicide and on 3 July 2009 Sills attended a house fire where an elderly man had died.

A letter was sent to Sills in relation to the amount of sick leave Sills was taking. Sills subsequently started to work in the Wyong Exhibits office. However whilst working in the Exhibits office she suffered stress on a number of occasions including when a nail gun used by a man who attempted suicide was delivered to the Exhibits office. On 16 November 2010 she sustained injuries in a motor vehicle accident and was off work for three or four months during which time she attempted self harm. In early September 2011 Sills was referred to a psychiatrist. She was medically discharged from the Police on 7 June 2012.

Sills subsequently commenced proceedings in the District Court alleging that whilst working as a police officer between May 2003 and June 2012 she was exposed to numerous traumatic incidents as a consequence of which she sustained psychological and/or psychiatric injury.

His Honour Judge Mahoney in the District Court found that a Police Medical Officer and Police Psychologist had recommended that Sills be provided with psychological counselling and other assistance however this was not implemented. His Honour Judge Mahoney found there had been no breach of duty of care. His Honour found it was not unreasonable, nor a breach of duty of care, for the police to do nothing to implement the recommendations.

His Honour however assessed potential damages at $1,405,000.00.

Sills appealed and on 7 February 2019 the NSW Court of Appeal handed down their judgment.

The Court of Appeal was of the opinion that the State had breached its duty of care to Sills in 2006 when she had been returned to general duties, without the recommendations of the medical officer and the psychologist being implemented. The Police were aware at the time that Sills was suffering from post traumatic stress disorder and if she was returned to general duties she was likely to be exposed to more incidents. Further, in 2009 there was another inadequate response to a report in the Critical Incidents Register. At that time the Police knew or should have known that Sills continued to suffer from post traumatic stress disorder and a further flag had been raised.

Sackville AJA in his judgment noted:

> *"The question for determination is not whether the State should have devised a system, or a better system, to identify Police Officers at risk of suffering psychological injuries as a result of exposure to trauma and to provide those officers with appropriate assistance. The appellant accepted that the procedures in place, if implemented, were satisfactory. So much was recognised by the primary Judge. The question is whether the primary Judge should have found that the State breached its duty of care by failing to implement the system in place for detecting and addressing psychological injury."*

Justice Sackville continued:

> *"In my opinion the evidence established that the State breached its duty of care to the appellant in 2006 by returning her to general duties without implementing the recommendations made by the PMO and the Police Psychologist. At the time the decision was made the State was aware that the appellant was suffering PTSD and that placing her on general duties was likely to expose her to further traumatic incidents. The State was aware that the PMO and Police Psychologist had certified the appellant as fit for general duties on the basis that she receive the counselling and support recommended by them. The failure to implement the recommendations exposed the appellant to precisely the risk of which the State had been made aware.*
>
> *The State also breached its duty of care to the appellant by its entirely inadequate response to the report in the Critical Incidents Register in May 2009. The State should have known that the appellant was continuing to suffer from PTSD. The accumulation of five Critical Incidents within a relatively short period should have raised a "red flag" that intervention well beyond an exchange of emails was required. At the very least the exercise or reasonable care required a meeting in person with the appellant to determine what measures were needed to protect her from yet further trauma. That course of action would have been consistent with the practice senior officers considered appropriate and said that they implemented as a matter of course."*

Although the State tried to argue that there was contributory negligence on the part of Sills this was rejected by the Court.

The end result was that the District Court judgment was overturned and Sills has been awarded substantial damages.

It remains to be seen whether or not the matter will proceed to the High Court.

Amanda Bond
asb@gdlaw.com.au

CONSTRUCTION ROUNDUP

Proposed Building Defects Scheme regulations released to public

The NSW Government recently released a public consultation draft of its proposed *Strata Schemes Management Amendment (Building Defects Scheme) Regulation 2019*. The regulation is intended to provide further detail with respect to the operation of the *Strata Schemes Management Act 2015* following the amendment of that Act by the *Strata Schemes Management Amendment (Building Defects Scheme) Act 2018*.

The new building defects scheme was discussed in the November 2018 issue of our newsletter. In summary, the scheme requires that inspections of newly completed strata building work be conducted by qualified inspectors, and that a bond provided by the developer is available (in certain circumstances) to the owners to rectify any defects that are not rectified by the builder.

The key areas covered by the proposed regulation are as follows:

- Professional associations will have the right to appoint members of strata inspector panels thus giving those persons the power to conduct the building inspections required by the building defects scheme during the period 15 to 18 months after completion of the construction work.
- When a developer nominates a building inspector for the approval of the owners corporation, it must do so in writing at least 14 days prior to the owners corporation's general meeting. A failure to comply with this requirement will attract a fine of up to $4,400 for a corporation or $2,200 for an individual.
- The developer must provide copies of certain designated documents to the building inspector including: the building contract; the specifications for the building work; the development consent;

any written warranties provided for the work; all certifications and any reports with respect to the work. Further, if the construction work utilised an alternative solution with respect to fire safety (in order to comply with the Building Code of Australia) then any report by the fire safety practitioner in this regard is required to be provided.

- Pursuant to the current building defects scheme, if the original builder has died, become insolvent, has ceased to exist or has become unavailable for any reason, then the developer is permitted to engage a new contractor to rectify any defective building work. The regulation provides the following additional reasons for being permitted to engage an alternative contractor: the building is unwilling to rectify the defective work; the builder is mentally or physically unable to carry out the rectification work; the builder is unable to carry out the rectification work because he or she is in prison; the builder cannot be located in Australia; the builder is prevented from carrying out the rectification work because it would be unlawful for him or her to do so (such as not having the required licence for the work).
- The building defects scheme requires a bond of 2% of the construction contract price to be lodged by the developer to provide security for the cost of rectifying defects in the construction work. The regulation provides further detail on how the contract price for the building work is to be determined, including providing power to the Supreme Court and NCAT to determine the contract price if appropriate.
- The bond lodged by the developer must be able to be claimed on for at least two and a half years after the occupation certificate for the building is issued.
- If the Secretary of the NSW Department of Finance, Services and Innovation is required to appoint a building inspector following the failure of the developer to do so, then the developer will be required to pay a $1,500 fee.
- The proposed regulation stipulates the amount of the fines that are applicable to contraventions of the Act, including: $110 for a corporation or $55 for a person for a developer failing to provide the owners corporation with written notice of the building inspector who has been nominated; $220 for the owners corporation not providing 14 days' notice to the developer and Secretary of its decision to approve or refuse an inspector; $220 for the building inspector failing to give 14 days' written notice of his or her intention to enter any part of the strata scheme; $220 for a building inspector not providing his or her written report to all required persons within 14 days of completing the report; $220 for owners corporation not giving the owners 14 days' written notice of receipt of the written report.

Since the building defects scheme only applies to strata buildings constructed pursuant to building contracts entered into after 1 January 2018, for the majority of these buildings the construction work would be still underway or very recently completed. Accordingly, the scheme has not yet been tested in operation. However, the speed at which the NSW Government has released the proposed regulation means that the additional detail it provides will no doubt assist somewhat in navigating the new regime.

Submissions to NSW Fair Trading on the proposed regulation closed on 13 January 2019. Therefore, it is likely that the final version of the regulation will be gazetted in the next few months.

If you have any questions about the operation of the new building defects regime for strata schemes, Gillis Delaney Lawyers have expert lawyers who can provide advice and assistance.

Linda Holland
lmh@gdlaw.com.au

Building Confidence – NSW to Adopt Recommendations

On Sunday 10 February 2019 the NSW Minister for Innovation and Better Regulation, Mr Matt Kean, announced that the NSW Government would accept the vast majority of changes recommended in a report by Chancellor of Western Sydney University Peter Shergold and lawyer Bronwyn Weir.

Prof Shergold and Ms Weir were commissioned by the Building Ministers Forum in August 2017 to inquire and report on the effectiveness of compliance and enforcement systems for the building and construction industry across Australia. This commission was due largely to a reported lack of public confidence in the integrity of the building industry, particularly given the prevalence of defects in newly built high-rise apartment buildings and the perceived lack of accountability of the developers, builders or certifiers to the ultimate owners.

In addition, the disclosure (following the Lacrosse Apartments fire in Melbourne in 2014 and the Grenfell tragedy in London in 2017) that numerous buildings across Australia have potentially deadly combustible cladding has focused public attention on the integrity and effectiveness of the building certification process.

The Shergold/Weir report was delivered in February 2018. Overall, the authors recommended the adoption of a national model of legislation to ensure that all building practitioners had better knowledge of, and were required to comply with, the National Construction Code.

The NCC is a performance based code which requires building design and construction to perform to the relevant Australian Standards, rather than prescribing specific building practices and materials. However, many builders, designers etc do not have a good working knowledge of the multitude of the applicable Australian Standards. Further, Shergold & Weir found that the current combination of builders designing "on the job" with certifiers' failure to reject non-compliant work was resulting in widespread departures from the requirements of the NCC.

The report made 24 recommendations, including the following:

- Participants in the building industry (such as builders, project managers, certifiers, architects and engineers) should be formally registered so that they can be regulated and made to be accountable for their actions. Consistency across the Australian States and Territories in the requirements for registration (such as education, skills etc) would not only make it easier for mutual recognition by States, but would also boost the economy by encouraging the spread of construction businesses across State borders. As part of the registration scheme, participants would be required to undertake regular compulsory continuing education, with a focus on increasing their knowledge of the NCC.
- The level and methods of collaboration between the various regulators (such as the local council, the building certifiers and the State Building Regulator) should be improved and their regulatory powers enhanced. Included in these reforms should be proactive auditing during the progression of the design and construction, in order to increase transparency and restore the public's trust in the process.
- Fire authorities should be included in the development of fire safety design. The authors comment that fire authorities currently lack confidence that buildings will comply with the minimum fire safety requirements of the NCC (a concern which appears justified given the prevalence of non-compliant combustible cladding on high rise buildings) and this can be overcome by ensuring a suitable level of engagement with fire authorities in the fire safety design process.
- The integrity of the private certification system should be improved in order to increase transparency and reduce the risk of conflict of interest. For instance, the authors recommend that any certifier who provides advice during the design process should be ineligible to certify that that design complies with the NCC. (Note that the NSW Government recently introduced reforms to the private certification system via the Building and Development Certifiers Act 2018 – refer to our December 2018 newsletter for more details.)
- Private certifiers should have a greater role in enforcing compliance with the NCC. The authors note that currently many certifiers do not wish to risk the commercial relationship that they have with the builder, but if they do report a non-compliance it is often the case that nothing is (or can be) done about it. The report recommends that certifiers should be given powers to issue directions to fix or stop work where non-compliance is detected, and if the non-compliance is not fixed then the matter should be reported to the government.
- A national database should be established recording details of each construction project, including details of all participants in the project, details of certifications, inspections and enforcement actions, and ongoing maintenance obligations. There would also be the requirement to adequately document how the design and/or construction meets the performance requirements of the NCC. Such data sharing would lead to greater transparency and also facilitate the auditing and regulation of the project and its participants.
- There should be mandatory inspections by the certifiers during the construction process and amendments to the design during the construction phase should be independently certified.
- Specialist areas of design (such as fire safety) should be reviewed by third party experts, such as a government-appointed panel or a registered expert practitioner, and the installation of fire safety systems should be independently inspected and certified.
- A compulsory product certification system for high risk building products should be established and the BMF should agree its position in this regard. This recommendation arises from the difficulties currently being encountered in identifying the type of aluminium cladding products currently installed on buildings. The report's authors acknowledge that the current CodeMark certification system for building products is already under review following the Lacrosse and Grenfell fires and a report has been requested. They recommend that the product certification system include mandatory permanent product labelling and prohibitions against the installation of high risk building products that are not certified.

One may say with cynicism that the NSW Government's announcement in the lead up to the 2019 State Election is no more than politicking, in an era when the residents of many high rise apartment blocks are dealing with the consequences of cheap construction and associated defects, and are facing high costs to replace combustible cladding, and also when the misfortunes of the displaced residents of the fourth-month old Opal Tower have only increased the

distrust by the public in the effectiveness and integrity of building design, construction and certification in NSW.

At this stage, the NSW Government has merely stated that it is going to accept many of the recommendations, but it has not provided any details of which recommendations it will adopt, or how they will be implemented.

Considering the existing opportunities for rorting and cutting corners on construction projects, one feels that it will not be until a builder or certifier is publicly held accountable for their shoddy work that the public will begin to trust in the system of private certification.

In the meantime, we will need to continue to deal with the legacy of an era in which inadequate designs, undocumented (and potentially dodgy) construction processes, substitute inferior products and/or inadequate certification will impact on (potentially) hundreds of thousands of home owners and residents throughout the country.

It is almost certain that we will continue to see numerous lawsuits against designers and builders for many years to come as these home owners try to deal with the escalating costs of rectifying defects and shoddy work.

If you need legal advice on defects in new construction work, Gillis Delaney Lawyers has experts who can provide specialist advice and representation to assist in navigating this complex area.

Linda Holland
lmh@gdlaw.com.au

EMPLOYMENT ROUNDUP

Employee Misconduct Justified Summary Dismissal

The Small Business Fair Dismissal Code provides that it is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds the employee's conduct is sufficiently serious to justify immediate dismissal.

Such serious misconduct can include theft, fraud, violence and serious breaches of occupational health and safety procedures.

The Full Bench of the Fair Work Commission in *Pinawin t/as Rose Vi Hair. Face. Body v Domingo* confirmed a two step test to determine if the employer had complied with the summary dismissal aspect of the Code.

The first step was there needed to be consideration whether, at the time of the dismissal, the employer held a belief the employee's conduct was sufficiently serious to justify immediate dismissal.

Secondly, it was necessary to consider whether that belief was based on reasonable grounds. It was noted the second element incorporated the concept the employer had carried out a reasonable investigation of the matter. Importantly, it was not necessary to determine whether the employer was correct in that belief.

In a recent matter in the Fair Work Commission, Senior Deputy President Hamberger in the matter of *Wilks v Inverell East Bowling Club Limited* was satisfied the employer's decision maker believed the employee was guilty of misconduct that was sufficiently serious to justify her immediate dismissal. The Senior Deputy President was satisfied the beliefs held by the decision maker were based on reasonable grounds and that he had carried out a proper investigation into the allegations and gave the employee an opportunity to respond to those allegations.

The employee was the office manager of the employer. At the relevant time between November 2017 and 14 May 2018 there was no general manager of the employer. The employee was never appointed acting general manager.

During this time the employer's contract cleaner had a discussion with the employer's Board regarding his duties and payment. The Board informed the cleaning contractor he should continue with what he had been doing at the same rate of pay until the Board made any further decisions regarding the services.

The employee's partner was an employee of the cleaning contractor.

The employee admitted in her statement that some time during February 2018 she suggested to the cleaning contractor that the cleaning contractor submit an invoice with an extra amount to cover his extra work. The contract cleaner from that time increased his weekly invoice by $150.00.

In June 2018 the employer's new general manager held a discussion with the employee where the employee informed the new general manager she thought the cleaning contract was too expensive and the employer should employ her partner directly, stating her partner did "all the work anyway".

In July 2018 the new general manager had a meeting with the cleaning contractor. The cleaning contractor informed the new general manager the employee's partner had informed him they were going to employ internal cleaners and that his services would no longer be required.

The new general manager was concerned the employee had told her partner what he was considering.

The new general manager told the contractor he believed his weekly charge to be excessive but no

decision had been made about the cleaning contract. The contractor stated to the new general manager he was happy to charge his previous price but it was the employee who advised him his previous rate was "too cheap".

The new general manager brought the employee's conduct to the attention of the Board who directed him to conduct an investigation.

The new general manager met with the employee in October 2018 and handed her a letter outlining the allegations against her including:

- the employee suggested to the cleaning contractor he increase his invoices to the club without having authority to enter into negotiations or authorise additional payments; and
- the employee's suggestion to increase the contractor's fees were self serving as her partner worked for the contractor and was able to maintain hours as a result;
- the employee had engaged in conversations with the new general manager during which she agreed the contractor was charging an excessive amount whilst failing to advise she had engaged in the same discussions with the contractor to increase his fees; and
- the employee had disclosed the content of her confidential conversations with the new general manager about the club's plans with regard to the cleaning contractor to her partner.

After considering the employee's responses the new general manager concluded the employee's employment should be terminated.

Senior Deputy President Hamberger was satisfied, based on the evidence, the new general manager, being the decision maker, believed the employee was guilty of misconduct that was sufficiently serious to justify her immediate dismissal. That misconduct included the employee had, without authority, encouraged the cleaning contractor to increase the amount he charged the club which would benefit her partner. The new general manager also believed the employee had been dishonest with him in her responses as well as arrogant and disrespectful that made their continued working relationship untenable.

The Senior Deputy President was satisfied the beliefs of the new general manager were based on reasonable grounds after the general manager had conducted a proper investigation into the allegations and gave the employee an opportunity to respond to those allegations.

Employers who are small business employers under the Code can obtain the protection of the Code when dismissing employees for misconduct if they follow the 2 step process as set out by the Full Bench.

Michael Gillis
mjg@gdlaw.com.au

The perennial industrial conundrum – employee or contractor?

The employment and industrial landscape is a hotbed of activity at the moment. Very important questions and decisions are being made. Some of the headline issues concern long term casuals being found to be permanent employees; outsourced/contract labour being held to be employees; and split shift workers being found entitled to overtime payments.

These will all have significant repercussions for employers (and for insurers, who will undoubtedly be faced with some large and costly class actions).

In future issues of GD News we will examine these topics in detail. This month, however, we look again at the perennial issue of employee versus independent contractor. Two recent cases show how critical the distinction remains, and how what appears to be the same thing can look very different to different people.

Federal Circuit Court

In *Parker v HG Innovations & Ors* [2019] FCCA 278 the Federal Circuit Court had to determine whether the applicant was or was not an employee for the purposes of a claim under section 340 of the *Fair Work Act 2009* (Cth) – a general protections claim.

The material facts were:

- The respondent proffered a standard contractor's agreement to govern the relationship, which expressly stated that the applicant was to be engaged as a contractor rather than an employee
- The applicant proceeded to perform services – and be paid – according to the terms of the contractor's agreement
- The applicant provided his Australian Business Number and other relevant personal details as would be expected to be recorded in a contractor's agreement to the respondent
- The applicant did not supply his Tax File Number to the respondent
- The respondent provided the applicant with a desk, stationery, a work phone and access to computing and document systems
- The applicant was given instructions as to how to perform various tasks, including the answering of telephone calls, speaking to customers, obtaining referrals, and arranging the rental of cars owned by the parent company to other entities
- The applicant was free to – and did – engage in other outside business activities

The Court correctly held that it is a question of fact, in any given situation, whether a person is an employee or a contractor. It found that:

"In this case, the applicant, during the entirety of his period of engagement with the respondents, either made it clear that he was content to be regarded as a contractor, or actively promoted himself as an independent contractor. He was damned by his own words in that regard. His claims to the contrary are a contrivance. His whole engagement was in the nature of the provision by him of services as part of a personal services business."

Accordingly, the general protections claim was struck out on the basis that it was without merit.

Fair Work Commission

In *O'Farrell v Guest Tek Australia Pty Limited* [2019] FWC 968, the Commission had to determine a claim for relief from unfair dismissal. Whether any remedy was available depended in whether the individual in question was an employee rather than an independent contractor.

The salient facts were:

- The parties entered into a written agreement denoting the applicant as an independent contractor
- The agreement expressly provided that the relationship was one of principal and independent contractor
- The agreement permitted the applicant to carry out other non-conflicting business activities
- The applicant was paid a form of "annualised salary" by 12 equal monthly payments, irrespective of the number of work days in the month
- The applicant accrued and took annual leave, and was replaced at those times by another employee of the respondent
- No GST was levied or paid in respect of the services provided by the applicant
- The applicant, although working remotely from head office in Canada, was in contact with his managers on a daily and weekly basis

The Commission identified the task in determining the employee/independent contractor question as multi-factorial. It noted that

"…the question of whether someone is an employee or an independent contractor is not to be determined by what they may be called or, indeed, what they may call themselves. A label, consensual or otherwise, cannot affect "the inherent character" of the relationship: It is the substance or reality of the relationship that counts."

In assessing the realty of the relationship, the Commission acknowledged that although the parties themselves had labelled the relationship as an independent contractor, the applicant was not performing the work of an entrepreneur who owns and operates a business. He was not billing the respondent for anything but his wages and mobile phone expenses – there was no GST charge, no on-costs, no overheads and no profit.

Importantly also, the Commission felt it implausible for a company to supply an employee to replace a contractor who was on leave. Such a scenario was unheard of. In the Commission's view:

"In the same way that if a bird looks like a duck, walks like a duck and quacks like a duck – then it is a duck - the Applicant in this case is an employee. The Applicant was paid an annualised salary in 12 equal instalments, like an employee. The Applicant accrued annual leave and sick leave, like an employee. The Applicant was required to report to his supervisors on a regular basis, like an employee."

Takeaway

These decisions clearly indicate that the question employee or independent contractor is not really a dichotomy, but a continuum. It is all about the "reality" - and how all the circumstances strike a decision maker. In both these cases, the outcome was emphatic, but different, even thought the facts are not all that dissimilar.

For employers, your arrangements need to be at the far ends of the continuum to escape the murky and unpredictable middle ground.

David Collinge
dec@gdlaw.com.au

WORKERS COMPENSATION ROUNDUP

An Acceptance of Liability is Rebuttable

Generally it is considered once an insurer accepts liability, either generally or with respect to treatment of particular body parts by making payment of expenses associated with the investigation or treatment, it is not possible for the insurer to later resile from the initial acceptance of liability.

In *Begnell v Super Start Batteries Pty Limited* [2009] NSWWCCPD 19, Deputy President Roche considered the effect of voluntary payments of weekly compensation and whether such payments amounted to an estoppel preventing the insurer from denying liability for occurrence of the injury in February 2006, some two and a half years after commencing voluntary compensation payments.

In determining the issue the Deputy President looked at the objectives of the workers compensation legislation and the great emphasis placed on prompt payment of claims that are properly notified within

seven days after receipt of initial notification unless the insurer has a reasonable excuse for not commencing those payments.

Deputy President Roche was of the view the only possible estoppel that could arise was estoppel by representation or conduct. Such an estoppel precludes a party who by representation has induced another party to adopt or accept a state of affairs and consequently to act to the other party's detriment from asserting a right inconsistent with the state of affairs in which the other party acted.

In the circumstances under consideration the Deputy President considered the only reasonable inference from the evidence was that the insurer conducted an investigation into the claim and accepted liability commencing weekly compensation payments. This occurred before the insurer received the statements from Mr Begnell's co-workers to suggest the injury did not occur as asserted.

The insurer's conduct amounted to a representation that accepted the essential elements of the claim, namely employment, the occurrence of an injury arising out of or in the course of that employment to which employment was a substantial contributing factor and consequent incapacity. Such a representation would have left Mr Begnell in no doubt that liability for his claim for weekly compensation had been accepted. This was reinforced by an offer of suitable employment in May 2004.

However Deputy President Roche did not accept the representation induced Mr Begnell to *"act, or fail to act, to his detriment"*. The Deputy President was not satisfied the passage of time had resulted in any or any significant prejudice or detriment to Mr Begnell. There was no evidence he had lost the opportunity to call evidence from a relevant witness or that the passage of time had prejudiced the preparation of his case.

Deputy President Roche stated:

> *"The central principle of the doctrine of estoppel by conduct is that the law will not permit an unconscionable departure by one party from the subject matter of an assumption which has been adopted by the other party as the basis of some course of conduct which would operate to that other party's detriment if the assumption were not adhered to for the purpose of litigation."*

Whether it would be unconscionable to allow a party to depart from the assumption or representation will depend on all the circumstances of the case and each case will have to be considered on its merits.

Deputy President Roche observed the Commission has a statutory duty to act according to "*equity, good conscience and the substantial merits of the case without regard to technicalities or legal form"* (Section 354(3)).

This provision applied to employers as well as workers. Whilst the insurer may have been tardy in its handling of the claim, Mr Begnell had called no evidence of any prejudice or detriment he would suffer if the case was determined according to its substantial merits. Therefore Deputy President Roche did not believe it was unconscionable to allow the employer to dispute whether Mr Begnell sustained an injury in compensable circumstances.

The principles of the decision were recently applied in the Presidential Decision of *Bonica v Piacentini & Son Pty Limited* [2019] NSWWCCPD 4 in circumstances where the insurer initially accepted liability in correspondence in November 2011 and subsequently disputed whether the claimant's left shoulder condition for which surgery was recommended resulted from the initial injury in 2005.

Deputy President Snell considered the respondent's acceptance of liability in November 2011 was one piece of evidence to be weighed with the evidence in the matter as a whole. The arbitrator found the respondent's payment or reimbursement of treatment expenses during 2012 indicated it *"at that time, accepted a causal relationship based on the reports of Dr Billett and Dr Kosmann"*. A report from Dr Kosmann commented that he was *"still waiting to hear from GIO regarding confirmation that they will take over responsibility for a Cortisone injection in the (worker's) left shoulder"*.

The arbitrator found Dr Kosmann and Dr Billett were provided a history by the worker he had a history of left shoulder pain and restriction of movement going back six to seven years. This history was not accepted as accurate and the Deputy President found it consistent with the admission of payment being deprived of weight as it was based on medical evidence which itself did not have weight due to lack of correlation between the history assumed in the reports and the facts as proved.

The arbitrator gave a valid reason for why the admission when weighed with the evidence as a whole lacked probity force. Consequently the Deputy President found no error in how the arbitrator had dealt with the respondent's acceptance of liability in November 2011.

Belinda Brown
bjb@gdlaw.com.au

Warning. The summaries in this review do not seek to express a view on the correctness or otherwise of any Court judgment. This publication should not be treated as providing any definitive advice on the law. It is recommended that readers seek specific advice in relation to any legal matter they are handling.