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## IN THIS EDITION




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## High Court Confirms Damages Payable By Tour Operator for Disappointment & Distress

With the travel industry largely shut down by the COVID-19 pandemic and many Australians counting down the days until our borders open for travel and eventually international holidays, the High Court in its judgment in *Moore v Scenic Tours Pty Lts* handed down on 24 April 2020 has delivered a reminder to Tour Operators, Cruise Ship Operators and Holiday Providers that if they fail to deliver what they promise they will be liable to compensate holidaymakers for loss including damages for disappointment and distress and for breach of a contract to provide a pleasant and relaxed holiday.

Mr Moore, a school teacher, brought a representative claim (class action) for compensation and damages, arising out of a series of European river cruises provided by the Scenic Tours Pty Ltd during periods of unusual rainfall and high water levels which occurred in Europe during May and June 2013.

The case involved an innovative use of some of the consumer guarantees in the Australian Consumer Law (ACL) and 12 months on, the appeal has upheld the win for consumers in part but rejected the damages award for pain and suffering that the trial judge awarded.

Moore booked his tour 18 months prior to departure and paid for in full well before the cruise commenced. The cruise was intended to depart from Amsterdam, travel along the Rhine River, the Main River, the Main/Danube Canal and the Danube River to Budapest.

As things turned out, the holiday experience was one of being shuffled around Europe, largely by coach, for a great part of the trip and changing ships on two occasions so that by the time he disembarked in Budapest, he had experienced three different Scenic ships and that far from his cruise being one where he was immersed in all-inclusive luxury, he experienced something entirely different.

The disruptions to the planned itineraries were caused by decisions made by Scenic when confronted with the

flooding in Europe. Locks along the rivers were either damaged or inoperative. Ships were unable to pass under bridges crossing the rivers and some docking facilities could not be used and had been washed away.

The claims against Scenic were that, with respect to 13 cruises, it knew at the time of booking that the guests wished to experience and enjoy a luxury five-star experience of a river cruise, in accordance with the selected itinerary which would include highlighted events and destinations. The services in fact supplied, it was claimed, did not fulfil this purpose, and did not provide the desired result.

As would be expected, Scenic defended the claims partly on the basis that its brochure, ticketing and other contractual documentation contained terms which had the effect of excluding any liability for events like those which occurred.

To outflank such reliance, the plaintiff did not sue in tort or for breach of conduct or for misleading and deceptive conduct; rather, he carefully framed his case as solely relying on a breach of one or more of the statutory guarantees provided in ss 60, 61(1) and 61(2) of the ACL.

There was no dispute that the plaintiff and group members were "consumers" within the meaning of the ACL and acquired "services" from Scenic in that capacity, so that the guarantees applied.

Section 60 of the ACL provides for a guarantee that services will be rendered with due care and skill ("the due care and skill guarantee"), which the plaintiff said was breached by Scenic in:

- failing to make any or any adequate enquiry about the nature and extent of flooding and rising river levels and thus failing to determine that it was "… inconceivable that the scheduled river cruises could proceed otherwise than without substantial disruption or delay";
- failing to cancel or delay the tours without receiving information that would lead a reasonable tour operator to conclude that it was likely that the river cruises could proceed in a way that the plaintiff and group members would substantially enjoy the benefit of travelling on the tour;
- failing prior to the embarkation of the plaintiff and some of the group members to unilaterally cancel their tours and offer them an alternative either by way of the closest available tour or departure; or
- failing to offer to passengers on those cruises the opportunity to cancel their tours, either prior to embarkation or after embarkation, when it became obvious that the tours would not be completed as programmed.

Section 61(1) of the ACL provides that where services are provided in circumstances, as here, the plaintiff and group members acquired them, and the purpose for which the services are required is made known, there is a guarantee that the services supplied would be reasonably fit for that purpose.

Section 61(2) of the ACL provides that where a desired result is made known (whether expressly or impliedly) to a provider of services prior to their acquisition, then the provider of the services guarantees that the services are such as might reasonably be expected to achieve the desired result.

Moore alleged that both the purpose guarantee and the result guarantee were breached because the services provided did not satisfy either or both of the guarantees.

By reason of being a representative proceeding, this initial judgment of the Court dealt with the whole of Moore's claim, and the determination of a number of questions likely to arise with respect to the claims of the group members.

In large measure, the Trial Judge found that Scenic had acted in ways which breached one or more of the ACL guarantees. It found that the plaintiff had suffered loss, and awarded him damages, equivalent to the cost of his cruise.

Moore had sought:

- compensation for "reduction in the value of services provided by [Scenic] below the price paid … by [Mr Moore] for the services", pursuant to s 267(3) of the ACL; and
- damages for "loss or damage suffered by [Mr Moore] because of the failure to comply with the [statutory] guarantee", pursuant to s 267(4) of the ACL.

The Trial Judge (Garling J) concluded that Scenic had failed to comply with the consumer guarantees in s 60 and s 61(1) and (2) of the Australian Consumer Laws and awarded Mr Moore $10,990 in compensation for loss of value (s 267(3) of the ACL); $2,000 in damages for disappointment and distress (s 267(4) of the ACL); plus interest.

Scenic had argued that damages for disappointment and distress were damages for personal injury and s16 of the Civil Liability Act 2002(NSW)("CLA") precluded an award of damages as the extent of injury did not meet the requisite threshold. The primary judge rejected Scenic's contention that s 16 of the CLA applied to Mr Moore's claim finding the CLA had no application to loss suffered outside of New South Wales; and that, because Mr Moore's disappointment and distress was suffered overseas, his claim for damages by way of compensation for that loss was unaffected by s 16.

Scenic challenged the Primary Judge's conclusion on s16 of the CLA and the Court of Appeal disagreed that s 16 has no application to loss sustained outside of New South Wales and the Trial Judge's award of damages for disappointment and distress was set aside.

With so much at stake for members of the class action

and their lawyers it was on to the High Court.

The High Court observed:

> *"Mr Moore's claim, founded as it was upon the ACL, was brought in federal jurisdiction. The CLA, being a State law expressed to be binding on a court, cannot affect Mr Moore's claim unless it is picked up and applied by a law of the Commonwealth. Scenic contends that s 16 of the CLA is picked up and applied by s 275 of the ACL so as to preclude this part of Mr Moore's claim.*
>
> *Mr Moore's first response to Scenic's contention is that s 16 of the CLA does not apply as a surrogate federal law because s 275 does not pick up and apply those State or Territory laws that affect the assessment of compensation for loss suffered. Secondly, Mr Moore submits that loss consisting of disappointment and distress for breach of a contractual obligation to provide a pleasant and relaxed vacation is not precluded by the provisions of Pt 2 of the CLA because those provisions are concerned exclusively with claims for damages for personal injury; and his claim for the disappointment of his expectation of a pleasant and relaxed vacation is not a claim for personal injury. Thirdly, Mr Moore submits that s 16 has no application where the loss for which damages are claimed is suffered outside of New South Wales. "*

Moore's first argument failed. The High Court concluded:

> *"The evident purpose of the amendment of the TPA and the enactment of s 275 of the ACL was to ensure the application of State and Territory laws that limit the extent of recovery for breach of a contract otherwise governed by that law. It is difficult to see any reason why the purpose would be to apply State and Territory laws limiting heads of compensable loss but not to apply State and Territory laws regulating the quantification of damages recoverable."*

However the High Court accepted Moore's argument that the claim for disappointment and distress was consequent to breach of contract and not a personal injury claim and s16 of the CLA had no application.

The High Court affirmed the principle in Baltic Shipping Co v Dillon (1993) 176 CLR 344 at 365 noting:

> *"In Baltic Shipping every member of the Court accepted that disappointment and distress "caused by the breach of a contract ... the object of the contract being to provide pleasure or relaxation" is a compensable head of loss separate and distinct from injured feelings compensable under the rubric of pain and suffering and loss of amenities of life associated with personal injury."*

As a general rule damages cannot be recovered for injured feelings caused by a breach of contract, however exceptions include "damages for distress, vexation and frustration where the very object of the contract has been to provide pleasure, relaxation or freedom from molestation and "damages for pain and suffering, including mental suffering and anxiety, where the defendant's breach of contract causes physical injury to the plaintiff. In relation to the latter category, Mason CJ in Baltic Shipping "was at pains to explain that damages for pain and suffering consequent upon physical injury may include compensation for injured feelings while the former category stands independent of physical or psychiatric injury" .

In this case there was no claim for personal injury damages and the compensation sought was therefore not effected by the CLA.

The High Court concluded:

> *"Disappointment and distress of this kind is not "non-economic loss" under Pt 2 of the CLA. The text and structure of Pt 2 of the CLA are clear that non-economic loss within Pt 2 is a head of loss associated with personal injury as pain and suffering. At common law, "pain and suffering" was understood to mean actual physical hurt occasioned by the accident or its aftermath and damages for emotional harm were not recoverable unless a psychiatric injury was suffered. Similarly, the assessment of damages for "loss of amenities of life" invites a comparison between the ability of a person to enjoy life before and after the personal injury. But in the present case, no physical injury was alleged and no psychiatric illness was alleged to have resulted from the breach of the consumer guarantees in the ACL. The exception to the general rule relating to promises of enjoyment, relaxation or freedom from molestation, breach of which results directly in disappointment and distress, compensates a plaintiff for what he or she was promised where the expectation of a peaceful and contented holiday has been unfulfilled. The comparison between "the expectations against the reality" does not involve any reference to, or assessment of, an impairment to the plaintiff's mental condition."*

The High Court consequently found it was not necessary to determine whether s 16 of the CLA is subject to the geographical limitation for which Mr Moore contended, namely it only applied to disappointment and distress suffered in NSW as s16 had no application at all to the claim that was made, it was not a personal injury claim.

The Trial Judge's order of damages for disappointment and distress pursuant to s 267(4) of the ACL and for pre-judgment interest thereon has been reinstated. All members of the class action will now be entitled to damages for disappointment and distress for breach of contract.

Tour Operators, Cruise Ship Operators and all in Holiday Providers will need to be very careful about the promises they make in response to the expectations of holidaymakers otherwise they may face claims for damages for disappointment and distress for breach of contract.

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## The NSW Government is Still Moving Forward to Ban Insurance for WHS Fines

The NSW Government is moving forward with its push to ban insurance for WHS Fines in NSW.

The Work Health and Safety Amendment (Review) Bill 2020 was introduced into the Legislative Assembly(LA) on 12 November 2019 where it was read for the first time. Consideration of the Bill was adjourned to subsequent sittings of the LA.

On 26 February 2020 the LA read the Bill for a second and third time and the Bill passed through the LA with only minor amendment. The Bill was then introduced to the Legislative Council (LC) on 24 March 2020. There was a first reading of the Bill in the LC on 24 March 2020 and the second reading and debate on the Bill will now take place at the next sittings of the LC on 15 September 2020.

A Bill must pass through both Houses of Parliament in the same form and then be assented to (or agreed to) by the Governor for it to become a law (or an Act).

If the Work Health and Safety Amendment (Review) Bill 2020 has a second and third reading in the LC without amendments proposed the Bill will be passed by Parliament. If there are amendments passed by the LC, the Bill will be returned to the LA to consider the proposed amendments. The LA is also sitting on 15 September 2020.

The impact on business in NSW from COVID- 19 may change the plans of the Government when it comes to the reform WHS laws however 15 September is now pencilled in as a date that NSW may pass laws that will forever transform WHS laws and result in a prohibition on insurance for WHS fines.

The Work Health and Safety Amendment (Review) Bill 2019 ("Bill") seeks to amend the Work Health and Safety Act 2011 and expedite implementation in New South Wales of 12 proposals based on the recommendations of the 2018 National review of the model Work Health and Safety Act, on which the current New South Wales Act is based.

In the second reading speech for the Bill in November 2019, Mr Anderson the Minister for Better Regulation and Innovation observed:

> *"Amendments to the model Act will not be progressed until well into next year, but having regard to the critical issues identified by Ms Boland and the Senate I am of the view that New South Wales cannot afford to wait until a decision is made to amend the model Act to address these issues."*

First the issue of industrial manslaughter has been addressed.

A notation will be inserted in the Work Health and Safety Act confirming that workplace deaths may be prosecuted as manslaughter under the Crimes Act 1900. That is not a change in the law but simply a confirmation of the position that currently exists.

It has always been the case that a work-related death can be prosecuted as manslaughter by criminal negligence and under the Crimes Act a maximum penalty of 25 years' imprisonment applies. According to Mr Anderson, the availability of this offence to prosecute work-related deaths is not well known or well understood in the community.

Mr Anderson observed:

> *"The insertion of the note will make it clear to employers, businesses, workers and the community more broadly that anyone who causes the death of a worker through negligence faces serious criminal sanction."*

No new offence will be created in respect of workplace deaths but the note is intended to direct the minds of those that manage WHS to the risk of a prosecution for manslaughter.

Next the proposed legislation will make prosecution of serious offences easier. The Government believes Category 1 prosecutions have been hampered because the fault element of the offence—recklessness—is too difficult to prove. To establish recklessness a prosecutor must establish actual knowledge of a risk and deliberate disregard for that risk.

That will change, with the new test for a Category 1 offence being whether there is "gross negligence or recklessness". There is no definition of what amounts to "gross negligence". SafeWork will be able to prosecute grossly negligent duty holders for a Category 1 offence where they expose persons to a risk of death or serious injury or illness. The maximum penalties for a Category 1 offence are imprisonment for up to five years and/or a fine of $346,500 for an individual and $3,463,000 for a corporation.

However the sting in the tail for all NSW businesses is that the proposed legislation incorporates a new offence relating to insurance or indemnity arrangements which cover work health and safety penalties. It will be an offence for a person to enter into, provide, or benefit from insurance or indemnity arrangements for liability for a monetary penalty for a work health and safety offence. If a company commits the new offence, its officers may also be liable.

The offence will cut both ways and apply to entities offering the insurance and or indemnity and those entering into an agreement to benefit from the insurance or indemnity. It will apply to insurers and businesses that take out insurance. It will apply to management liability and statutory fines insurance currently offered by insurers.

At the moment most policies of insurance that offer cover for WHS fines contain a provision that stipulates the cover is available to the extent permitted by law. In those circumstances the policies will not necessarily fall foul of the prohibition however the cover will not be

permitted by the law of NSW and an insurer will not be able to pay a fine without committing an offence so that's the end of that for insurance for WHS fines in NSW. One bright light however is that it will still be permissible to insure legal and investigation costs incurred in the investigation of the commission of an offence and the defence costs of any prosecution.

Many businesses see insurance cover for WHS fines as a primary driver in their decision to arrange management liability insurance or statutory fines insurance and insurers are likely to be confronted by:

- a decline in interest in these insurance products;
- pressure to reduce premiums where a risk driver is removed during a policy term;
- a need to innovate to make these products attractive.

The prohibition on insurance will not be retrospective. It will not apply to insurance policies and indemnity agreements in place where the cover is for a liability for a monetary penalty for an incident that occurred after the commencement of the new legislation. It will apply to insurance policies in place preventing insurance or indemnity for penalties arising from incidents after the legislation commences.

Once the Bill is passed by Parliament the changes will commence on the Assent of the legislation.

NSW is stepping up to prohibit insurance cover for WHS fines and 15 September could be prove to be a critical date with the Work Health and Safety Amendment (Review) Bill 2020 being considered by the Legislative Council on that day and the Bill may be passed by both Houses on that day. Insurance covering WHS fines will be of no value for incidents occurring after the date the new legislation commences.

The impact on business in NSW from COVID- 19 may change the plans of the Government on its strategy to reform WHS laws however 15 September 2020 should be pencilled in as a date that NSW may pass laws that will result in a prohibition on indemnifying arranging insurance, providing insurance cover or giving an indemnity in respect of WHS fines in NSW.

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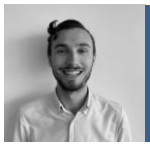

## COVID 19 & Significant Changes to Retail and Commercial Leasing Arrangements in NSW

On 7 April 2020, the National Cabinet adopted the National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19 (the "**Code**").

The Code establishes a set of good faith leasing principles which are to apply to commercial tenancies (including retail, office and industrial) which satisfy the criteria set out in the Code. In particular, the Code seeks to:

- prohibit and regulate the exercise of certain rights by landlords relating to enforcement; and
- require parties to renegotiate rent and other terms in good faith having regard to the leasing principles set out in the Code.

**When will the Code apply?**

In NSW, the Code has been given effect via:

- the Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW) made under the Retail Leases Act 1994 (NSW) as it relates to retail leases; and
- the incorporation of Schedule 5 in the Conveyancing (General) Regulation 2018 (NSW) made under the Conveyancing Act 1919 (NSW) as it relates to commercial leases,

(collectively, the "Regulations").

The Regulations commenced on 24 April 2020 and will apply for a period of 6 months.

**Eligibility**

Whether the Regulations will apply to a tenant will depend on whether a tenant is an 'impacted lessee', that is whether:

- a tenant suffers financial stress or hardship;
- a tenant is eligible for the Commonwealth Government's JobKeeper programme; and
- a tenant's annual turnover was less $50 million in the 2018-2019 financial year.

To demonstrate financial stress or hardship, tenants will be required to provide "sufficient and accurate information" (including information generated from an accounting system and information provided to and/or received from a financial institution). It will likely be a matter for negotiation between parties as to what information comprises "sufficient and accurate information" and how such information is to be provided.

In order to be eligible for the JobKeeper programme, a tenant must establish that they have suffered or expect to suffer a 30% reduction in turnover in the relevant month or quarter (depending on their Business Activity Statement reporting period) relative to their turnover in a corresponding period a year earlier for companies with turnovers of up to $1 billion per annum, or otherwise a 50% reduction for companies with turnover of more than $1 billion per annum.

The $50 million annual turnover threshold will be applied in respect of franchises at the franchisee level, and in respect of retail corporate groups at the group level (rather than at the individual retail outlet level).

Importantly, the limitation of a tenants' annual turnover means that although a tenant may be entitled to participate in the JobKeeper programme, the

Regulations will not apply if they have a turnover exceeding $50 million.

Falling foul of the above criteria, the Code encourages parties to apply the principles set out in the Code in spirit, having regard to the size and financial structure of tenants.

**What actions are prohibited or restricted?**

The Regulations provide that, if a tenant is an impacted lessee, a landlord must not take any 'prescribed action' against the tenant for a failure to pay rent or outgoings, or a tenant's business not being open for business during the hours specified in the lease.

Further, the Regulations impose a prohibition on rent increases (except where rent is to be determined by reference to turnover) and require a landlord to pass on any reduction in statutory charges (e.g. land tax or council rates).

**What is prescribed action?**

'Prescribed action' is defined as taking action or seeking orders or issuing proceedings in a court of tribunal for any of the following:

- eviction of a tenant from leased premises or land;
- exercising a right of re-entry to leased premises or land;
- recovery of leased premises or land;
- seizure of goods;
- forfeiture;
- damages;
- requiring the payment of interest on, or a fee or charge relating to unpaid rent;
- recovering or whole or part of a security bond;
- possession;
- termination of leases; and
- any other remedy available to a landlord against a tenant at common law or under the law of NSW.

**Obligation to renegotiate rent and other terms before prescribed action**

A tenant may request that a landlord renegotiates rent and other terms of its lease. If requested, parties must renegotiate in good faith, having regard to:

- the economic impacts of COVID-19; and
- the leasing principles set out in the Code.

**Dispute Resolution**

If landlords and tenants cannot reach agreement, the matter may be referred by either party to applicable leasing dispute resolution processes for mediation (including the Small Business Commission).

If parties are unable to reach agreement at mediation, either party may escalate the matter to the NSW Civil and Administrative Tribunal ("**NCAT**"). In order to bring an application before NCAT with respect to a retail lease dispute, a party must meet the following threshold requirements:

- obtain a certificate from the NSW Small Business Commission accompanying the application stating either:
  - mediation was unsuccessful; or
  - mediation was unlikely to resolve the dispute.
- the application must be either:
  - a retail tenancy claim; or
  - an unconscionable conduct claim.
- the claim cannot exceed $750,000.

The Regulations provide that Part 8 of the *Retail Leases Act 1994* (1994) (i.e. dispute resolution processes) will extend to impacted commercial lease disputes.

**What's next and issues landlords and tenants should consider**

Landlords and tenants should consider whether the Regulations will apply, and if uncertain, obtain advice on how the Regulations (if applied) may affect the terms of their leases.

In particular, the following issues should be considered by landlords:

- landlords who hold cash security deposits for performance of their tenant's obligations should register their security interest in the deposits on the Personal Property Securities Register as a failure to do so may result in the landlord's interest in those deposits vesting if the tenant is placed into liquidation;
- landlords should carefully consider whether they enforce default provisions of the lease (e.g. terminations or calling on tenancy securities) as incorrectly doing so could contravene state and territory legislation and regulation;
- landlords should identify imminent lease expiry dates before offering relief packages to tenants;
- landlords should request that tenants produce information which demonstrates their eligibility for the JobKeeper programme as well as information identifying financial stress and hardship; and
- landlords should consider the implications of rent concessions or lease variations on later market rent determinations and market valuations of their investment properties.

On the other hand, the following issues should be considered by tenants:

- tenants should identify lease expiry dates and consider whether to negotiate lease extensions with revised rental models, or to vacate upon the expiry of the lease;
- tenants should gather financial information which demonstrates their eligibility for the JobKeeper

programme as well as information identifying financial stress and hardship; and

- tenants should have full and frank discussions with their landlord about changes in their financial circumstances.

Ultimately, any agreed concessions on rent and other obligations should be formalised and documented in writing to minimise the risks of disputes arising in respect of these matters.

Do not hesitate to contact us to discuss how these changes may affect you or if you require assistance in any mediation or dispute resolution processes.

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## Unfair Contract Term Regime Applies to Insurance Contracts from 5 April 2021

Insurance contracts that are "small business contracts" or "consumer contracts" will be subject to the Unfair Contract Term ("UCT") regime found in Part 2, Division 2, Subdivision BA of the ASIC Act from 5 April 2021 with the passing of the Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020 in late February 2020.

The Regime will not apply to all insurance contracts. It will only apply to insurance contracts that are "consumer contracts" or "small business contracts".

An insurance contract is a consumer contract where at least one of the parties is an individual who acquires the insurance wholly or predominantly for personal, domestic or household use or consumption.

An insurance contract is a small business contract if:

(a) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and

(b) either of the following applies:

  (i) the upfront price payable under the contract does not exceed $300,000;

  (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed $1,000,000.

Insurers have 12 months to ready for the impact that the UCT regime.

Small business contracts will include business packs, ISR policies and property policies.

It is important to note that it is still on the cards that the Government expands the definition of small business in the future to expand the application of the UCT regime further, and the necessary consultation with stakeholders on this issue has already occurred.

From 5 April 2021 the UCT regime will apply to insurance contracts entered into, renewed or varied after that date. It will apply to all contract terms for renewals and where insurance policies are varied by endorsement or otherwise it will apply to those variations without impact on the terms in place before 5 April 2021.

The obligation to act with the utmost good faith imposed by the Insurance Contracts Act will remain and sit alongside the UCT regime.

UCT legislation is not new to Australia. UCT legislation has applied to all consumer contracts entered into after 1 July 2010 and small business contracts since 12 November 2016. UCT legislation applies to Insurance Contracts in the UK and in other jurisdictions.

The UCT laws will apply to consumers and small businesses who are parties to a contract of insurance and insured and third-party beneficiaries under the insurance will have the rights to apply to the Court to have a term of the insurance contract declared void.

The UCT legislation provides that a term in an insurance contract will be void if it is unfair. A term in a contract is unfair if:

- it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.
- In determining whether a term of an insurance contract is unfair a court will take into account such matters as it thinks relevant, but must take into account:
- the extent to which the term is transparent;
- the contract as a whole.
- A term is transparent if the term is:
- expressed in reasonably plain language; and
- legible; and
- presented clearly; and
- readily available to any party affected by the term.

The UCT Regime does not apply to terms that define the main subject matter of a contract. The main subject matter of an insurance contract will be limited to the description of what is being insured. This narrow definition of subject matter will ensure most insurance contract terms are up for review.

However the UCT Regime will not apply to terms that set the quantum or existence of an excess or deductible in an insurance contract as long as they are presented transparently.

Exclusions and definitions will come into focus.

Exclusions that operate on the happening of an act and these exclusions will come within the scope of a UCT review even though they concern the risk that is underwritten if the condition disproportionately or unreasonably disadvantages the insured.

Ambiguous or unclear terms that do not use terms with definitions could be called into question.

All general conditions will be up for review under UCT laws.

Conditions which when construed literally which result in an unreasonable commercial contract are likely to be seen as lacking clarity and lacking in transparency. For example the general principle governing the operation of a reasonable precautions clause is that an insured must have had actual knowledge of a risk of damage to the insured property and, having such knowledge, either deliberately courted that risk or recklessly disregarded in order to have breached the condition. Interpretations of clauses found in case law may not be enough for a clause to pass the UCT test.

Courts will have the power when dealing with unfair contract terms to make orders:

- declaring a contract void from the start
- declaring a term an unfair term
- declaring terms of the contract are void
- varying terms
- preventing enforcement of terms
- directing refunds of money
- ordering compensation.

UCT laws will cause insurers to carefully review of a range of usual provisions in insurance contracts including:

- cancellation provisions;
- premium refund clauses;
- provisions dealing with the alteration of risk;
- basis of settlement clauses; and
- notification clauses, particularly in claims made policies.

The introduction of UCT legislation is not intended to limit the way insurers underwrite, rather it intends to deliver certainty of cover and eliminate terms that are unfair.

The application of the UCT regime to insurance contracts will result in a major shift in the landscape for insurers and a raft of amendments to insurance contracts as insurers grapple with the risk that clauses in a contract may be found to be unfair and declared void or rewritten by the Courts.

From 5 April 2021 consumers and small businesses will have rights to challenge unfair terms in insurance contract in addition to rights under the Insurance Contracts Act.

Crafting insurance contracts that do not fall foul of the UCT laws will become an art form as insurers develop techniques in scoping insuring clauses and exclusions without disproportionately or unreasonably disadvantaging the insured when regard is had to the nature of cover offered and developing definitions that have clarity.

Insurers should now start a review of insurance contracts that will be subject to the UCT Regime and identify and address:

- conflicts between different clauses in the insurance policy;
- unclear definitions requiring amendment;
- provisions that would benefit from the use of defined terms;
- cancellation and premium refund clauses that operate unfairly;
- exclusions that do not clearly scope carve outs from an exclusion;
- exclusions that do not articulate the precise nature of the claim or damage excluded;
- use of the term “consequential loss of any kind” without defining what amounts to consequential loss;
- harsh notification clauses
- clauses interpreted by the Courts to have a meaning other than a plain reading of the words, eg “failure to take reasonable care” which is read down to “not deliberately court a danger”.
- basis of settlement clauses that permit an insurer to pay a cash settlement rather than repair or replace with the cash settlement taking into account discounts available to the insurer which may not be available to the insured.

The insurance industry will be stepping into a new world for consumers and small businesses from 5 April 2021 with more scrutiny on insurance contract terms. Its time to prepare for change and for insurers to scrutinise the terms of current policy wordings with less than 12 months before the new regime begins.

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## COVID-19 Emergency Legislation in NSW – an Update

In our previous edition of GD News we set out details of the emergency measures legislation being passed in NSW as a consequence of the COVID-19 Pandemic. This is consistent with the approaches of legislature around the world. In the State of New York in the USA for example, an Executive Order has been issued by the Governor allowing a marriage licence to be obtained utilising audio-video technology until May 18.

This is perhaps not the most romantic way to exchange vows, but effective in an emergency in what is no doubt one of the hardest hit areas in the world.

But what is the latest in NSW when it comes to legal documents?

NSW has approved the use of audio-visual technology when witnessing documents. Video conferencing technology such as Skype, WhatsApp, FaceTime, Microsoft Teams and Zoom and other methods can now be used to witness legal documents.

The *Electronic Transactions Amendment (COVID-19) Witnessing of Documents Regulation* 2020 was passed on 22 April 2020. That Regulation provides that during the COVID-19 Pandemic documents that require a witness may be witnessed by audio visual link. The Regulation is made under the *Electronic Transactions Act* 2000.

Documents that can be witnessed include Wills, Powers of Attorney or Enduring Powers of Attorney, Deeds or Agreements, Enduring Guardianship Appointments, Affidavits including annexures or exhibits to the Affidavit and Statutory Declarations.

The Regulation provides that the person witnessing the signing of the document must observe the person signing the document in real time, confirm the signature was witnessed by signing the document or a copy of the document and be reasonably satisfied the document the witness signs is the same document or a copy of the document signed by the signatory and endorse the document or a copy of the document with a statement specifying the method used to witness the signature of the signatory and that the document was witnessed in accordance with this Regulation.

So what about the Court process?

We discuss the approach of the Federal Court in the following article.

In the District Court criminal jurisdiction the temporary suspension of jury trials is reviewed each month and at the moment will continue until at least 31 May 2020. The District Court is hopeful however that jury trials will resume in some locations earlier than previously anticipated. Civil cases in the District Court otherwise continue via audio visual link for hearings and by telephone for directions hearings. This approach also continues in the Supreme Court.

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## COVID-19: The Federal Court's Approach to Virtual Hearings

In our April 2020 edition of GD NEWS we summarised the emergency measures legislation enacted by the NSW Parliament and its impact upon NSW Courts with particular emphasis upon amendments to the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) which allows for Court hearings to be conducted by audio visual link.

Similar steps have been taken by the Federal Court of Australia.

On 31 March 2020 Chief Justice Allsop issued *"Special Measures in Response to COVID-19 (SMIN-1)"* confirming the arrangements for the continued operation of the Federal Court during the COVID-19 outbreak in Australia.

SMIN-1 emphasised the Court's priority was the health and safety of the community, parties, practitioners, judges, staff and the families of these groups.

The Federal Court has confirmed it will, to the extent possible, have all documents filed using the Court's electronic filing facility (eLodgment). Subpoenas and inspection of documents are to occur at the Registry of the Court only by appointment and if it is truly necessary for the conduct of the proceeding.

Court appearances are, like the Courts in New South Wales, to be limited with alternative arrangements put in place to facilitate remote appearances at all Court events.

For short listings and events of half a day or less the Federal Court will seek to accommodate any listings or events by proceeding on the papers, by telephone or a combination of both.

Longer listings and events that would ordinarily require in-person attendance for half a day or more will undergo a triage and prioritisation process.

All Federal Court hearings including longer listings of over half a day or more are now proceeding via Microsoft Teams.

A similar information note was issued by the Chief Justice on 7 April 2020 with respect to appeals and hearings before the Full Court *("Special Measures Information Note: Appeals and Full Court Hearings (SMIN-3"))*.

On 2 April 2020 the Federal Court issued *"A Guide to Virtual Hearings and the use of Microsoft Teams for Practitioners and Litigants"*. The Guide confirms that, to the extent possible, proceedings identified as being suitable will be listed for hearing using Microsoft Teams. Proceedings conducted in this matter will be referred to as "Virtual Hearings".

The Court has commenced a review of all upcoming hearings to determine their suitability for a Virtual Hearing. Parties have been asked to consider and liaise with the Court whether a Virtual Hearing is suitable, giving consideration to the following:

- the appropriate facilities available to relevant participants including practitioners, litigants in person, the parties themselves and any witnesses that the parties intend to call;
- location and time zones of witnesses;

- firewall and security issues.

Parties have also been invited to consider and liaise with the Court as to whether a teleconference, in lieu of a Virtual Hearing, may be suitable. Parties are expected to seek appropriate orders to facilitate a Virtual Hearing.

The Court has emphasised the same formal etiquette and protocol of a physical Court is expected in the Virtual Court. Judges are to continue to be addressed as "your Honour" and Registrars are to be addressed as "Registrar".

The Court may dispense with any of the usual formalities and the parties are expected to act accordingly.

Participants are expected to ensure there is sufficient internet coverage in their location and to join a Virtual Hearing from a quiet, secure location.

The Court will continue to administer the oath or affirmation for each witness but the party calling the witness should ensure that any relevant religious text is available to that witness in advance of the Virtual Hearing, if applicable.

The impact of these new measures has already been considered by Justice Perram in *Capic v Ford Motor Company of Australia Limited*, in which his Honour was asked to rule on Ford's application to adjourn a six week hearing listed to commence on 15 June 2020.

Ford submitted the trial ought not proceed and should instead be listed later in the year (after October) because of the need to ensure a safe system of work for practitioners and witnesses and the realistic limits of technology.

Ford contended the following difficulties would arise:

- technological limitations;
- physical separation of legal teams;
- conferring with expert witnesses surrounding their evidence;
- lay witnesses and in particular, cross examination;
- document management;
- future issues;
- trial length and expense.

His Honour made the following observations:

- whilst accepting the inconvenience of internet connection issues, this is not by itself a reason not to proceed;
- the ability for Junior Counsel to assist Senior Counsel where participants are appearing from home is certainly degraded. However, in a hearing conducted by his Honour earlier this year where Senior and Junior Counsel were isolated from each other, they were nevertheless able to communicate with each other using WhatsApp. Whilst this may be a poor situation in which to have to run a trial it does not mean the trial will be unfair or unjust;
- experts can confer beforehand on virtual platforms which, although this may be tedious and far from satisfactory, is not impossible;
- whilst there are many authorities in the Federal Court which underscore the unsatisfactory nature of cross examination by video link, those statements were not made in the present climate nor were they made with the benefit of seeing cross examination on platforms such as Microsoft Teams;
- Justice Perram highlighted that he had been using a digital Court Book in trials for some time now and the use of a virtual Courtroom has had no impact on that aspect of the hearing;
- problems that may arise during the trial if a witness falls sick or has to care for someone who is sick may present challenging but not insurmountable difficulties that can be addressed as they arise;
- whilst conducting the trial in a virtual environment will prolong the hearing and thereby increase its expense, there were other factors to consider before allowing an application for an adjournment in the current climate.

Justice Perram emphasised the following:

> *"If I could be sure that the crisis would have passed by October I would not hesitate to adjourn all the trials in my docket (save urgent cases) and then begin a process of relisting my entire docket from October 2020. The effect of that would be a postponement of six months with all cases being reallocated thereafter.*
>
> *However, there is simply no guarantee that the situation will be any better in six months time. It may be that this is a state of affairs which persists for a year or so. It is not feasible or consistent with the overarching concerns of the administration of justice to stop the work of the Courts for such a period. Nor is it healthy for the economy.*
>
> *A prolonged cessation of business will be a very poor outcome. Those who can carry on should, in my view, do their best to carry on as inconvenient and tedious as this is going to be."*

The views expressed by Justice Perram provide an insight into the approach adopted by the Federal Court which appears determined to continue delivering access to justice despite the restrictions necessitated by the COVID-19 pandemic.

This approach, which is consistent with the approach adopted by the Courts of New South Wales, was clearly at the forefront of Justice Perram's mind when his Honour concluded:

> *"Under ordinary circumstances, I would not remotely contemplate imposing such an unsatisfactory mode of a trial on a party against its will. But these are not ordinary circumstances and we have entered a*

*period in which much that is around us is and is going to continue to be unsatisfactory. I think we must try our best to make this trial work. If it becomes unworkable then it can be adjourned, but we must at least try."*

Therefore, even a lengthy trial listed for six weeks with a large number of witnesses and documents involving complex legal issues will proceed to trial in the Virtual Courtroom.

It will be interesting to see if the trial is able to be completed despite the difficulties anticipated by Ford that were considered by his Honour in relation to the adjournment application.

This is the new norm.

Courts are unlikely to adjourn hearings without first attempting to proceed in a Virtual Courtroom via Microsoft Teams or other platforms.

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## The Horse Still Hasn't Bolted on Dangerous Recreational Activities

The NSW Court of Appeal has recently upheld the successful defence of a claim where the defendant relied on the provisions in the *Civil Liability Act* 2002 relating to dangerous recreational activities (*Menz v Wagga Wagga Showground Inc*).

Kerrie Anne Menz attended the agricultural show held at the Wagga Wagga Showground with her horse, Cannons Gladiator, who she called Sonny. On 27 September 2012 Menz attended the first day of the show and rode Sonny in a number of events. The events were entered by purchasing tickets at the office.

On 28 September 2012 Menz attended the last day of the show to ride Sonny in further events. At around 10.00 am Menz was riding Sonny in a warm up area of the showground prior to the start of the event in which she was competing. There were a number of children playing nearby on a fence that surrounded a greyhound track in the centre of the showground. The children made a loud noise when they banged a metal sign on the fence. A horse called Banjo that was being ridden nearby by Cassandra MacDonald was startled, as was Sonny. Sonny fell onto his right side while Menz was in the saddle, as a consequence of which she also fell and sustained a significant injury.

Prior to this incident Menz had been competing at events in the show for many years.

Before the commencement of the show the Wagga Wagga Show Society issued the "148th Show Horse Program – 27 & 28 September 2012". Page 7 of that document provided that:

*"All competitors must sign waivers before they ride if not they ask [sic] to leave the ring and will not be allowed to compete until waivers are signed. No exemptions will be granted and no certificates will be accepted from competitors."*

Menz conceded she would have obtained a copy of the program and that prior to competing in the events with Sonny the previous day she had signed an indemnity and waiver.

Menz was unsuccessful before Justice Bellew in the Supreme Court on all grounds and appealed.

The issues on appeal were:

- whether the trial judge had erred in characterising the risk as an obvious risk and finding that Menz was engaged in a dangerous recreational activity such that Section 5L of the Civil Liability Act 2002 applied to defeat her claim;
- whether the trial judge had erred in rejecting the expert evidence called by Menz at trial;
- whether the trial judge erred in finding that the Wagga Wagga Show Society Inc had not breached its duty under Section 5B of the Civil Liability Act 2002 by failing to station marshals at the event.

Ultimately Menz failed on all grounds and the appeal was unsuccessful.

The leading judgment was that of Leeming JA.

According to Leeming JA, when Section 5L applies:

*"A defendant who can establish that the harm has resulted from the materialisation of an obvious risk of a dangerous recreational activity will have a complete defence."*

In this particular case there was no factual dispute as to the cause of the injuries. It was also accepted by Menz that horse riding was a recreational activity in accordance with definition of Section 5K of the legislation. However Menz argued that she was not engaged in a dangerous recreational activity.

However Leeming JA was satisfied that the activity being undertaken by Menz (horse riding) was dangerous and the risk that materialised was an obvious risk.

Justice JA stated:

*"In the present case, the harm was caused as a result of the fall. True it is that the indirect cause was the noise made by the children. But that does not deny a conclusion that the entirety of the personal injury may be fairly said to be "as a result of" the horse being spooked and its rider losing control."*

*"... there will, inevitably, be difficult cases. But the present is, to my mind, quite clear. There are three basal and inescapable facts in this litigation. The first was that, as it was put, there was "no such thing as a bombproof horse". The second was that horses may at any time be spooked by a noise, or a shadow, or some other stimulus. The third was that a rider runs*

*a risk of serious injury in the event that a horse is spooked and behaves unpredictably. Those facts make it appropriate to characterise the harm suffered by Ms Menz as the materialisation of the obvious risk of her horse being spooked by some stimulus. It is not necessary in order fairly to describe what occurred to provide the additional particularity that the noise made by children spooked the horse.*

*A "dangerous recreational activity" is defined, exhaustively, in Section 5K, to mean a recreational activity that involves a significant risk of physical harm. It was not disputed that a low risk of catastrophic harm may be "significant" for the purposes of Section 5K although it is a matter of judgment in every case."*

The Court therefore concluded that Menz was engaged in a dangerous recreational activity and her claim must therefore fail.

In this case, Leeming JA noted that Menz tried to argue that a warm up ought to be distinguished from competition and therefore excluded from the definition of dangerous recreational activity. That argument was not accepted by the Court. As Leeming JA pointed out, a warm up should not be separated from a competition. This would result in all sorts of inconsistencies, such as the difference between being injured when getting off a chair lift and when actually skiing. Further, in this case a warm up was still dangerous because of the ever present risk of fall because of the horse's unexpected reaction.

Leeming JA also found that the trial judge was correct in excluding the evidence in the expert's report and also determined that Menz had not established that the Wagga Wagga Show Society Inc had breached its duty of care in any event.

The end result for Ms Menz was the appeal was unsuccessful. Horse riding remains a dangerous recreational activity.

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## Slip and Fall Claims – Inspections and Expert Witnesses

Slip and fall personal injury claims are common.

Since 2010 the NSW Court of Appeal has delivered judgment in a series of cases in which slip and fall claims have failed against the occupiers of supermarkets and fast food outlets. They include a slip and fall on:

- a wet substance on the floor of an express checkout (Harris v Woolworths),
- pieces of cardboard on a supermarket floor (Coles v Meneghello ),
- wet steps inside the entrance to a McDonalds store (Jackson v McDonalds),
- soapy residue in the common area of a shopping centre outside a supermarket (Woolworths v Ryder), and
- a puddle of water from a flower display inside a supermarket (Coles v Bright).

The slip resistance characteristics of flooring is often an issue in a slip and fall claim and without expert evidence that a surface is unsafe a personal injury claim will fail.

One of the forensic tools available to plaintiffs is a site inspection with an expert who can carry out tests on the floor and determine its slip resistance characteristics.

A common request made by plaintiffs in insurance litigation includes a request for physical access to an accident site so that experts may carry out site inspections and testing. Often these requests are made before the precise nature of the claim has been specified, with lawyers often waiting for an expert report before responding to requests for clarification about the nature of the claim being pursued and often amending claims to suit the evidence contained in the expert report.

In NSW rule 23.8 of the Uniform Civil Procedure Rules prescribes the regime for orders for inspection of property and is in the following terms:

**UCPR 23.8 Inspection of property**

1. *For the purpose of enabling the proper determination of any matter in question in any proceedings, the court may make orders for any of the following--*
   a. *the inspection of any property,*
   b. *the taking of samples of any property,*
   c. *the making of any observation of any property,*
   d. *the trying of any experiment on or with any property,*
   e. *the observation of any process.*
2. *An order under subrule (1) may authorise any person to enter any land, or to do any other thing, for the purpose of getting access to the property.*
3. *A party applying for an order under this rule must, so far as practicable, serve notice of motion on each person who would be affected by the order if made.*
4. *The court is not to make an order under this rule unless it is satisfied that sufficient relief is not available under section 169 of the Evidence Act 1995.*
5. *This rule extends to proceedings on an application for an order under Part 5 (Preliminary discovery and inspection).*
6. *In this rule, "property" includes any land and any document or other chattel, whether in the*

*ownership or possession of a party or not.*

In the recent decision in the Supreme Court in *Soma-Devan v SCentre Shopping Centre Management Pty Ltd t/as Westfield Hurstville [2020] NSWSC 125* the Court was called on to consider whether simply raising an issue with the slippery nature of a floor in pleadings is enough to ground an entitlement to inspect the premises with an expert.

Ms Soma-Devan commenced proceedings against Westfield Hurstville alleging she injured herself on 26 November 2015 when she slipped and fell on the floor of Scentre's premises which was contaminated with ice cream. She requested access to Westfield Hurstville's premises to carry out a site inspection and slip testing of the floor. SCentre refused access on the basis the statement of claim and the particulars provided in response to questions posed to the plaintiff inadequately specified the nature of the claim being pursued. Soma-Devon subsequently sought orders from the Court pursuant to Rule 23.8(1) of the Uniform Civil Procedure Rule to allow her expert to conduct a site inspection at Westfield Hurstville.

In the case it was apparent that the plaintiff contended both that the floor surface of the shopping centre was inherently slippery and accordingly unsafe in its natural condition without the presence of any foreign material as well as being slippery if some substance such as ice cream were deposited upon it. SCentre sought to limit the scope of the claim that would be run to a claim that the floor was slippery when contaminated thus its opposition to a view and expert inspection.

However there is a relatively low hurdle to overcome to be entitled to a view of property. The Court accepted that the claim included contentions the nature of the floor was slippery even in the absence of contamination.

Harrison J stated:

> *"I have some considerable difficulty with the suggestion that assessment and determination of the propensities of the floor in the location at which the plaintiff sustained her injuries is not now, or will not be at the trial, "a matter in question in [these] proceedings". I understand the first defendant's concern that, on one view, the plaintiff has not properly or adequately particularised with precision the way or ways in which her claim is to be propounded. However, I disagree with the submission that the plaintiff's obligation to particularise her claim in this way ought to amount in effect to a disqualifying precondition attaching to her right to the relief that she seeks. "*

SCentre argued that the Court can only be confident of the just, quick and cheap resolution of the real issues in the proceedings if the real issues in the proceedings have been raised and defined by the pleadings, Harrison J stated:

> *"Doing the best I can with the benefit of my experience, I confidently anticipate that at least one of those "real issues" will be whether the floor was slippery at the time the plaintiff was injured. What I take for practical purposes to be the current state of the plaintiff's pleadings, in the form of the proposed SASOC, more than adequately raises that issue. It is an entirely different question whether the plaintiff can make out that case at trial. In my opinion, the plaintiff is entitled to inspect the premises with her expert in order to assist her with that case at least one of the "real issues" in the proceedings was whether the floor was slippery when the plaintiff tripped and fell."*

Ultimately, the Court took a "common sense" approach and as the plaintiff had raised the issue of the slippery floor in her pleadings that was enough to be entitled to inspect the premises with her expert. Its an easy road to an inspection of property for a plaintiff.

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## Converting Winding Up a Company to a Voluntary Administration to Facilitate a Restructure

*In the matter of Equitycorp Australia Ltd (In liq) and Ors* , a decision of Gleeson J in the Supreme Court of New South Wales on 27 February 2020, demonstrates that even after a company has been subject to a Court-ordered liquidation for a long time, a strategy is available to achieve a restructure and end the liquidation.

This case shows that by first obtaining Court orders for the Liquidators' appointment as Administrators of the company and a stay of the winding up, it is feasible to implement a Deed of Company Arrangement to facilitate a restructure and end the liquidation.

In the context of the pandemic, and the end, on 24 September 2020, of the moratorium on winding up for failure of a company to comply with a statutory demand, this decision will assist directors in restructuring a company to save a business in late 2020 if their company has entered a Court-ordered liquidation, because of a failure to pay a creditor such as the ATO, a landlord or supplier.

This article considers when that strategy can be used, and the requirements to be met.

In 1989, Equitycorp Australia Ltd and two other associated entities were wound up by orders of the Supreme Court of New South Wales and one other associated entity was wound up by order of the Supreme Court of the Australian Capital Territory. The four companies were members of a large group of entities. Some entities were based in Australia and many others were based overseas. There had been many transactions between the various companies based here and overseas. The overseas entities had also been in liquidation, or a form of external administration which was the local equivalent, for many years.

The present liquidators of the Australian companies including Equitycorp Australia Ltd ("the Liquidators") were satisfied that any recoveries available to unrelated creditors had been completed, however the inter-company liabilities needed to be discharged before the windings up could be finished. The cost and complexity of that work was so substantial that it was doubtful that it would benefit to unrelated creditors.

By contrast, the Liquidators had, in conjunction with the external administrators of many other group entities based overseas, and with the consent of unrelated creditors of the Australian companies, devised an arrangement, recorded in a signed, non-binding term sheet, which provided for a series of steps to be taken in relation to each company, in a particular sequence, which would enable a more cost effective and timely realisation. Deeds of Company Arrangement were to be executed to give effect to the arrangement and the liquidations were to be stayed.

The Australian-based companies had been incorporated so long ago in NSW and the ACT that previous Commonwealth and State companies legislation applied to them. The Court was required to determine threshold questions of whether the companies were bodies corporate registered under the *Corporations Act 2001 (Cth)* ("the Act") and whether the Liquidators were liquidators of a company for the purposes of s436B of the Act. The latter refers to the appointment of an administrator to a company by a liquidator of that company.

Gleeson J found that the four companies was each a company for the purposes of the Act and that the Liquidators were liquidators within s436B(1) of the Act, based on the reasoning of Barrett J *In the matter of Equitycorp Australia Limited (In Liquidation)* 2011 NSWSC 1368 as it concerned those issues.

The next issue was whether the Liquidators could seek their appointment as Administrators of the companies.

A liquidator of a company may, by writing, appoint an administrator of a company if he or she thinks that the company is insolvent, or is likely to become insolvent at some future time: s436B(1) of the Act. However, absent a resolution of creditors or the leave of the Court, a liquidator cannot appoint himself or herself, or their partner or employee as the administrator: s436B(2) of the Act. Further, s448C provides that except with the leave of the Court, a person must not consent to be appointed as an administrator or deed administrator of a Deed of Company Arrangement ("DOCA") of a company if the person is a partner of an officer of the company (and a liquidator is such an officer).

In considering whether it was appropriate to grant leave under ss436B(2) and 448C, Gleeson J referred to earlier authorities which had held that if a liquidator had no previous association with a company or its officers, and there was no other ground rendering their appointment inappropriate, the Court would normally grant leave. While a liquidator seeking such leave bears the onus of showing that their appointment as administrator would be in the public interest, that onus was not a heavy burden, and provided that:

- there was no conflict of interest, threat to independence or anything offensive to commercial morality;
- costs savings could be made because of the appointee's familiarity with the company's affairs through their work as liquidator; and
- continuity was desirable eg where a liquidator had been involved in negotiations or previous arrangements and the involvement of the same person albeit in their capacity as administrator, would be beneficial,

the Court would grant leave to a liquidator seeking to be appointed as administrator.

Accordingly, the Court appointed the Liquidators as Administrators of the four Australian companies.

For the administrations of the four companies to be as expeditious and cost effective as possible, the Liquidators sought orders under s447A of the *Corporations Act 2001 (Cth)* to modify provisions of Part 5.3A of the Act as follows:

- to dispense with a first meeting of creditors in the administrations of each of the companies;
- to excuse the directors from delivering to the administrators reports concerning the business, property, affairs and financial circumstances of each of the companies;
- to permit meetings of creditors required under s439A of the Act to be held at any time within the convening period for those meetings, so that the plaintiffs as Administrators, could hold those meetings sooner than they could otherwise do so if they were ready to convene the meetings in shorter timeframes than Part 5.3A of the Act usually permits;
- the plaintiffs as Administrators be able to accept proofs of debt in the liquidations of the companies as proofs of debt in the administrations without adjustment for interest; and
- s439C(c) of the Act not apply, so as to remove one of the usually available alternatives to creditors, namely, to resolve to wind up the companies. Orders of this kind have been considered appropriate in other decisions to ensure that any earlier relation-back day is preserved.

The Court granted those orders because the statutory tasks which would otherwise be required of the Administrators would generate unnecessary work and would not enhance the coordinated distribution contemplated in the intended DOCA's for the companies. Moreover, the Liquidators had extensively investigated the affairs of the four companies and reported on them, and recoveries and investigations

had long since been completed.

Notably, creditors had unanimously supported the Liquidators in applying for the proposed orders, there would be substantial costs savings and no possibility of a parallel creditors voluntary liquidation following a resolution under s439C(c). Significantly, the business, property and affairs of the companies could be administered in a way that would result in a superior return to creditors and members compared with an immediate winding up, and there was no discretionary consideration weighing against the orders sought or limitation emerging from the leading case on s447A orders which prevented them from being made.

The Court ordered the stay of the liquidation of each of the four Australian companies to prevent duplication of work during the administration of each company, to enable the restructure of each company to occur, and because the creditors of each company and the Liquidators of each company supported the stay. Additionally, because the restructures would not restore the companies to solvency, usual discretionary factors such as the commercial morality of returning control of a company to its directors and directors' non-compliance with their duties did not need to be considered.

It can be concluded from Gleeson J's reasoning that in late 2020, directors will be able to salvage the business of a company in a Court-ordered winding up by:

- funding a restructure in such a way as to give creditors a better return through a DOCA than they would receive in the winding up; and
- where necessary, funding the liquidator to apply to the Court for leave to have themselves appointed as the administrator of the company with a view to having the company execute a DOCA, and to obtain other orders to dispense with costly and unnecessary tasks which an administrator would be otherwise obliged to perform.

The likelihood of success of this strategy will be improved if ASIC does not object to the proposal, and creditors to agree to the proposal in advance.

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## CONSTRUCTION ROUNDUP

### Security For Costs – The Strength Of The Claim And The Cause Of The Plaintiff's Impecuniosity

In our newsletters we have been following the ongoing dispute between Grandview Ausbuilder Pty Limited and Budget Demolitions & Excavations Pty Limited (see our December 2018 and February 2019 editions).

Grandview (which now is under administration) was the builder of a development at Villawood known as "Maple Village". Budget was engaged by Grandview to carry out demolition and excavation work for the project.

Budget served two payment claims under the *Building and Construction Industry Security of Payment Act 1999* (NSW) totalling $1,024,573.36. Grandview failed either to serve a payment schedule in response to the payment claims or to pay the amount claimed by Budget, which meant that Budget became entitled to immediate payment of the amount of the claims.

Instead of recovering the outstanding amount in court as a debt due as it was entitled to do under section 15 of the Security of Payment Act, Budget issued a statutory demand to Grandview. Grandview made an application to court to set aside the statutory demand pursuant to section 459G of the *Corporations Act 2001* (Cth).

Section 459H of that Act provides that where such an application is made and the court is satisfied that there is a genuine dispute about the existence of the debt forming the basis of the statutory demand, or where the debtor has an offsetting claim, the court must calculate the proportion of the substantiated debt that is subject to the offsetting amount, and make orders accordingly.

Grandview argued that it had three offsetting claims, namely an entitlement to levy liquidated damages for late completion of the work, as well as two different claims for damages. (If Budget had instead utilised the enforcement procedures under the Security of Payment Act, then Grandview would not have been permitted under that Act to rely on its offsetting claims in order to try to avoid paying the full amount of the payment claim.)

In the Supreme Court Parker J commented that Budget had a "strong case" that its liability to pay liquidated damages ceased before 31 January, since Grandview had actively taken steps to exclude it from the site on 4 January. In this regard, his Honour noted that for the purpose of deciding whether the statutory demand should be set aside the court was only concerned with whether Grandview's claim was genuine and sustainable. If it was, then the strength of the claim and the likelihood of it being sustained at a hearing were immaterial.

In Parker J's view, Grandview had a potentially viable claim for delay damages for every calendar day from 13 December to 31 January inclusive. His Honour held therefore that Grandview had established that it had an offsetting claim in the sum of $220,000 for the purposes of section 459H(1)(b) of the Corporations Act.

His Honour however rejected the other two offsetting claims for damages.

Parker J ordered that the amount of the statutory demand be reduced by $220,000, but only if Grandview undertook to commence proceedings as

quickly as reasonably practicable to assert its offsetting claim (along with any claim arising out of the subcontract), to pay the sum of $220,000 into court, and thereafter to prosecute its claims with all due dispatch.

Grandview however was not prepared to provide such an undertaking and instead filed an appeal challenging Parker J's conclusions that neither of the other two offsetting claims was available to it within the meaning of s 459H(1)(b) of the Corporations Act.

As part of the appeal proceedings, Grandview was required to pay a total of $347,000 into court. In the meantime, Grandview also commenced formal proceedings under the building contract prosecuting its three claims against Budget.

The Court of Appeal examined Grandview's offsetting claims and held that Grandview did not have any offsetting claim or contractual entitlement (including the claim for liquidated damages which Parker J had held was arguable) as a credible or plausible answer to Budget's statutory demand. As a result, the Court of Appeal dismissed the appeal and the amount of $347,000 paid by Grandview into court was released to Budget.

Budget then pursued winding up proceedings against Grandview, based on its failure to pay the balance of the statutory demand.

In the meantime, in the substantive proceedings commenced by Grandview against Budget, Budget applied for an order that Grandview pay an amount into court as security for its costs of defending the claim.

That application was heard by Parker J (*Grandview v. Budget* [2020] NSWSC 343).

Grandview opposed the order for security on the basis that:

- Budget had filed a cross-claim against Grandview and Grandview's defence to that cross-claim raised the same issues as the principal claim;
- an order for security would stultify the proceedings and thus be to the disadvantage of Grandview's creditors;
- Budget's own misconduct was the cause of Grandview's impecuniosity; and
- on the merits, Grandview had a strong claim.

**Same issues in cross claim**

Parker J acknowledged that a recognised ground for refusing an order for security for costs is where the plaintiff's proceedings are, as a matter of substance, defensive. But he pointed out that it was difficult to see how the fact that Budget had filed a cross-claim meant that Grandview's proceedings were defensive.

His Honour noted that Grandview had brought its claims against Budget before the cross-claim had been instituted, and it had continued to pursue those initial claims.

His Honour also commented that a claim which is a not a defensive one at the time of its commencement does not somehow became a defensive claim retrospectively simply because a cross-claim is filed.

**Stultification**

Parker J referred to the earlier court judgments and noted that it appeared that the major creditors of Grandview were Budget and the Australian Taxation Office, and that Grandview's former director, Mr Zhang, had agreed to provide $100,000 in funding for the present litigation.

His Honour noted that in *Bell Wholesale Co Limited v. Gates Export Corporation* (1984) 2 FCR 1, the Full Court of the Federal Court had held that *"a court was not justified in declining to order security on the ground that to do so will frustrate the litigation unless a company in the position of the appellant here establishes that those who stand behind it and who will benefit from the litigation if it is successful … are also without means*".

His Honour stated that he did not think that the evidence before the court established that Grandview's creditors were the only persons who stood behind it or who would benefit from the litigation if it were successful. He also pointed out that Mr Zhang's funding of the litigation underlined the possibility that Mr Zhang was standing behind Grandview or was hoping to benefit from its success in the litigation.

He noted that there was no evidence put before the Court about how the litigation was being funded, and therefore the Court could only surmise about those who would stand to benefit from the outcome of the litigation.

His Honour therefore considered that the obligation cast on Grandview by the *Bell* principle had not been discharged.

**Cause of impecuniosity**

Parker J noted that it is well recognised that where the defendant's conduct complained of by the plaintiff in the proceedings was itself responsible for the plaintiff's financial position, that may be a factor in whether to grant security for costs.

However, the evidence showed that Grandview had had very few assets before the work on the project had even begun, and within twelve months its balance sheet had shown a deterioration of $3.3 million. This evidence strongly suggested that Grandview's impecuniosity was the result of factors which were quite independent of the claim which was the subject of the proceedings.

**Strength of Grandview's claim**

Parker J stated that he did not see how the strength of Grandview's claim could be relevant to the question of whether security for costs should be ordered to be provided. He noted that there was no public interest in

the claim being brought, since it was commercial litigation which was about money.

His Honour further commented that if it had been important to evaluate the strength of the claim, he would have been "*far from persuaded*" that it was a strong one. He said "*Indeed … I think the claim may well require reconsideration from the ground up before it should be allowed to proceed at all*".

He also noted that Grandview's legal representatives had submitted that there was evidence that the Court of Appeal's assessment of Grandview's claim was not necessarily valid, but his Honour was not satisfied by what he described as "bland assurances".

Accordingly, Parker J held that it was appropriate that Grandview provide security for Budget's costs. After considering the parties' opposing submissions on the quantum of costs that should be provided, he held that Grandview was required to provide $21,000 in immediate security, with Budget permitted to seek additional security if the proceedings were further prosecuted.

It will be interesting to see how this protracted dispute between Grandview and Budget proceeds after this latest decision. We anticipate that there may be further arguments about whether Grandview should be permitted to continue with its claim in the way that it has been pleaded, in light of the comments by Parker J and the Court of Appeal on the prospects of success of its claim.

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## Vito Zepinic Tries Again, Despite Being Declared A Vexatious Litigant

In our November 2016 and July 2017 newsletters we discussed the multitude of proceedings that had been commenced by Vito Zepinic and members of his family against Chateau Constructions (Aust) Pty Limited stemming from a dispute over the quality of work carried out at Mr Zepinic's house at Turramurra.

Mr Zepinic was once the security consultant for convicted Bosnian war criminal Radovan Karadzic and despite having no medical qualifications had previously passed himself off as a psychiatrist in Australia and England.

In his dispute with Chateau Constructions, Mr Zepinic had initiated no less than 10 separate appeal proceedings (including two special leave applications to the High Court), culminating in the sale in 2014 of Mr and Mrs Zepinic's house at Turramurra to pay for the costs incurred by Chateau Constructions in defending Mr Zepinic's various claims. Mr Nicholas Malanos was the trustee appointed to sell the property.

On 25 May 2017, Mr Zepinic was declared by Pembroke J to be a vexatious litigant under the *Vexatious Proceedings Act 2008* (NSW) ([2017] NSWSC 582) and orders were made that Mr Zepinic and various members of his family were not permitted to file any more proceedings with respect to its dispute with Chateau Constructions unless they first obtained the leave of the Court.

On 14 December 2018, an appeal by Mr Zepinic and his daughter against Pembroke J's orders was unanimously dismissed by the Court of Appeal: [2018] NSWCA 317.

In between the hearings before Pembroke J and the Court of Appeal, counsel instructed by Mr Zepinic approached the Chief Judge in Equity seeking leave to file an application for Mr Zepinic to commence proceedings against Mr Malanos, seeking an order that Mr Malanos pay the balance of the proceeds of sale of the Turramurra property into court, and to account to the Court with respect to the sale.

Leave for the initial application for leave to be filed was provided by Ward CJ in Eq and the ensuing application was part heard by Kunc J; however it was interrupted by other matters arising in the Duty List. By the time the matter was back before his Honour, the sale proceeds had already been paid into Court. This meant that the orders sought by Mr Zepinic had largely become otiose.

Mr Zepinic pressed for an order that Mr Malanos provide an accounting to the Court, and the parties participated in court-order mediation in this regard.

It became clear following the mediation that Mr Zepinic intended to apply for the proceeds of sale to be paid out to him, and he (independently of his solicitors and counsel) filed a summons, affidavits and submissions to this effect. These documents, amongst other things, complained of the conduct of Mr Malanos in his capacity as trustee.

His lawyers and counsel informed the Court that these documents filed by Mr Zepinic conflicted with the documents filed by the legal practitioners and were not submissions that could be made by a barrister and was not evidence that could be read by a barrister as an officer of the Court. Accordingly, Mr Zepinic's legal representatives withdrew from the case and Mr Zepinic continued the proceedings unrepresented. He filed a further Summons seeking (amongst other things) an order that:

> *"Pursuant to Articles 15 & 16 of the 14. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Articles 11 & 15 of the Vienna Convention on the Law of Treaties 1969, r11.5, r11A.4, r11A.11 and r18.2(i) of the Uniform Civil Procedure Rules 2005, and s78.59 of the NSW Supreme Court Rules 1970, an order that the Defendant's Notice of Motion filed in Court on 11 August 2014 is invalid and subsequent orders void (having no legal effect);"*

He also sought orders that:

- the consent orders agreed between his (then)

lawyers and Chateau's lawyers in 2014 were invalid;

- the sale of the Turramurra property was invalid;
- a trust be created to the benefit of himself and his wife with respect to the Turramurra property.

The final hearing took place in November 2018, with further submissions made in January 2019, but the formal reasons for the decision were not issued until April 2020.

In his judgment, Kunc J noted that many of Mr Zepinic's submissions appeared to be directed towards an attack on orders made in earlier proceedings, such as the appointment of Mr Malanos as trustee, and the sale of the Turramurra property. Kunc J stated that by doing so Mr Zepinic was engaging in what may be referred to as a classical example of an abuse of process, particularly since the property had been sold and thus third party rights had now intervened. Therefore, the Court would not grant leave to reagitate those matters.

Mr Zepinic had also raised issue with Mr Malanos' payment of tax on the rental income earned from the property, suggesting that he had somehow established an independent trust for his own benefit. Kunc J explained that this was simply a misconception by Mr Zepinic of how the relevant trust operated and said that the Court was satisfied that there was nothing untoward or unusual about the way the trust was administered.

Kunc J also dismissed Mr Zepinic's complaints about how he had been served with legal documents in the proceedings, noting that this specific issue had been adjudicated on by the Courts in various other proceedings instituted by Mr Zepinic.

Kunc J held that the various prayers for relief in respect of which Mr Zepinic now sought leave were vexatious proceedings and an abuse of the process of the Court. His Honour stated:

> *"Insofar as what may constitute an abuse of process, it is well settled that attempts to re-litigate matters or other otherwise propound multiple claims that have no reasonable prospects of success can constitute an abuse of process. I am satisfied they do in this case. Mr Zepinic's various claims are a melange which attempt to relitigate matters that have been decided adversely to him some years ago, combined with complaints about the Trustee's conduct which he has comprehensively failed to demonstrate have any reasonable basis or prospects of success. The irresistible conclusion is that the proceedings in respect of which Mr Zepinic seeks leave are yet another example of the vexatious conduct which led to the orders made by Pembroke J …"*

Accordingly, Kunc J dismissed Mr Zepinic's application.

Noting Mr Zepinic's history of not accepting the decisions of the Courts, it may be anticipated that he will seek leave to appeal from Kunc J's decision.

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## EMPLOYMENT ROUNDUP

### Working From Home - What Are The Implications?

In last month's GD News we reported on the Federal Governments "JobKeeper" relief initiative which had then just been announced.

In global terms, the initiative provides that businesses will receive a fortnightly wage subsidy up to $1,500 per employee as part of a bid to prevent millions of people from losing their jobs to the COVID-19 pandemic.

The relevant legislation has now been passed by the Parliament and received the Royal Assent. Important details which were previously lacking are now available.

ELIGIBLE EMPLOYERS

Employers will be eligible if they:

- have been carrying on a business in Australia, or be a non-profit body pursuing its objectives principally in Australia, on 1 March 2020; and
- have suffered a decline in turnover at the time their eligibility is being assessed.

The legal form of an employing entity is not restricted. Eligible employers can be:

- individuals in business as sole traders,
- partnerships, or
- bodies corporate (including corporations).

There is no requirement that an employer be registered for GST in order to qualify.

Decline In Turnover

It is necessary to show a decline in turnover:

- for small and medium enterprises - of 30%;
- for businesses with an aggregate turnover of in excess of $1 billion – of 50%; and
- for registered charities – of 15%.

The calculation for establishing decline requires a comparison of 2 periods:

(a) the entity's "projected GST turnover" in a calendar month ending after 30 March 2020, or a quarter that starts on 1 April 2020 or 1 July 2020; and

(b) the entity's "current GST turnover" for the same period in 2019.

The terms "projected GST turnover" and "current GST turnover" are essentially modified versions of the concept of "GST turnover" found in the GST legislation. Very broadly, it consists of all business income less GST included in sales to customers, input taxed sales, or sales outside Australia.

Eligible Employees

Employers are only entitled to JobKeeper payments for individuals who meet all the following requirements:

- they were an employee of the employer during the "relevant fortnight";
- as at 1 March 2020, they were 16 years or over;
- as at 1 March 2020, they were an employee of the employer;
- as at 1 March 2020, they were not a casual employee, unless they were a "long term casual employee";
- as at 1 March 2020, they were an Australian resident or an Australian tax resident holding a special category visa; and
- the individual has given the employer a "nomination notice".

JobKeeper payment entitlements are calculated on the basis of fortnights. If the person was not an employee of the employer during a particular fortnight, the employer is not entitled to payment for that employee in that fortnight.

Determining who is or is not a *"long term casual employee"* for the purposes of these tests can be a difficult question. Generally, the critical question is whether such a casual employee was employed by the entity on a regular and systematic basis during the period of 12 months ending on 1 March 2020.

For an employee to be employed on a "regular and systematic" basis suggests that the employee is not simply working regularly, but also with a degree of frequency in accordance with some kind of system, method or plan.

Currently, the form of the required *"nomination notice"* has not been prescribed. It purpose is to prevent double dipping by employees, so it will likely requirement confirmation that the employee is not an employee of another employer and is not the subject of a JobKeeper payment from another employer.

Payment Of Wages

The whole concept of JobKeeper is to keep employees employed. For that reason, receipt of the government subsidy requires the employer to keep paying the employee wages.

Accordingly, eligibility means that – for all employers – they must pay the employee at least $1,500 for the relevant fortnight.

Because JobKeeper reimbursement is in arrears, employers must first have made the payment to the employee and then claim from the scheme.

The minimum payment of $1,500 per fortnight includes:

- pre-tax income in the form of salary/wages/commission/bonuses/allowances
- PAYG withholding amounts (including repayment for HELP loans)
- superannuation contributions (but only if made under a salary sacrifice arrangement)
- other payments made under an existing salary sacrifice arrangement with the employee.

Changes To The Fair Work Act

Significant changes have been made to the *Fair Work Act 2009* (Cth) (***FWA***). These are said to be in order to assist employers qualify for the benefits provided by the JobKeeper scheme.

The amendments include provisions which allow:

- employers to stand down employees irrespective of whether they are otherwise entitled to do so under the FW Act, a workplace instrument or a contract of employment;
- employers to direct employees to perform different duties or perform duties at a different location (including the employee's home);
- employers and employees to enter into agreements to change ordinary working days and times, irrespective of what is said in a workplace instrument or a contract of employment;
- employers and employees to agree the employee will take annual leave at half pay, without contravening the FW Act, a workplace instrument or a contract of employment; and
- employers to request employees to take annual leave, which the employee must not reasonably refuse.

These are far-reaching changes. They allow for the overriding of existing contractual and statutory duties and entitlements.

The amendments are temporary and their repeal on 28 September 2020 is mandated by the legislation.

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## WORKERS COMPENSATION ROUNDUP

### Is Injury from Physical Altercation at Work Compensable?

To the layman it may appear unsuual to consider that a worker would be entitled to workers compensation benefits in respect of an injury the worker sustained as a consequence of a private quarrel that arose in the

workplace, particularly after the worker had bundied off from work.

These issues were the subject of a recent Presidential appeal in the Workers Compensation Commission In *Toll Holdings Limited v McCaw* [2020] NSWCCPD 14.

The worker sustained facial injuries as a consequence of an assault by a co-worker in the employer's car park after ceasing work on 16 August 2018. He also developed a psychological condition as a reaction to the assault and its aftermath.

There was no dispute the worker had made comments to others in the workplace about the co-worker's fiancée and had interactions with the co-worker which were unwelcome and unwanted which the co-worker reported to the employer four months earlier. There was no evidence of any unwelcome or unwanted conduct by the worker in respect of the co-worker or otherwise on the day of the assault or in the days preceding it.

Liability was disputed on the employer's behalf on the basis the injury did not arise out of or in the course of the worker's employment and employment was not a substantial contributing factor to the injury.

The worker's employment was terminated as a consequence of a breach of the employer's workplace behaviour policy and standards by his demonstration of aggressive and threatening behaviour.

At first instance the arbitrator found the worker was injured in the course of his employment at the time of the assault. The arbitrator considered a worker may interrupt the course of his employment by misconduct or by pursuing some private purpose, however once that ceased he returned to the course of his employment when he recommenced the activities associated with his work. The evidence did not suggest that in the period leading up to the assault the worker was performing other than his ordinary work or activities incidental to it.

On balance the arbitrator found there was a causal connection between the employment and the worker's injury. The assault took place on the employer's premises. Workers in the factory had fanned the flames of discord by repeating to the fiancée comments made by the worker and it was not possible to sever these comments from the "employment" as the word was used in Section 9A of the 1987 Act more generally.

Therefore the case was distinguishable from earlier decisions where a worker's private enemy came to the place of employment and assaulted the worker or cases where a worker had made derogatory remarks about or engaged in a relationship with the spouse/partner of the assailant.

The arbitrator found employment was a real and substantial cause of the assault and therefore in his view employment was a substantial contributing factor.

The employer appealed the arbitrator's finding the worker had satisfied Sections 4 and 9A of the legislation. The employer contended the worker's behaviour, unwarranted and unwelcome as it was, was so far removed from his employment duties that it could not be considered to have arisen out of the course of his employment.

The President Judge Phillips noted the arbitrator found the evidence did not suggest in the period leading up to the assault the worker was performing other than his ordinary work or activities incidental to the work. Even if the words were construed as private concerns or alternately misconduct, it ended when he resumed the activities of his employment. There was nothing to suggest that during his shift the worker worked on the day of the assault he was doing anything other than performing the lawful command of his employer.

The President found there was no error in this reasoning as clearly on the facts there was no conduct by the worker on the day of the assault which provoked the co-worker or caused the fight.

He referred to the leading decision of *Stojkovic* where Judge Neilsen reviewed the authorities as they pertain to fights or assaults in the workplace as to whether or not conduct on behalf of the applicant interrupted the normal course of employment such as to deny the worker compensation.

In this case the worker was working normally on the day of the assault and there was nothing to suggest there was any interruption to the course of his employment or any conduct on the worker's part that would otherwise disentitle him. Clearly bundying off at the end of the shift and walking to his motor vehicle in the employer's car park was incidental to his employment. There was nothing to suggest the worker instigated the fight or even encouraged it.

In *Stojkovic*, Judge Neilsen found the worker was the instigator of the fracas and had thus taken himself out of the course of his employment.

The employer's real argument was the worker's statements regarding his co-worker were of such a quality as to take the worker out of the course of his employment without limitation. This submission relied on the subjective intentions of the co-worker as to why he assaulted the worker.

The President found that absent any conduct by the worker on the day of the assault, the subjective intention of the co-worker did not operate automatically to remove the worker from the course of his employment.

The employer also argued the assault was a private quarrel between the worker and his co-worker and thus unrelated to the worker's employment. It was clear the co-worker's fiancée had heard about the worker's remarks from her co-workers which, as the arbitrator found, unwittingly fanned the flames of discord. It was not possible to sever these comments from

"employment" as used in Section 9A and in the 1987 Act more generally. The President considered this was a compelling finding, particularly when taken with the fact that there was nothing on the day of the assault in the worker's behaviour which instigated or promoted the assault.

It was not coincidental that the worker and the co-worker were at the same location and it was therefore an available inference or finding they were more likely to come together because of their common employment and that was probably causative in according with the reasoning in *Kelly*.

Therefore the President did not find there was any error identified in the arbitrator's decision. The arbitrator had in a detailed and reasoned way found the facts that were available to him and assiduously applied the binding authorities consistent with their terms to the facts as found. He considered the appeal was simply a re-statement of the arguments which were unsuccessfully conducted before the arbitrator rather than a process where relevant error was identified. Therefore the arbitrator's determination was confirmed.

The decision highlights the fact a worker can be the instigator of events which ultimately cause the assault, sufficient to warrant his dismissal, however unless there is an immediate response by the co-worker such as to interrupt the normal course of employment, a subsequent aggressive reprisal by the co-worker may not be sufficient to break the chain of causation by employment.

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## When Does Domestic Violence Also Satisfy The Causal Test For A Work Injury ?

The NSW Court of Appeal has unanimously dismissed an appeal by the Nominal Insurer from a Determination of the Workers Compensation Commission (WCC) entitling the dependants of a deceased worker to compensation in accordance with Section 25 of the *Workers Compensation Act 1987* ("1987 Act").

In *Workers Compensation Nominal Insurer v Hill* [2020] NSWCA 54, the Court upheld the decision of Deputy President Wood who dismissed an appeal against the decision of an Arbitrator that the death of the worker resulted from an injury arising out of or in the course of her employment for the purposes of Section 4 and Section 9A of the 1987 Act.

**Background**

On 16 June 2020 Michelle Carroll ("deceased worker") was killed by her de-facto partner, Stephen Hill. Both were employed by a family company, SL Hill & Associates Pty Limited which conducted business from residential premises in Wamberal, New South Wales.

The evidence before the Commission noted the perpetrator was suffering paranoid delusions at the time he attacked the deceased worker, tragically resulting in her death. The perpetrator was subsequently charged with murder although found not guilty on the ground of his mental illness.

Liability in respect of a claim for death benefits pursuant to Part 3, Division 1 of the 1987 Act was declined on the basis the death of the worker had not resulted from an "injury" as defined and required by Sections 4 and 9A of the 1987 Act.

Relevantly, section 4 of the 1987 Act defines "injury" to mean a personal injury arising out of or in the course of employment.

Section 9A of the 1987 Act imports an additional causative requirement, namely that no compensation will be payable in respect of an injury unless the employment concerned was a substantial contributing factor to the injury.

**Proceedings in the Commission**

An Application in Respect of Death of Worker was lodged in the Commission on behalf of the dependants of the deceased which proceeded to a contested hearing before an Arbitrator in the WCC.

On 19 December 2018, the Arbitrator determined the issue in dispute in the dependants' favour, concluding on the evidence the deceased worker died as a result of an injury arising out of or in the course of employment and to which her employment had been a substantial contributing factor.

The employer appealed the decision of the arbitrator, contending the decision was affected by an error of fact, law or discretion for the purposes of Section 352 of the *Workplace Injury Management and Workers Compensation Act 1998* ("1998 Act").

On 22 July 2019, Deputy President Wood dismissed the employer's appeal and confirmed the determination of the arbitrator in favour of the dependants of the deceased worker.

In so doing, the Deputy President was not satisfied there had been a relevant error on the part of the arbitrator for the purposes of Section 352(5), concluding that whilst the worker suffered injury resulting in her death at home at the hands of her partner, there was sufficient evidence to support the arbitrator's finding her death occurred in and arose out of her employment and to which employment was a substantial contributing factor to her death.

**Decision of NSW Court of Appeal**

Section 353 of the 1998 Act provides that if a party to any proceedings before the Commission constituted by a Presidential Member is aggrieved by a decision of the Presidential Member in point of law, the party may

appeal to the Court of Appeal.

Section 353(3) provides a decision of the Court of Appeal under the provision is binding on the Commission and on all parties to the proceedings in respect of which the appeal was made.

By Notice of Appeal filed on 30 September 2019, the Nominal Insurer ("appellant") appealed the Deputy President's decision in a point of law in accordance with Section 353 of the 1998 Act.

The appeal raised four issues, namely:

- the scope of an appeal from a decision of a Deputy President;
- the scope of an appeal from an arbitrator to a Deputy President;
- whether the Deputy President erred in holding that there was evidence to support the arbitrator's findings as to the elements of the claim; and
- whether the Deputy President failed to hold that Mr Hill's assault, being inspired by delusions, was causally connected to Ms Carroll's employment.

On 31 March 2020 the Court of Appeal comprising Basten JA, Payne JA and Simpson AJA unanimously dismissed the appeal.

In delivering the decision of the Court, Basten JA confirmed the right of appeal to the Court provided by Section 353 extended to any decision in point of law made in the course of the hearing before the Deputy President including an error based on no or insufficient evidence as finding of fact necessarily depended upon first accepting there was evidence capable of supporting that finding: *Kostas v HIA Insurance Services Pty Limited* (2010) 241 CLR 390.

Basten JA then considered the task of the Deputy President when considering an appeal from an arbitrator in accordance with Section 352(5) of the 1998 Act.

The Court confirmed the Deputy President was not entitled to uphold an appeal from an arbitrator unless satisfied as to any "error of fact, law or discretion", being terms identified and discussed by the Court in *Whiteley Muir & Zwanenberg Limited v Kerr* (1996) 39 ALJR 505.

The Court of Appeal then considered the issue of whether the arbitrator and subsequently the Deputy President, had erred in holding there was sufficient evidence to support a finding of "injury" as required by Sections 4 and 9A of the 1987 Act.

This enquiry in turn required the Court to be satisfied there was a causal connection between the perpetrator's assault and the deceased's employment.

For the appellant, it was submitted neither the arbitrator or Deputy President considered a "critical element" in its appeal, namely while there was a connection between the perpetrator's employment and his delusions, and arguably between *his* employment and his attack on the deceased, the Commission had failed to address the causal question of whether there was a causal connection between the deceased's employment and her death.

On behalf of the appellant it was contended that the medical evidence confirmed the irrational beliefs of the perpetrator were the product of a psychosis and not based in reality. Therefore it could be concluded that it formed a part of the conditions of the deceased's employment.

In dismissing the appellant's argument, Basten JA noted that: *"It is not in doubt* that a person can suffer compensable injury as a result of a physical attack, verbal abuse, sexual harassment or bullying at the workplace at the hands of management or a co-worker. In the view of His Honour, there was no reason to exclude conduct arising from delusional or irrational belief from a potential cause of compensable injury as proposed by the appellant, adding that the conduct of a supervisor or co-worker forms part of the employment conditions of an injured worker.

The Court was satisfied on the evidence before the Commission that the conditions of the deceased worker's employment involved a risk of sudden and violent attack which materialised.

Whilst recognising there may be instances of domestic violence between couples who work from home in the same business which would not satisfy the definition of "injury" in accordance with Sections 4 and 9A of the 1987 Act, on the findings of fact by the arbitrator and subsequently the Deputy President this was not the case in the matter before the Court.

In that regard, the Court noted that the evidence before Commission that was accepted by the arbitrator included the belief of Mr Hill that the deceased worker was conspiring with ASIC and AMP to take his clients and accreditation as a financial planner, accessing his computer, spying on him and recording his conversations.

It was the evidence of Mr Hill that he became pre-occupied and focussed on the deceased's activities causing to develop the delusion that she was being unfaithful.

Further, the arbitrator noted that Mr Hill had required the deceased worker to undertake a lie detector examination, paid for by the employer and principally related to employment issues as well as her fidelity.

Basten JA notes:

> *"The findings of fact demonstrated a palpable and direct connection between Mr Hill's delusions, Ms Carroll's employment and the harm suffered by her.*
>
> *These findings were identified in the Deputy President's reasons."*

**Comment**

The decision of the Court of Appeal is noteworthy given that it has been handed down at a time when

individuals are working from their residential premises as a consequence of the current COVID-19 crisis.

Further, the case involves an act of domestic violence which has come under increasing scrutiny by both Government and community groups in the current climate of financial hardship and social isolation.

Be that as it may, both the Court of Appeal and the Commission were concerned with first principles in relation to determining "injury" within the meaning of the 1987 Act and the evidence required to establish the requisite causal nexus between harm and employment.

The Court of Appeal has taken the opportunity of confirming employment can be a substantial contributing factor to an injury even when caused by delusional conduct which in part arises from a domestic relationship.

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