# GD NEWS / MARCH 2020

## IN THIS EDITION



## Insurance Broker Found Liable To Pay Damages For Failure To Procure Insurance

The economic marketplace in 2020 would be unrecognisable for corporations and entrepreneurs of 50 years ago.

The manner in which business is conducted has been transformed by an exponential growth in technology affecting digital communication, computers and software, as well as the advent of the internet and globalisation.

Corporations who engage in trade and commerce in the information technology sector are often faced with complex commercial transactions involving proprietary interests across transnational boundaries.

This has brought about an increased degree of risks which the insurance industry has tried to match by offering suitable products which offer appropriate cover for the modern business.

Likewise, the insurance broker of 50 years ago would have faced different considerations to that of the present day broker, especially those who advise IT clients about the type of insurance necessary to cover the risks associated with the insured's business.

It is incumbent on the present day broker to keep abreast of new insurance products to ensure their clients' insurance needs are met.

Despite these ever-changing times the legal principles governing the relationship between insurance broker and insured remain relatively unchanged.

The nature of this relationship and the duties owed by an insurance broker to an insured were recently considered by his Honour, Justice Anderson of the Federal Court of Australia in *PC Case Gear Pty Ltd v Instrat Insurance Brokers Pty Ltd (in liq).*

PC Case Gear Pty Ltd ("PCCG") carried on business as a supplier of computer hardware and software. A focus of the business involved personal computers specially designed and assembled with components for playing computer games.

PCCG's business also included selling computers with


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Microsoft's Windows operating system pre-installed. To facilitate this, PCCG would purchase licences for Windows from a third party distributor and install them on computers prior to sale.

Between 2009 and 2016 PCCG retained Instrat Insurance Brokers Pty Ltd ("Instrat") to advise in relation to, and effect, liability insurance. At renewal each year, representatives of Instrat met with representatives of PCCG to discuss PCCG's insurance cover. Instrat asked questions of PCCG concerning the proportion of items imported by the business in comparison with the proportion that the business sourced domestically.

Following these meetings Instrat provided PCCG with an insurance plan which recorded the premiums payable for the coming year, the sums insured and also a section titled "Major Recommendations" which identified gaps in the insurance cover, with a list of "Uninsured Exposures."

This section of the insurance plan relevantly recorded a gap in coverage concerning protection against being sued for copyright or patent infringements and amounts that may be awarded by a Court.

PCCG did not take out insurance for copyright infringement. Instrat accepted there was a risk to PCCG for copyright infringement but this risk was minimal.

The evidence confirmed that Instrat did not bring to PCCG's attention, at each policy renewal, the risk of copyright infringement nor that this constituted a gap in coverage under the insurance plan.

In January 2016, PCCG received a letter of demand from lawyers acting on behalf of Microsoft's Australian subsidiary in respect of alleged breach of copyright by PCCG.

It transpired that PCCG had installed 4,000 licences as a component to their customers' computers but the licence was only authorised for use on refurbished computers.

PCCG did not trade in refurbished computers.

Microsoft alleged that PCCG had committed a breach of copyright and sought damages in the sum of $700,000.

PCCG instructed solicitors who reached a settlement of the Microsoft claim for $250,000.

PCCG then commenced proceedings in the Federal Court against its insurance broker, Instrat Insurance Brokers Pty Ltd ("Instrat"), for damages representing the $250,000 settlement of the Microsoft claim.

PCCG contended that Instrat was in breach of its retainer and was negligent in failing to advise PCCG of the risk of copyright infringement claims and for PCCG to take out insurance to cover unintended breach of copyright claims.

Instrat denied liability and also raised defences including failure to mitigate and contributory negligence.

Justice Anderson rejected Instrat's defences and found in favour of PCCG.

His Honour helpfully summarised the duties owed by an insurance broker to an insured in the following terms:

- An insurance broker will owe duties to its client concurrently in contract and in tort.
- However, tort law will not impose any additional duty on the broker beyond the scope of the contractual retainer.
- The nature and content of an insurance broker's duty to the client will accordingly depend on the instructions given by the client to the broker.
- As a starting point, any contract between broker and client carries with it a term implied by law that the broker will exercise reasonable skill and care.
- An insurance broker must use reasonable skill and care to ascertain the client's needs by instructions or otherwise.
- Unless the scope of the broker's role is not otherwise confined, this requires the broker to become sufficiently familiar with the client's business.
- The process of obtaining instructions will involve taking reasonable care to inform the client as to the availability of certain forms of insurance cover to ensure that the client considers these matters and then provides instructions as to the types and levels of cover that it wishes to secure.
- Where a broker has a continuing retainer with a client, the broker has a duty to inquire about matters of which it has not made adequate inquiry in the past.
- Where the client provides ambiguous instructions to the insurance broker and the client would consequently be left substantially under insured if those instructions were undertaken, the broker has a duty to highlight to the client the consequences of putting those instructions into effect, and confirm the instructions.
- Once the client has instructed the insurance broker to obtain certain cover, the broker must use reasonable care and skill to procure the cover requested.
- The broker must ensure that the policy is suitable for the purposes for which it is sought by the client.
- An insurance broker is not required to explain in detail the effect of each term of an insurance contract. However, the broker should draw the client's attention to any onerous or unusual terms, and should explain to the client the nature of those terms.

Justice Anderson accepted the evidence adduced by PCCG that Instrat never highlighted in the "Uninsured Exposures" section that PCCG was not covered for the risk of copyright infringement. His Honour held that in the circumstances of this case it was necessary for Instrat, to comply with its duties to PCCG, to expressly raise this risk with PCCG and to make PCCG aware such cover was exempted under the insurance plan.

This amounted to a breach of the insurance retainer and the duty of care owed by Instrat to PCCG. His Honour stated:

> *"…the insurance retainer imposed general obligations on Instrat to provide PCCG with advice in respect of the risks to which the business was exposed. The purpose of this advice was to enable PCCG to make an informed decision about its insurance requirements, and place PCCG in a position to instruct Instrat about the insurance cover which PCCG wished Instrat to procure on its behalf. As such, the heart of this relationship was PCCG's reliance on Instrat's own skill and judgment. It was incumbent on Instrat to make appropriate inquiries, not for PCCG to anticipate what Instrat ought to do."*

His Honour rejected the defences of failure to mitigate and contributory negligence.

PCCG's claim against Instrat was successful.

This decision is a timely reminder for all insurance brokers about the nature and scope of a client retainer and the duties associated with providing advice to and procuring appropriate insurance cover for a client.

The Federal Court has emphasised the importance of an insurance broker making appropriate enquiries to understand the nature of the client's business so as to identify potential risks and advise the client about available insurance policies to cover those risks so that the client can provide instructions informed by the broker's advice.

Here, whilst the broker accepted there was a risk to the insured of copyright infringement albeit minimal, the client was never informed about this risk nor advised about available insurance to cover the risk. This was held to be a breach of the broker's retainer and of its duty of care to the client.

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## Court Rejects Application For Permanent Stay Of Historical Child Abuse Claims

One of the more significant developments arising from the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse was the enactment of legislation in 2016 which amended the *Limitation Act 1969* (NSW) by removing the limitation periods with respect to a claim for damages involving sexual or serious physical abuse of a child who was under 18 years of age when the abuse occurred.

The amendments operated retrospectively. In passing these amendments, the NSW parliament recognised the necessity for claimants to overcome what were often insurmountable problems due to the limitation period in circumstances where a lengthy period of time had elapsed since the alleged abuse occurred.

However, the removal of the limitation period created the possibility of claims being made where the alleged abuse might have occurred so long ago that the ability to properly investigate the allegations or obtain relevant evidence might be so compromised that a fair trial may not be possible.

Accordingly, s6A(6) was inserted into the Act to preserve the Court's inherent jurisdiction or other powers available to it to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible.

Last year, the NSW Court of Appeal delivered judgment in *Moubarak by his tutor Coorey v Holt* which confirmed the relevant principles concerning the Court's jurisdiction to order a permanent stay of proceedings involving child abuse claims within the meaning of s6A of the Act. The Court noted the following observations in the Royal Commission Report:

*"It seems to us that the objective should be to allow claims for damages that arise from allegations of institutional child sexual abuse to be determined on their merits. The claimant has no incentive to delay commencing proceedings. The claimant will still need to prove their case through admissible evidence. The defendant will be protected from unfair proceedings as a result of the passage of time by preserving the court's power to stay proceedings."*

The power to order a permanent stay of proceedings is found in *Civil Procedure Act 2005* (NSW), s67. In *Moubarak*, the Court of Appeal considered several High Court authorities and summarised the relevant principles as follows:

- The onus of proving that a permanent stay of proceedings should be granted lies squarely on a defendant.
- A permanent stay should only be ordered in exceptional circumstances.
- A permanent stay should be granted when the interests of the administration of justice so demand.
- The categories of cases in which a permanent stay may be ordered are not closed.
- One category of case where a permanent stay may be ordered is where the proceedings or their continuance would be vexatious or oppressive.
- The continuation of proceedings may be

oppressive if that is their objective effect.

- Proceedings may be oppressive where their effect is seriously and unfairly burdensome, prejudicial or damaging.
- Proceedings may be stayed on a permanent basis where their continuation would be manifestly unfair to a party.
- Proceedings may be stayed on a permanent basis where their continuation would bring the administration of justice into disrepute amongst right-thinking people.

In *Moubarak*, the Court of Appeal reversed the decision of the primary judge and ordered a permanent stay of proceedings against a defendant who was nearly 90 years of age when the appeal judgment was handed down; who suffered from dementia and had been admitted into a nursing home in 2015. In those circumstances, Bell P stated:

> *"Whilst it is correct that a number of forensic steps would have been open to the defendant's tutor in defending the proceedings … none of these matters, in my opinion, would make up for the fact that the defendant was, because of his mental condition, at all relevant times utterly in the dark about the allegations made against him and quite unable to give instructions in relation to them. Nothing that a trial judge could do in the conduct of the trial could, in my opinion, relieve against these consequences."*

Further, there was no evidence that the defendant in *Moubarak* had ever been confronted by the plaintiff with the detail of the alleged child abuse and he was already suffering advanced dementia when the alleged assaults were first reported to the police in 2015.

The principles in *Moubarak* were subsequently applied by the NSW Court of Appeal in *The Council of Trinity Grammar School v Anderson* where the Court again reversed the decision of the primary judge and ordered the proceedings be permanently stayed.

The claim involved abuse allegedly perpetrated by a teacher upon the plaintiff whilst a student at the school in the 1970s. Critically, the claim was against the school by reason of its vicarious liability of the teacher, not against the teacher himself.

Accordingly, the defence would need to call pivotal evidence from the headmaster of the school and the master of the preparatory school who were both deceased.

The Court of Appeal found a fair trial was not possible as the school could not meet the allegations giving rise to vicarious liability in respect of the allegations of sexual assault in the absence of those pivotal witnesses.

In *Ward v The Trustees of the Roman Catholic Church for the Diocese of Lismore* the NSW Supreme Court ordered a permanent stay of proceedings which involved alleged child abuse perpetrated by a priest during the 1940s and where the alleged perpetrator had died in 1957.

However, lengthy periods of delay and the death of pivotal witnesses will not always result in the proceedings being permanently stayed.

This was recently illustrated by the NSW Court of Appeal in *Gorman v McKnight* which involved three plaintiffs who brought separate claims for damages against the estate of the same person who allegedly perpetrated acts of child abuse upon them at various times during the 1970s, 1980s and 1990s.

The alleged perpetrator had died in 2016. However, unlike the circumstances in Anderson and Ward, the death of a pivotal witness (here, the alleged perpetrator) was held not to be an impediment to a fair trial.

The executors of the estate applied for a permanent stay which proceeded to hearing before his Honour Justice Garling. The evidence at the hearing disclosed the following:

- In August 2015 one of the plaintiffs gave a statement to the police which resulted in a listening device order being obtained to enable the police to record a telephone conversation between the plaintiff and the alleged perpetrator in which admissions were made concerning the plaintiff's age and the fact of the acts of abuse having occurred.
- The alleged perpetrator was subsequently arrested and charged with various offences.
- Whilst incarcerated, the alleged perpetrator's solicitor was able to conduct several conferences and obtain his instructions in relation to the allegations made by all three plaintiffs.

Garling J refused to order a permanent stay of the three proceedings despite the death of the alleged perpetrator in circumstances where his Honour considered there was available evidence to establish the alleged perpetrator's response to the alleged sexual acts.

Further, his Honour was critical of the solicitor for the executor having failed to establish that he had conducted all reasonable enquiries to investigate the allegations and ascertain what evidence was available.

The executors sought leave to appeal which was conducted concurrently with the appeal hearing. The Court of Appeal (Bell P, Payne JA and Emmett AJA) unanimously granted leave to appeal but dismissed the appeal.

In the leading judgment of the President, his Honour distinguished these cases from Moubarak principally due to the transcript of the telephone intercept and the evidence of the solicitor for the executors arising from his conferences with the alleged perpetrator prior to this death, that the existence of sexual interactions between each of the plaintiffs and the alleged

perpetrator, and the age of the plaintiffs at the time of the alleged abuse, could not seriously be put in issue.

Payne JA agreed and also remarked:

> *"In the present case, the quality and extent of the enquiries made by the applicant for the permanent stay about matters which bore upon the fairness or unfairness of the proceedings were appropriately characterised by the primary judge as 'perfunctory'. The applicant for the permanent stay, in the circumstances of this case, did not prove that reasonable enquiries had been undertaken."*

This decision serves as a reminder that the Court's discretion to order a permanent stay in child abuse cases will be exercised only in exceptional circumstances where the evidence is such that a fair trial is not possible.

Although the Courts have upheld the making of such an order on three occasions during the past 12 months, this decision illustrates that the death of a pivotal witness will not always create the necessary circumstances to warrant a permanent stay.

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## CONSTRUCTION ROUNDUP

### Construction Projects and Multiple Agreements

Construction projects often involve multiple written agreements that, when read together, define the terms of engagement and scope of works to be carried out by various contractors.

The effect of having multiple agreements can have a significant bearing on the validity of payment claims submitted by a contractor for works performed in the construction project if they do not comply with the terms of the agreement when read as a whole.

In previous editions of GD News we have discussed the level of detail required under the security of payment legislation for a valid payment claim to be made.

More recently in *Canterbury-Bankstown Council v Payce Communities Pty Ltd* the NSW Supreme Court considered the validity of payment claims with respect to a construction project, the scope of which was defined in several written agreements.

In 2014, Canterbury-Bankstown Council entered into an Umbrella Agreement with Payce Communities Pty Limited which required Payce to construct a number of buildings including a new senior citizens centre and a library. Payce was required to fit out the library and senior citizens centre in accordance with a document described as "the Fit Out Agreement", which formed Schedule 2 of the Umbrella Agreement.

The Fit Out Agreement was expressed in Clause 9.2 of the Umbrella Agreement to come into force upon the satisfaction of certain conditions precedent.

The balance of Clause 9 of the Umbrella Agreement established a process for the design and development of the fit out to be undertaken in accordance with the Fit Out Agreement. Relevantly, Clause 9.6(e) of the Umbrella Agreement provided:

> *"Upon completion of the design development process the draft design documentation as approved by both Council and Payce will become the final design documentation and will not be further amended except in accordance with clause 9.8 or because there are faults in the design documentation which requires rectification."*

Clause 9.7 of the Umbrella Agreement provided that, upon completion of the design documentation, the price for the agreed design was to be determined by an Independent Certifier.

Despite these conditions, the parties did not follow the procedure to agree on the scope of the fit out work and the price in accordance with the Umbrella Agreement.

A dispute arose concerning the costs of the design which was resolved when an agreed contract price was determined.

However, the work on the fit out commenced without any final agreement being reached about the actual design.

In 2019, Payce submitted a payment claim in the amount of $1,748,000 regarding works said to comprise 44 items of variation work and one item for builder's margin which Payce asserted was payable in accordance with the Fit Out Agreement.

The Council disputed this payment claim and served a payment schedule in response stating the scheduled amount was Nil.

The dispute was referred to an adjudicator under the *Building and Construction Industry Security of Payment Act* who found in favour of Payce.

The Council applied to the NSW Supreme Court to have the Adjudication Determination declared void on three grounds:

- The payment claim made by Payce did not comply with the requirements of the Act because it was made in respect of more than one construction contract;
- The Act did not apply to the contracts in question because the consideration payable for the work carried out was to be calculated otherwise than by reference to the value of that work, with the result that the exclusion contained in s7(2)(c) of the Act applied; and

- The Council was denied natural justice because the Adjudicator determined the application on a basis that was advanced by neither party and failed to give adequate reasons for his decision.

The matter proceeded to hearing before his Honour Justice Ball.

The Council contended that an adjudication determination can only be made in respect of one payment claim and a payment claim can only be made in respect of one contract relying upon the principles enunciated in *Matrix Projects (Qld) Pty Ltd v Luscombe*.

Ball J noted there were a number of documents governing the terms on which Payce was to carry out the fit out work on the library and senior citizens centre. However, there was a single price for that work to be determined in accordance with those documents.

Consequently, his Honour characterised the documents as a single contract for the purposes of characterising any payment claim made under them.

The Council further argued the Act did not apply to the contracts in question due to the application of s 7(2)(c) of the Act which provides:

*"This Act does not apply to –*

*(a) …*

*(b) (Repealed)*

*(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied."*

Ball J considered the Council's argument to have two strands:

- the work performed under the Fit Out Agreement was part of a broader agreement governed by the Umbrella Agreement. The consideration payable under the Umbrella Agreement was not calculated by reference to the value of the work performed but rather involved a series of transactions including the transfer of property; and
- before the Fit Out Agreement could operate, the parties had to agree on the scope of work in accordance with the Umbrella Agreement and they never did so.

Ball J rejected this argument on the basis that the Fit Out Agreement came into effect on satisfaction of the last of the conditions precedent referred to in the Umbrella Agreement.

Further, the Fit Out Agreement governed the terms on which the fit out of the library and senior citizens centre was to be performed and provided for periodic payments to be calculated by reference to the value of the work done.

The parties agreed a price for that work and the work was subsequently performed.

Justice Ball noted that whilst the scope of work was not reached in accordance with the relevant terms of the Umbrella Agreement, this did not alter the nature of the agreement on payment.

In support of the alleged denial of natural justice, the Council submitted the Adjudicator determined the matter by reference to clauses of both agreements, whereas both parties based their submissions on the Fit Out Agreement alone. It further submitted that the Adjudicator had determined the matter relying on an estoppel argument not advanced by Payce.

Ball J stated that the relevance of the clauses was drawn to the Adjudicator's attention by Payce and he was entitled to take them into account in forming a view on the parties' obligations.

Further, according to his Honour, the Adjudicator did not rely on an estoppel. Rather the Adjudicator advanced it as an alternative argument to the one based on the contract. Thus, the Council could not have been denied natural justice.

Additionally, the Council submitted it was denied natural justice because the Adjudicator gave no reasons for rejecting its submissions.

Section 22(3) of the Act provides:

*"The adjudicator's determination must –*

*(a) be in writing; and*

*(b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination);*

*(c) …"*

Ball J held that the approach taken by the Adjudicator satisfied the requirement of s 22(3).

The Council's challenge to the Adjudication Determination was rejected and the proceeding was dismissed.

This case suggests it might be prudent to clearly define the terms of engagement and scope of works within a single agreement.

However, the decision highlights that even where multiple agreements exist, their combined effect can still render a payment claim valid where there is an agreed price but other conditions of the contract terms have not been met.

Where multiple agreements are necessary the effect of subsequent agreements should be clarified to minimise the risk of a potential dispute.

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## Security of Payments Legislation And the Danger Of Anshun Estoppel

The *Building and Construction Industry Security of Payment Act 1999* (NSW) ("SOP Act") prescribes an adjudication process which is intended to resolve disputes about payment claims on an interim basis quickly and relatively cheaply without recourse to litigation before the Courts.

Despite the best intentions of the legislature some disputes do arise which result in Court proceedings.

The Courts have held that where Court proceedings are brought to determine a dispute arising from a construction project, it is necessary to include all claims or issues between the parties in the one proceeding. This includes any disputes relating to payment claims that might otherwise be determined as part of the adjudication process under the SOP Act.

A problem can arise where Court proceedings are finalised but not all of the issues raised by the parties are determined on their merits. What happens if a payment claim is made in respect of issues that were previously raised in earlier Court proceedings that were finalised without determining those issues on the merits? Can this give rise to an *Anshun* estoppel?

The NSW Supreme Court recently considered these principles in *TWT Property Group Pty Ltd v Cenric Group Pty Ltd*.

On 20 June 2017, TWT engaged Cenric to demolish a structure in Harris Street Pyrmont and to excavate the site.

On 6 November 2017 Cenric entered into a subcontract with Bundanoon Sandstone Pty Ltd to excavate and sell sandstone harvested from the site.

On 9 March 2018 TWT sent to Cenric a "Notice to Show Cause" pursuant to the subcontract contending that Cenric had "substantially departed from the construction program without reasonable cause".

The Notice required Cenric to show cause as to why TWT should not exercise its rights under the contract to take the work out of Cenric's hands.

On 19 March 2018 TWT served a further Notice on Cenric stating it intended to take the remaining work out of Cenric's hands.

On 20 March 2018 Cenric removed its equipment from the site and TWT engaged Bundanoon directly to carry out the excavation work.

On 29 March 2018 Cenric commenced proceedings in the NSW Supreme Court against TWT and Bundanoon claiming damages arising from its exclusion from the site. Cenric did not make a claim for payment in respect of the work it had completed up to 19 March 2018 when it was excluded from the site.

TWT filed a cross-claim against Cenric in which it sought liquidated damages due to an alleged failure by Cenric to proceed with due expedition and without delay.

In its Defence to the Cross Claim, Cenric claimed a set-off in respect of an amount said to be owed by TWT to Cenric for work completed by Cenric prior to being excluded from site, even though this was not included by Cenric in its claim for damages against TWT.

The matter proceeded to hearing before his Honour Justice McDougall by which time the cross claim by TWT against Cenric had been abandoned.

Accordingly, the only issue for his Honour to determine was whether or not Cenric was validly excluded from site and, if so, what damages were to be awarded.

Justice McDougall found that TWT was not entitled to exclude Cenric from the site. However, the damages awarded to Cenric did not include any amount for the work carried out by Cenric prior to its exclusion from the site.

On 10 December 2018, following the conclusion of the proceedings before McDougall J, Cenric served a payment claim for $444,726.06, being the amount Cenric contended was owing to it by TWT for work done prior to its exclusion from the site on 19 March 2018.

TWT disputed the payment claim and served a payment schedule certifying the amount as $Nil.

On 14 January 2019, Cenric lodged an adjudication application.

On 22 February 2019 the adjudicator issued a determination in which he found that:

- "the payment claim was not served within 12 months after the construction to which the claim related was last carried out;
- the payment claim thus did not comply with s 13(4)(b) of the Act;
- accordingly he had no jurisdiction to determine the matter; and
- there was consequently an amount of "$Nil" payable by TWT to Cenric."

Cenric then purportedly withdrew its 14 January 2019 adjudication application despite the adjudicator's determination.

On 1 March 2019, Cenric lodged a further adjudication application based on the same payment claim the subject of the first adjudication determination.

In the meantime, TWT commenced proceedings in the NSW Supreme Court seeking to challenge the validity of the payment claim or, alternatively, uphold the adjudication determination handed down on 22 February 2019.

The matter proceeded to hearing before his Honour

Justice Stevenson. The following issues arose:

- Whether it was an abuse of process for Cenric to make the 10 December 2018 payment claim by reason of an Anshun estoppel said to arise from Cenric's unreasonable failure to include in its claim for damages determined by McDougall J the claim for work done prior to its exclusion from the site on 19 March 2018; and
- If there was no Anshun estoppel, whether the 22 February 2019 adjudication determination was amenable to challenge on the basis that, as a matter of objective fact, the payment claim relates to work carried out within 12 months of service of the payment claim.

It was first contended by Cenric that the parties had, prior to the commencement of the 2018 proceedings before McDougall J, adopted a mutual position that Cenric and TWT would not agitate the balance of the reconciliation of monies owed under the Head Contract and would defer this aspect to be determined later in another forum.

Stevenson J held he was not satisfied that such an agreement existed as there was no evidence to suggest it was accepted by TWT.

In determining whether an *Anshun* estoppel existed Stevenson J noted the relevant factors included:

- whether the claim sought to be made in the second proceeding arose substantially out of the same facts as those made in the first proceeding; and
- whether the claim in the second proceeding, if successful, would result in a judgment conflicting with the judgment in the first proceeding.

Justice Stevenson confirmed the principles of *Anshun* estoppel applied whether or not the failure to include the claim in the original claim for damages determined by McDougall J was deliberate or as a result of negligence or inadvertence.

Cenric's claim for payment for work done on the site prior to its exclusion on 19 March 2018 were held to arise out of the same facts that were propounded before McDougall J in the 2018 proceedings.

Stevenson J considered Cenric's omission could not have been a matter of oversight, as Cenric had raised it in answer to TWT's cross-claim even though that aspect of the earlier proceeding was abandoned prior to the hearing before Justice McDougall.

According to Justice Stevenson Cenric's failure to propound its claim for work done to 19 March 2018 in the 2018 proceedings before McDougall J was unreasonable such that Cenric was now estopped from claiming that amount from TWT.

Therefore the service of the 10 December 2018 payment claim was held to be an abuse of process, as was the 1 March 2019 adjudication application, which was based on that payment clam.

Whilst it was unnecessary for Stevenson J to make a finding in relation to the 22 February 2019 adjudication determination, his Honour also held that, were it necessary, he would have concluded that the determination was void on the basis of a breach of natural justice.

This case demonstrates the risks to parties involved in a dispute under the SOP Act which results in Court proceedings if the plaintiff does not ensure it includes all claims in any claim for damages.

A party will be estopped from making any subsequent payment claim arising out of the same facts that were the subject of an earlier Court judgment, even if that amount was not claimed in the earlier claim.

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## EMPLOYMENT ROUNDUP

### Post Employment Restraints - Real Estate Agent Restrained to Protect Rent Roll

Concerns about the impact that the departure of an employee may have on a business often results in actions by former employers seeking to enforce restraints in employment contracts and duties of confidentiality.

The recent decision of the Supreme Court of NSW in Dundoen Pty Limited v Richard Wills (Real Estate) Pty Limited [2020] NSWSC 15 serves as a reminder of the principles that a Court takes into account in determining whether to restrain an employee from competitive conduct after the termination of their employment as well as the test to be applied when an interim order is sought to restrain conduct before the final hearing of the claim

Dundoen Pty Limited trading as Charlotte Peterswald, is a real estate agency in Waverley that purchased the management rights to the rent roll asset of Wills Bros (Estate Agents) Pty Limited, a real estate agency in Waverley owned and operated by David and Douglas Wills (Will Bros). Jillian Wills the daughter of David Wills commenced employment with Dundoen Pty Limited as a Senior Property Manager after the rent roll was purchased.

On 12 November 2019 Dundoen Pty Limited terminated Ms Wills' employment on the ground of redundancy. Shortly after, Ms Wills accepted an offer to work as a Senior Property Manager at a real estate agency operated by Richard Wills (Real Estate) Pty Limited in Bondi Junction (Richard Wills Agency). Ms Wills' cousin, John Wills, is the sole director and principal of the Richard Wills Agency.

Before Ms Wills commenced employment with the Richard Wills Agency on 28 January 2020 Dundoen Pty Limited commenced proceedings in the Supreme Court seeking to restrain Ms Wills from taking up her employment and to enforce other restraints contained in Ms Wills' employment agreement with Dundoen Pty Limited.

Dundoen claimed Ms Wills both during and after her employment breached:

- the express terms of her employment agreement with Dundoen, including the terms relating to confidential information and restrictions on her post-employment activities;
- implied duties of fidelity and obligations of loyalty owed;
- equitable obligations owed in respect of confidential information; and
- ss 182 and 183 of the Corporations Act 2001 (Cth).

The proceedings sought interlocutory relief restraining Ms Wills from breaching the terms of her employment agreement relating to confidential information and restrictions on her post-employment activities, and further interlocutory relief restraining the Richard Wills Agency from taking any action to induce Ms Wills to breach any interlocutory orders made by the Court.

Initially the parties in the proceedings consented to a form of orders restraining conduct but Dundoen sought further orders that:

- Until further order of the court or hearing and determination by the court of the Dundoen's application for interlocutory relief or consent of the Dundoen is given in writing, orders that:
- Ms Wills be restrained from carrying on or being engaged, concerned, or interested directly or indirectly with the Richard Wills Agency in providing real estate agency services within a radius of 5 kilometres from 326 Bronte Rd, Waverley in the State of New South Wales NSW.
- Ms Wills be restrained from soliciting, attempting to solicit, or accepting, any instructions to provide real estate agency services from any person or entity with whom the Ms Wills had direct dealings in the course of or in connection with her employment with the Dundoen
- Ms Wills be restrained from soliciting, attempting to solicit, or accepting, any instructions to provide real estate services in respect of any managed properties the subject of an Agency Agreement as defined in the Property, Stock and Business Agents *Act* 2002 and *The Property, Stock and Business Agents Regulation* 2014 contract with the Dundoenf at 12 November 2019, being the date of Ms Wills' redundancy.

The hearing of the interim injunction came before Henry J who found that an injunction should be ordered.

Henry J observed:

> *"Whether a restraint of trade is valid involves determining three matters:*
>
> - *whether the alleged breach (independently of public policy considerations) infringes the terms of the restraint properly construed;*
> - *whether the restraint in its application to that breach is against public policy. This involves a consideration of whether the restraint is necessary to protect the parties' legitimate business interests and is not injurious to the public; and*
> - *that, if it is not, then in its application to the alleged infringing conduct, the restraint is valid unless the Court makes an order under s 4(3) of the Restraints of Trade Act."*

The parties accept that the relevant principles to be applied, arising both under general law and under the Restraints of Trade Act NSW, are as set out by McDougall J in Stacks/Taree Pty Ltd v Marshall (No 2) [2010] NSWSC 77 at [44] where it was stated:

- At common law, a restraint of trade is contrary to public policy and void, unless it can be shown that the restraint is, in the circumstances of the particular case, reasonable.
- In New South Wales, it is not strictly correct that a restraint is prima facie void; a restraint is valid to the extent to which it is not against public policy, even if not in severable terms: Restraints of Trade Act (NSW), section 4(1):.
- The onus at common law of showing that the restraint goes no further than is reasonably necessary to protect the interests of the person in whose favour the restraint operates, lies on the party seeking to support the restraint as reasonable.
- The onus of establishing that a contract in restraint of trade is injurious to the public interest lies on the party alleging that this is so.
- The Court gives considerable weight to what parties have negotiated and embodied in their contracts, but a contractual consensus cannot be regarded as conclusive, even where there is a contractual admission as to reasonableness.
- The validity of the restraint is to be tested at the time of entering into the contract and by reference to what the restraint entitled or required the parties to do rather than what they intend to do or have actually done.
- The test of reasonableness is measured by reference to the interests of the parties concerned and the interests of the public.…The requirement

that the restraint be reasonable in the interests of the parties means that the restraint must afford no more than adequate protection to the party in whose favour it is imposed.

- An employer is not entitled to require protection against mere competition. Covenants that restrain competition are invalid unless they are reasonably necessary to protect legitimate business interests.
- An employer is entitled to protection against the use by the employee of knowledge obtained by him of his employer's affairs in the ordinary course of trade. A restraint clause will be invalid unless it is necessary to prevent disclosure of trade secrets or use of a connexion built up by the employee with customers.
- The relevant knowledge must be more than simply the skill and knowledge necessary to equip the employee as a possible competitor in the trade, but the obtaining of personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him to take advantage of his employer's trade connection or utilise information confidentially obtained.
- An employer's customer connection is an interest which can support a reasonable restraint of trade, but only if the employee has become, vis-a-vis the client, the human face of the business, namely the person who represents the business to the customer.
- The effect of the Restraints of Trade Act 1976 (NSW) is to allow the restraint to be read down so as to be valid to the extent necessary only to capture the conduct of the defendant, if that extent would have been valid. However, the Act does not allow the Court to remake the contract or a covenant in the contract. Whilst the Court is permitted to read down the clause if the clause is so capable, it cannot be re-drafted.

The Court heard evidence that:

- Dundoen received notice that one of its landlord clients was transferring the management of their properties to the Richard Wills Agency after Ms Wills had been reprimanded about her workplace performance. John Wills' evidence was that the landlord moved to the Richard Wills Agency because of poor service on the part of Dundoen.
- After Ms Wills was made redundant Dundoen received notice from the Richard Wills Agency advising that a landlord client was moving the management of two properties to the Richard Wills Agency. John Wills' evidence is that the landlord had a connection with the "Wills" family for decades and was moving to his agency after being told that Ms Wills had left Dundoen.
- In December 2019, a landlord client gave notice to Dundoen that they were transferring eight properties to the Richard Wills Agency under management. The landlord advised they were moving the business because of the longstanding relationship with Ms Wills and the Wills' family. John Wills' evidence is that the intention of this landlord to move the management of these properties to his agency was unknown to him or the company.
- Ms Wills accepted that she had long-standing relationships with many of the landlord clients on the CP rent roll but denies soliciting or influencing them to terminate their management services with CP. Other than some material on her phone which she has offered to delete, she also denies having in her possession any of CP's confidential information.
- Dundoen had never lost property managements to the Richard Wills Agency prior to 2019 and that Ms Wills rarely lost properties except for "sale or normal circumstances".
- The Court must consider whether CP's case for interlocutory relief raises a serious question to be tried and whether the balance of convenience and related factors warrant the grant of interlocutory injunctions: Australian Broadcasting Corporation v O'Neill (2006) 227 CLR 57; [2006] HCA 46 at 81-82 [65] per Gummow and Hayne JJ (*ABC v O'Neil*).

Henry J observed that when deciding a claim for interim relief:

- The relative strengths of the parties' cases are not irrelevant to the exercise of the Court's discretion. The stronger the case for final relief, the less may be required to tip the balance of convenience. The greater the balance of convenience, the less strong a case for final relief may be required: This is applicable in enforcing a post-employment restraint of trade:
- As this is an interlocutory hearing, the Court's task is not to undertake a preliminary trial and to give or withhold relief upon some forecast as to the ultimate result of the factual disputes between the parties. The Court is only required to reach a provisional conclusion as to particular facts or matters in dispute:
- In this case, as the Restraint Period sought to be enforced is three years (cascading down to 12 months); the grant of interlocutory relief would not have the practical effect of conclusively determining the dispute between the parties. It is to be expected that an expedited final hearing would be heard and determined well within that time. The Court is, therefore, not required to definitively assess the strength of the plaintiff's claim for final relief:

Henry J observed the restraints were lengthy and referred to 3 cases where significant periods of restraint were upheld noting:

*"In Devine Real Estate Concord Pty Ltd & Ors v Wajih Agha (aka Roger Agha) & Anor [2019] NSWSC 786 at [410], Sackar J upheld a restraint of three years in relation to a real estate agent in circumstances where the person against whom the restraint was enforced had been a shareholder in the relevant business and was found to have engaged in malicious, blatant and extensive breaches of his obligations.*

*In* Pearson v HRX Holdings Pty Ltd *(2012) 205 FCR 187, the Full Federal Court (Keane CJ, Foster and Griffiths JJ) upheld a two-year restraint against an employee who had extensive knowledge of the former employer's clients and operations to render him the "human face of the business" in circumstances where the employee held shares in his former employer and was remunerated for 21 months of the two-year restraint period*

*In* Genesys Wealth Advisers Ltd v Miles*, the New South Wales Supreme Court ([2008] NSWSC 802) and the Court of Appeal (*Miles v Genesys Wealth Advisers Ltd *[2009] NSWCA 25) upheld a 30 months restraint but it was in relation to the CEO and Managing Director who had access to significant confidential information relating to the future plans of the company, which was not generally available within the company itself …. The 30 month restraint was included in a deed of release negotiated at the time of his departure and for which he received legal advice and obtained the benefit of the release of shares."*

Henry J observed that "while there may be questions about the reasonableness of the three year restraint, I am satisfied that there is a serious question to be tried that a period of 12 months is not an unreasonable one to permit Ms Wills' personal influence to dissipate." However Henry J noted:

*"Three years seems to me to be an unreasonable period for Dundoen to insist on keeping Ms Wills out of the Eastern Suburbs market (or the employ of the Richard Wills Agency) to protect against the risk that she might find it impossible to put out of her mind, and not use, Dundoen's confidential information. Presumably, the quality of the confidentiality of Dundoen's information will dissipate over time, particularly as landlord clients come and go from Dundoen's rent roll. Memories also fade over time. "*

After weighing the facts Henry J concluded:

- there was a serious question to be tried that the non-compete restraint is valid and there is a threatened breach of the non-compete restraint in the employment agreement.
- As to the non-solicitation and dealing restraint, Dundoen had shown there was a serious question to be tried that a restraint period of more than four months as offered by Ms Wills was reasonable. It will be a question at the final hearing as to whether, if found to be valid, a three year duration or some lesser period, is reasonable.
- The balance of convenience, supported by the prima facie case of validity, favours the grant of interlocutory relief in relation to the non-compete and non-solicitation and dealing restraints.

Restraints in an employment contract can be enforced on an interim basis to protect a business after an employee departs.

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## Incentive Bonuses – Can An Employer Change The Goalposts?

More and more employers remunerate employees on the basis of a fixed component of salary and a 'variable' (or 'at-risk' or 'incentive') component.

There are clearly good human management reasons for structuring reward packages in this way – employees are motivated to work harder, and the cost of employment is reduced for under- performing workers.

But there are also potential pitfalls. Employers generally seek to reserve to themselves some right to alter the terms of incentive plans or schemes, invariable using terms like "in its absolute discretion". These are not always (or some would say ever) effective in achieving the intended result. This can be a rude surprise for employers faced with large incentive claims from a workforce.

Just such a problem faced the employer in *Subasic v Hewlett-Packard Australia Pty Limited [2020] ACTSC 2*.

***Factual background***

Ms Subasic was employed as a sales executive, dealing mostly with government agency customers of the Employer. She was paid by her employer in two ways - first, by a fixed sum or base salary. The second component was a performance payment - if Ms Subasic met certain sales targets, she would receive an additional sum described as a Target Incentive Amount (TIA).

In addition to the TIA there was a further incentive payable (Super Bonus) if Ms Subasic achieved a specified sales quota. This extra incentive was calculated at a more generous rate, the basis for which was set out in a policy of the Employer.

Ms Subasic was set her sales target or quota. She outperformed - achieving sales of more than five times the target set. As a result, she was expecting a significant sum of money by way of her incentive payment for the Period, being the TIA plus the extra commission at the accelerated rate, which amounted to $446,250.39. She was able to calculate the amount

precisely because the rates were set out in a sales letter issued to her, pursuant to the Employer's compensation policy, and she had access to her sales figures through a computer system program.

However, that expectation was not met. Ms Subasic was paid $136,500, which was an amount equating to 350% of her TIA.

Ms Subasic queried why she had not received the additional incentive payment she believed was owed. She was subsequently informed for the first time that a decision had been made to cap her incentive payment or commission at 350% of the TIA.

***Issues***

The main issue in the litigation was whether by the terms of the employment agreement at the material time there was:

- an express contractual obligation to pay an incentive to Ms Subasic in addition to her base salary; or
- an implied obligation of good faith or a duty to co-operate which required such a payment.

Secondary to that was an issue - if a contractual right did exist – as to whether such entitlement was subject to the discretion or approval of the Employer, and if so, the nature of the scope of the discretion to be exercised.

***The critical incentive terms***

In addition to a base salary provision, the employment contract signed by Ms Subasic said:

> *Target Incentive Amount*
>
> *You are also invited to participate in our Base Plus Program that includes a Target Incentive Amount (TIA) of $57,000 per annum in addition to your base pay. The Program and the TIA are subject to change or cancellation at Hewlett-Packard's discretion and are aligned to market date research conducted from time to time by HP.*

The relevant letter - establishing the Super Bonus - was issued to Ms Subasic under the HP Global Sales Compensation Policy (Compensation Policy).

The Compensation Policy contained the following words:

> *…none of the contents of this Policy, HP Sales Plans, nor regional sales compensation guideline shall be construed to imply the creation or existence of a contract between HP and any participant, nor a guarantee of employment for any specified period of time.*
>
> *No Sales Plan participant will have any right to monies accrued through the plan until and unless all terms, provisions, and conditions, as set forth in this policy, the assigned Sales Plan and sales accrediting process and procedures have been met.*

The Sales Letter included the following:

> *…The purpose of this document is to communicate your Sales Plan, the business objectives and the parameters on which your incentive compensation calculation will be based.*
>
> ***Terms & Conditions***
>
> *Your Sales Plan is governed by the …HP Global Sales Compensation Policy…*
>
> *Sales employee will receive advance pay…when performance is 0-60% of quota.*
>
> ***Legal Info***
>
> *To the extent allowed by law, the various components of your compensation are subject to change in accordance with the governing policies described above.*
>
> *There are no oral agreements or other modifications concerning sales compensation between the sales employee and [the Employer] which are not contained or referenced herein. No modification of this Sales Letter shall be effective unless approved in writing by HP Sales Management and HP Sales Compensation Management.*
>
> *This Sales Letter is considered accepted after 30 days unless you notify Hewlett-Packard otherwise.*
>
> *HP has implemented a management review policy to evaluate sales performance significantly above target or for evaluation of credit for "large" deals. This evaluation does not include bonus, SPIF and Discretionary performance. This policy complies with HP's Pay for Performance philosophy and is considered fair and equitable for both employees and the company. When a sales employee reaches an identified performance threshold, a management review occurs. As a result of these reviews, management may adjust various components of the employee's Sales Plan, may hold incentive payments until review is complete, or may stop or recover unapproved payments to ensure fair measurement of performance.*

***Outcome***

Despite what might look like substantial reservations to the employer to take what action it thought fit in regards to the incentive scheme, Ms Subasic was successful in establishing a contractual right to be paid her Super Bonus.

Adopting orthodox (but poorly understood) principle as to the construction of contractual terms, the Court held:

> *That there was a discretionary element to the existence of the Program or its amendment in the Letter of Offer does not negate the contractual obligation to pay an employee who participated in the Program, or its successor, according to whatever terms were set by the Employer. ... the discretion to change or amend the Program or the TIA was to be exercised 'honestly and conformably with the*

*purposes of the contract'.*

*... the words in the General Terms and Conditions, referring to a benefit under a policy being a 'guide only' and not to be read as a 'contractual term', do not enable a construction that any payment of an incentive earned under the Program in its original form or as amended could be withheld entirely at the whim of the Employer.*

*...a reasonable construction of the Employment Agreement was that the Employer was not permitted to decide arbitrarily, capriciously or unreasonably that it need not pay an incentive payment where the set objectives had been satisfied.*

Additionally, the Court found that there was an implied term of good faith in the exercise of the discretion with regard to the incentive payment under the Program as amended, the content of which was that the Employer could not decide arbitrarily, capriciously or unreasonably that it need not pay an incentive payment where the set objectives had been satisfied.

The Court was of the view that it would defeat the commercial purpose of the clause if it were construed as permitting the Employer to introduce an incentive program, expressly remove a cap on incentive payments, market the program as rewarding strong performance, and then when employees performed strongly, exercise its discretion to refuse to pay the incentive specified.

Orders were made giving Ms Subasic the unpaid Super Bonus.

**Takeaway**

Extreme care needs to be taken in arranging remuneration and incentive schemes for employees. Words which sound like they will protect an employer against adverse changes do not always work.

A discretion is not a licence to change an employee's remuneration on a whim. A discretion must be exercised reasonably and in accordance with the purposes of the employment contract.

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## No Genuine Redundancy Where Employer Offered Another Position at a Significantly Lower Wage

On 21 February 2020, Deputy President Beaumont in a matter of *Francombe v M Clinicia Pty Limited* in the Fair Work Commission determined that an employee's dismissal was not a case of genuine redundancy as it was reasonable in all the circumstances for the employee to be redeployed within the employer's business.

The employee had been employed as a practical nurse manager from January 2018 until she was dismissed on 18 October 2019.

The employer led evidence at the hearing of being in financial distress for some time with debts in excess of $300,000 in July 2019. The employer made known to all its employees at that same time of the need to make operational changes in light of its financial predicament.

On 15 October 2019 the employee was informed at a meeting her position was being made redundant as the employer could no longer afford to employ her. She was informed at the meeting she could be offered another position however it was at a significantly lower wage. The employee requested her redundancy be put in writing with a copy of the contract for the new position.

The following day the employee received a letter containing her redundancy entitlement and a new employment contract.

After the meeting the employee became aware that some of her duties were being moved to another employee.

The employee refused the new position that was offered to her.

The employee complained there had not been any consultation.

The Deputy President noted Section 389(1)(a) required the Commission to be satisfied the role of practice nurse manager was no longer required to be performed by anyone because of changes in the operational requirements of the employer.

Whilst "operational requirements" was not defined by the *Fair Work Act 2009*, it was considered to be a broad term that permits consideration of many matters including the state of the market in which the business operates and the application of good management to the business.

Some examples of changes in operational requirements included a downturn in trade that reduced the number of employees required and the employer restructuring the business to improve efficiency including the redistribution of tasks done by a particular person between several other employees, thus resulting in the person's job no longer existing. It follows that an employee may still be genuinely made redundant where there are aspects of the employee's duties still being performed by other employees.

The Deputy President noted it is the "job" that is no longer required to be performed rather than the duties and the onus is on the employer to prove that on the balance of probabilities the redundancy was due to the changes in operational requirements.

The Deputy President was satisfied there were proper operational requirements that necessitated the elimination of the employee's job based on the employer's financial circumstances.

The employee also complained there had been no consultation by the employer about the redundancy as required by Section 389(b).

The Full Bench of the Fair Work Commission in *Ventyx v Paul Murray*, considered the consultation obligation only arose once a definite decision by the employer had been made.

The Deputy President noted consultation was not perfunctory advice on what is about to happen, rather consultation is providing the individual, or other relevant persons, with a bona fide opportunity to influence the decision maker once the employer has made the decision.

Section 119 of the *Fair Work Act 2009* provides employees whose jobs have been made redundant an entitlement to redundancy pay. However, an employer can, under Section 120 of the *Fair Work Act 2009* apply to the Fair Work Commission to determine if the amount of redundancy pay can be reduced if the employer obtains other acceptable employment for the employee.

Likewise Section 389(2) provides that a person's dismissal is not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within the employer's business or an associated entity of the employer.

In *Ulan Coal Mines Limited v Honeysett*, the Full Bench of Fair Work Australia considered what constitutes a case of reasonable redeployment. In *Ulan* 14 mining employees were dismissed as a result of restructuring of the coal mine. There were however vacancies for positions of mine workers at various different mines operated by either Ulan or its associated entities. Rather than redeploying the 14 employees into these available positions, the dismissed employees were not given any preference and had to compete against other applicants for the positions.

The Full Bench in *Ulan* stated the question of whether it was reasonable to redeploy an employee internally or with an associated entity must be considered as at the time of the dismissal and would depend on a number of factors including:

- the nature of any available positions;
- the qualifications required for the position;
- the employee's skills, qualifications and experience;
- whether the employee can perform the position to the required standard, either immediately or with a reasonable period of retraining;
- the location of the job;
- the remuneration which is offered; and
- where the available business is in an associated entity, the degree of managerial integration between the employer and that entity.

The Deputy President determined the employee was offered a nursing position which attracted less pay and less responsibilities than that of practice nurse manager. The Deputy President was satisfied it was as suitable job or position to which the employee could be redeployed and that redeployment was reasonable in the circumstances.

As such the Deputy President was satisfied the employer attempted to redeploy the employee into the nursing position which attracted a lesser pay and responsibility and those factors alone did not defeat an argument of compliance with Section 389(2)(a).

Employers should be aware when considering redundancies that should they be able to offer those selected employees positions within their organisation or an associated entity (even if the position is for lesser pay and responsibilities) it may be considered reasonable in the circumstances and avoid having to pay redundancy pay to that employee.

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## WORKERS COMPENSATION ROUNDUP

### Limitation Periods & the *Workers Compensation Act* 1987

In our previous issue of GD News we discussed recent decisions of the NSW Court of Appeal in relation to the the *Limitation Act* 1969 and discoverability.

The *Limitation Act* 1969 governs personal injury claims pursuant to the *Civil Liability Act* 2002. The limitation period for claims for work injury damages are governed by Section 151D of the *Workers Compensation Act 1987*.

When considering whether to grant leave to a claimant to proceed pursuant to Section 151D of the *Workers Compensation Act* 1987 a Court will consider the explanation for the delay and any prejudice that arises to the defendant as a consequence of the delay.

Often in cases of work injury damages it will take more than three years, if not many more than three years, for a claimant to satisfy the threshold of 15% permanent impairment that is required to commence a claim for work injury damages. Other pre-requisites must then be complied with.

A claimant must then satisfy the Court that they should be granted leave to proceed out of time pursuant to section 151D. Consent of the defendant to a claim proceeding out of time is not in itself sufficient.

The Supreme Court has recently considered an application for leave to proceed pursuant to Section 151D of the *Workers Compensation Act 1987*

(*Hull v Gregory Ronald Lyons t/as Greg Lyons Building Constructions*). In that case the claimant was working at the Katoomba RSL which was undergoing renovations when, on 23 April 2013 he sustained injury when he fell into a hole at the premises. The employer, Briter Doors Solutions Pty Limited, was the second defendant to the proceedings. As the accident occurred on 23 April 2013 prima facie the limitation period against the employer expired on 23 April 2016.

Justice Button considered the evidence before the Court and noted there was no evidence of actual prejudice on the part of the employer, who did not oppose the application. Whilst Senior Counsel for the claimant accepted that in an ideal world investigations in relation to the claim could have been undertaken more expeditiously, his Honour was satisfied there was no actual prejudice and there was a reasonable explanation for the delay.

His Honour concluded that:

*"I think it is true that, speaking generally, the longer things take, the more memories fade, and the less precise evidence must be. But without descending to a level of detail, I believe it has been perfectly clear to all of the entities involved – ever since the date of the accident – that it would be quite possible that there would be a litigious dispute. And certainly the evidence shows that, from a period early in 2014, the insurer of the second defendant was making investigations about what had happened, why it had happened, how it had happened and who might be to blame for it.*

*In all the circumstances that I have set out, and without descending to a greater level of analysis as to principle, and bearing in mind the considered position of Counsel for the second defendant not to oppose the grant of leave, I'm soundly satisfied that the orders sought in the Notice of Motion of the plaintiff should be made."*

In these circumstances the claimant was granted leave to proceed against the employer although was ordered to pay the employer's costs of the application.

Whether or not a claimant will be granted leave to proceed in a work injury damages claim will depend on the facts and circumstances of each case. The considerations for the Court are very different to personal injury claims governed by the *Civil Liability Act* 2002.

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## A Journey to Obtain Medical Treatment has a Real and Substantial Connection to Employment

In 2012 the New South Wales *Workers Compensation Act* 1987 was amended to restrict a worker's entitlement to receive compensation with respect to personal injuries received on a journey which fell within the scope of Section 10(3), by the addition of Section 10(3A) which required there be "a real and substantial connection between the employment and the accident or incident out of which the personal injury arose".

Since that time there have been a number of Presidential decisions dealing with the application of Section 10(3A) which have overwhelmingly been determined in the worker's favour.

None of these decisions have dealt with the application of sub-section (3A) in the context of a journey which is made for the purpose of obtaining medical treatment.

These issues were considered recently in the matter of *Australia New Zealand Banking Group Limited v Khullar* [2020] NSWWCCPD 3 by Deputy President Michael Snell.

The worker was using a note counting machine when a rubber band broke and flicked into her right eye. As a result of hyper extending her neck as a reaction to the rubber band flicking into her eye she also injured her neck and right shoulder.

The worker attended her treating ophthalmologist at about 7.00 am for treatment of her right eye injury and when driving home after the appointment her car was struck in the rear at a roundabout and as a result she injured her neck and right shoulder.

The worker made a workers compensation claim in respect of her eye injury, neck and right shoulder injury and the injuries sustained returning home from her treatment. The employer accepted liability for the initial eye injury but disputed injury to the cervical spine and shoulders. It also disputed liability in respect of the motor vehicle accident on the basis the accident was not "work related".

At first instance an arbitrator made an award in the worker's favour with respect to all alleged injuries.

The employer appealed on the basis that whilst the arbitrator's findings were sufficient to establish the journey provisions applied on the basis of Section 10(3)(c), it was also necessary for the worker to establish a real and substantial connection between her employment and the accident as required by Section 10(3A).

The Deputy President provided a comprehensive review of the Presidential decisions dealing with application of Section 10(3A) of the 1987 Act.

The Deputy President accepted the reference to "employment" in Section 10(3A) is to *"not just the particular tasks performed, but also the nature, conditions, obligations or incidents of the employment"* as stated in the decision of *Wickenden* where it was sufficient that a worker's employment put her on a country road in the middle of the night. Therefore, the worker's participation and cooperation with the employer in the management and treatment of her injury was properly regarded as part of the incidents of

her employment.

The Deputy President stated:

> *"The mere act of driving on one of the journeys falling within Section 10(3)(c) does not of itself provide the necessary connection. Consideration of whether Section 10(3A) is satisfied depends on whether there was a real and substantial connection between the worker's employment and the motor vehicle accident..."*

Further, the Deputy President indicated that Section 10(3A) involved *"A question of fact, applying the words of the provision, in a common sense and practical manner in each case". This did not necessarily involve proof the accident was caused by the employment.*

The Deputy President drew on "human experience" to accept at the time the accident occurred the traffic would be heavier than at most other times of the day. Even though the statement made by the other driver at the time of the accident was hearsay, the Deputy President found it was admissible in the context of the Commission's procedures and was entitled to weight. The statement was consistent with traffic on the road at the time of the accident reflecting people travelling to work and dropping children off which is what one would expect in the morning peak hour and was therefore supportive of the inference the arbitrator drew despite the lack of specific evidence the roads were busy and it was rush hour.

The Deputy President accepted the worker's attendance on the ophthalmologist was reasonably necessary treatment for the employment injury and by its very nature was relevant to management of the worker's time off and return to work. The appointment put the worker on the road at a time and place where she would not otherwise have been, driving in peak hour traffic at about 7.20 am.

The Deputy President agreed there were similarities between the worker's factual situation and that in *Wickenden* where the worker "confronted cattle on a country road in the dark", where Roche DP accepted this was a circumstance to which Mrs Wickenden was exposed because of her employment.

Therefore in the particular factual circumstances under consideration the Deputy President found there was a real and substantial connection between the employment and the accident.

The decision demonstrates that a worker will likely succeed in establishing there is a real and substantial connection between a journey-related injury and employment if they can demonstrate the accident occurred whilst undertaking tasks incidental to their employment in circumstances where they would not ordinarily have been exposed to the risk of injury that befell them.

Therefore the restriction imposed by Section 10(3A) will still result in the exclusion of injuries which occur during the normal journeys workers engage in on a daily basis.

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## Appeals Under Section 352 WIM Act 1998 – The Need to be "Wrong"

The President of the NSW Workers Compensation Commission has confirmed that a party seeking to disturb a decision of an Arbitrator below will not succeed on appeal unless the Commission is satisfied the decision in issue was manifestly "wrong" for the purposes of Section 352 of the *Workplace Injury Management and Workers Compensation Act 1998* ("1998 Act").

Relevantly, Section 352(5) of the 1998 Act provides an appeal against the decision of the Commission constituted by an Arbitrator is limited to a determination of whether the decision appealed against was or was not affected by an error of fact, law or discretion and to the correction of any such error. The appeal is not a review or new hearing.

In *Cruceanu v Vix Technology (Australia) Limited* [2020] NSWWCCPD7, the worker, Octavian Cruceanu, commenced proceedings in the Commission seeking permanent impairment compensation in respect of alleged injury to his right lower extremity and cervical spine sustained in a work related incident on 10 April 2012.

The worker sought to establish 41% whole person impairment ("WPI") based on his medico-legal case and at the same time establish he was a "*worker with highest needs*" as defined by Section 32A of the *Workers Compensation Act 1987* ("1987 Act") and breach the 15% threshold so as to enable him to proceed with a claim for work injury damages.

The insurer of the respondent employer accepted the work incident had resulted in "injury" to the worker's right knee and right wrist for the purposes of Sections 4 and 9A of the 1987 Act. By issue of a Notice pursuant to former Section 74 of the 1998 Act, the insurer raised a threshold injury dispute in relation to injury to the worker's cervical spine.

A determination of "injury" to the cervical spine and consequent permanent impairment was essential to the worker if he was to establish an entitlement to permanent impairment compensation.

The worker lodged an Application to Resolve a Dispute in which he sought to establish the work related incident had resulted in injury to his cervical spine either by way of direct trauma and/or as a consequence of its impact on an underlying disease process for the purposes of Section 4(b)(ii) of the 1987 Act.

**Decision of Arbitrator**

The disputed injury was the subject of a contested hearing before the Arbitrator in the Commission on 11 June 2019.

On 5 July 2019 the Commission issued a Certificate of Determination and the Statement of Reasons of the Arbitrator, confirming the worker had failed to establish injury to his cervical spine in circumstances implicating his employment.

Further, in the absence of a finding of injury to his cervical spine, the assessed impairment of the worker's accepted right knee injury was insufficient in itself to entitle the worker to permanent impairment compensation noting the "greater than 10%" threshold imposed by Section 66(1) of the 1987 Act.

Accordingly the worker's claim in its entirety was dismissed.

In arriving at his decision, the Arbitrator noted he had to deal with conflicting medical opinion in respect of the question of injury to the worker's cervical spine and its relationship to his employment.

Whilst it was not unusual for an Arbitrator in the Commission to be confronted with this situation, the difficulty for the worker in the present case was that despite his evidence to the contrary, there was a complete absence of complaint of neck pain in the treating medical records over a period of approximately 18 months subsequent to the subject injury.

The Arbitrator noted an absence of evidence in regard to the worker's cervical spine notwithstanding the worker's multiple attendances on his general practitioner, three neurosurgeons and two orthopaedic surgeons in the period following the injury.

In view of the above the Arbitrator concluded the factual assumptions upon which the worker's medico-legal expert based his opinion were not proven.

Accordingly he was not satisfied the worker had established on the balance of probabilities his cervical symptoms became manifest or deteriorated at the time of or following the injury.

Further, this was so notwithstanding evidence suggesting the presence of significant pre-existing cervical spondylosis.

**Decision on Appeal**

In dismissing the worker's appeal, President Judge Phillips noted it was first necessary to detail the principles to be applied when determining whether the decision of the Arbitrator was affected by an "error of fact, law or discretion" as required by Section 352(5) of the 1998 Act.

The President noted in *Raulston v Toll Pty Limited* [2011] NSWCCPD 25, Roche DP reviewed the principles to which the Commission will have regard on appeal.

In *Raulston*, DP Roche confirmed that the Commission is to consider the question of "error" for the purposes of Section 352(5) as identified by Barwick CJ in *Whiteley Muir & Zwanenberg Limited v Kerr* (1966) 39 ALJR 505 as follows:

- *"*a finding of a primary fact may only be disturbed by a Presidential Member if "other probabilities so outweigh that chosen by the arbitrator that it can be said that his or her conclusion was wrong;
- having found the primary fact/s, the arbitrator may draw a particular inference from them. It is not enough that the Presidential Member would have drawn a different inference, it must be shown that the inference drawn by the arbitrator was wrong to displace the decision;
- it may be shown that an arbitrator was wrong by establishing that material facts have been overlooked, or given undue or too little weight in deciding the inference to be drawn: or the available inference in the opposite sense to that chosen by the arbitrator is so preponderant in the opinion of the Appellant Court that the arbitrator's decision is wrong."

The President noted the above authority confirmed the worker must identify the relevant error and establish that the arbitrator "was actually wrong".

Following his review of the evidence before the Arbitrator and the Arbitrator's assessment of that evidence, the President concluded the worker had not identified and established "error" in the sense required and proceeded to confirm the Arbitrator's decision.

The decision of the President in *Cruceanu* serves as a reminder that parties to proceedings in the WCC must carefully consider the basis of an Arbitrator's decision before proceeding with an appeal.

In particular, the authorities above confirm an appeal based on "error" will not succeed simply because there was evidence to justify a different outcome unless the decision is so preponderant it supports the conclusion it is "wrong" in the required sense.

Further, the decision of the Arbitrator as confirmed on appeal serves to further highlight the potential value of contemporaneous medical records in matters before the Commission where there is competing medico-legal opinion directed to the issues of injury and causation.

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*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.*