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Proper Construction of an ISR Policy Regarding Declared Assets & Property Insured

In 1882 the famous Oscar Wilde travelled to New York for a lecture tour whereupon disembarking the ship he was asked by a customs officer whether he had anything to declare. Wilde supposedly responded with:

"I have nothing to declare but my genius!"

In the context of an industrial special risks policy of insurance the value of property intended to be insured is often declared in a Schedule of Declared Assets before entering into the contract of insurance. The declared values of those assets generally relate to buildings, plant and equipment, stock and other tangible items of property relevant to Section 1 cover for material damage to property.

Is that all that needs to be declared? Does the Schedule of Declared Assets provided by an insured to the insurer constitute the property insured under the policy? What about property not declared in the Schedule of Declared Assets?

These issues were recently considered by Chief Justice Allsop of the Federal Court of Australia in *Oceanview Developments Pty Limited t/as Darwin River Tavern & Darwin River Supermarket v Allianz Australia Insurance Limited t/as Territory Insurance Office*.

Oceanview owned two lots of real property in Darwin River. On one of those properties it conducted hotel, supermarket, post office and service station businesses. The other property contained buildings and other superstructure for a nursery business that operated before Oceanview purchased the property. Oceanview did not purchase the nursery business when it acquired that lot.

In September 2018 a fire caused damage to various items of property comprising pipes, tanks, drains, cables, switches, sockets, conduits and other infrastructure for water and power, pots, stands, uprights as well as other equipment and property that had been used in the nursery.

None of the property comprising the supermarket, post office and petrol station was damaged in the fire. However, other buildings and infrastructure on both properties did sustain fire damage including some of the infrastructure to the nursery.

Oceanview claimed indemnity under its industrial special risks policy issued by Allianz under Section 1 regarding material damage. The insurer disputed Oceanview's entitlement to indemnity in respect of some items of property on the basis they were not listed in the Schedule of Declared Assets that was submitted to Allianz before the ISR policy was renewed.

Oceanview commenced proceedings in the Federal Court. By agreement the parties requested the Court determine as a separate question whether the "Property Insured" under Section 1 of the ISR policy was confined or limited to:

- the property described in the Schedule of Declared Assets;
- the property or categories of property which is or are used in or related to the Business of Oceanview as described in the policy schedule and/or in the Schedule of Declared Assets.

The separate question proceeded to hearing before Chief Justice Allsop who observed that the policy contained standard ISR Mark IV wording for the insuring clause and what constituted "Property Insured".

Importantly, "Property Insured" was not defined by reference to a Schedule of Declared Assets.

As is commonplace with ISR policies, a Closing Endorsement was issued containing a description of the insured, the business of the insured, the relevant situation, the premium, declared value and sub-limits under the policy.

It also contained certain items of property that were expressly excluded from cover.

On a separate page after the endorsement was a document entitled "Schedule of Declared Assets" which provided values of the buildings and stock on both properties owned by Oceanview in Darwin River.

Crucial to the Court's determination of the separate question was the following notation recorded on the Schedule of Declared Assets:

"This table does not form part of the policy"

Allianz submitted that although the Schedule of Declared Assets did not form part of the policy, it provided essential contextual background as the document through which Oceanview satisfied its obligation in the co-insurance clause to insure the Property Insured for full value at inception.

Many of the items of damaged property for which Oceanview sought indemnity under the Allianz ISR policy were not listed in the Schedule of Declared Assets before policy renewal.

The insurer's main contention was that the interpretation of the policy wording for which Oceanview contended would result in the insurer being compelled to indemnify its insured for damage to property which had not been factored into the premium calculation.

Oceanview contended the Schedule of Declared Assets was not a contractual document and that any specific exclusion of certain property would have been unnecessary if the insurance was limited to the declared assets in that Schedule.

Further, Oceanview argued the Declaration of Values in the Schedule of Declared Values related to the co-insurance or under insurance provision as well as a calculation of the premium, but no more than that.

Chief Justice Allsop decided in favour of Oceanview regarding the proper construction of the ISR policy wording.

The pivotal issue was articulated by his Honour in the following terms:

"What the declared values of all Property Insured are is one thing, what was the property the subject of the indemnity is quite another."

His Honour observed whilst the definition of the Situation in the Schedule to the Closing Endorsement referred to the purposes of the Business, it did not expressly qualify the two lots of real property described in the Schedule of Declared Assets so as to limit the Property Insured thereto. Those properties were described as "principally" the Situation. However, the Situation went on to describe:

"…and any other Situation in Australia owned or occupied by Oceanview for the purposes of the Business".

Further, there was no restriction on the extent of the Property Insured by reference to some connection with the Business as defined in the Schedule.

Allsop CJ also held the declared values in the Schedule of Declared Assets did not form a basis for interpreting the wording of the insuring clause and the definition of Property Insured.

Those declared values, according to his Honour, did not concern the identification of what constituted the Property Insured, rather it dealt with the declared values of property.

In support of this construction, his Honour considered the Basis of Settlement under Section 1 of the policy which included property that may not have a relational connection with the business of Oceanview. His Honour also accepted Oceanview's argument that the declared values were provided to give effect to the co-insurance clause and to calculate the premium.

His Honour distinguished the circumstances of this case from an earlier decision of the NSW Court of Appeal in *Caine v Lumley General Insurance Limited* in which the Court adopted a different construction of the relevant ISR policy wording. His Honour observed that in *Caine,* the Schedule of Declared Assets was expressly stated to form part of the contract of insurance and was also referenced in the definition sections of the policy, unlike the present case.

Chief Justice Allsop then concluded:

> *"[The Court's] construction [of the ISR Policy] is not uncommercial, though, given the nature of the rating of such a policy, especially for Section 1, it is not difficult to understand why the insurer feels aggrieved that it was not informed of the property that would fall within the coverage. That may be a question of non disclosure and its consequence; or one for the co-insurance provisions, or both...In effect my conclusion is that [Oceanview] is entitled, subject to the operation of the policy, and any question of non disclosure, to indemnity under Section 1 for damage to all Property Insured...other than excluded property happening at the Situation defined in the Closing Endorsement..."*

The pivotal fact which determined the outcome of the dispute was that the Schedule of Declared Assets was expressly stated not to be a contractual document. In addition, the Policy Endorsement / Schedule contained an expansive definition regarding the Situation of the Business of the insured and the specific items of property damaged in the fire, for which Allianz sought to disallow, were not expressly excluded.

The Court accepted Oceanview's submission that the Schedule of Declared Assets served a limited purpose of providing monetary amounts relevant to the co-insurance clause as well as calculating the insurance premium.

The important implication arising from this decision is that if an insurer wishes to confine the property insured under an ISR policy to the property described in the Schedule of Declared Assets it must expressly include that document as part of the contract of insurance with a notation either in the policy wording or the relevant Closing Endorsement to give effect to that intention.

Otherwise, when working out what property is to be insured under the ISR policy the insured, like Oscar Wilde entering New York in 1882, will effectively have nothing to declare.

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Whether the Duty of Utmost Good Faith Precludes a Security for Costs Application by an Insurer

An insurer's duty of utmost good faith is a well known area of insurance law since the enactment of the *Insurance Contracts Act 1984* (Cth) nearly 40 years ago.

The duty is enshrined in Section 13 of the Act which implies into a contract of insurance a provision requiring each party to the insurance contract to act towards the other party with the utmost good faith in respect of any matter arising under or in relation to the insurance contract.

Does the duty of utmost good faith apply to an insurer's conduct during the course of litigation between the insured and insurer arising out of the insurance contract?

Or, does the duty cease when Court proceedings are commenced to determine an insurance dispute arising from the contract of insurance entered into between an insured and insurer?

Further, does the duty of utmost good faith preclude an insurer bringing an application for security for costs in proceedings brought against it by the insured?

These interesting issues were recently considered by Chief Justice Allsop of the Federal Court of Australia in *All Class Insurance Brokers Pty Limited (in liquidation) v Chubb Insurance Australia Limited*.

All Class was in the business of insurance broking until it was the subject of a Winding Up Order and a liquidator was appointed in April 2013.

Its sole director and secretary made a number of unauthorised withdrawals of funds held by All Class in a trust account for the benefit of its clients in breach of various sections of the *Corporations Act 2001* (Cth).

The total amount of the unauthorised withdrawals was approximately $2 million.

All Class made a claim under a policy of insurance with Chubb (in its former corporate identity) seeking indemnity under the policy by reason of the director's theft, fraud and dishonesty.

All Class contended the director was an employee at the time of the alleged acts of theft, fraud or dishonesty which created an entitlement to indemnity under the policy.

Chubb denied liability to indemnify All Class on the basis the director was not an employee for the purpose of the policy and, being a director, there was no direct loss to All Class as the funds were applied by the director for the company's benefit.

Shortly after making the claim, All Class was placed in liquidation. In the ensuing years between 2013 and 2019 the liquidator of All Class corresponded with Chubb in relation to the claim but the insurer's position remained unchanged with respect to indemnity.

In April 2019 proceedings were commenced at the Federal Court in the name of All Class (in liquidation) against Chubb. It was clear however that the liquidator was conducting the proceedings on behalf of the company. On that basis, Chubb raised enquiries

regarding the capacity for the company to pay any adverse costs orders made against it in the proceedings.

Having not received a satisfactory response, Chubb filed an application for security for costs in October 2019 which proceeded before Chief Justice Allsop in March 2020.

The Chief Justice noted in respect of any application for security for costs under the *Corporations Act 2001*, Section 1335 provides there is a threshold to be satisfied before the Court considers whether or not to exercise its discretion to order security for costs against a party.

That threshold requires the applicant for security to satisfy the Court that it appears by credible testimony there is reason to believe the corporation will be unable to pay the costs of the defendant. Once this threshold is met the Court will then consider the matters relevant to the exercise of its discretion to order security for costs.

Chief Justice Allsop summarised those relevant factors as follows:

- whether the application for security for costs has been brought promptly;
- the strength and bona fides of the applicant's case;
- whether the applicant's impecuniosity was caused by the respondent's conduct subject to the clam;
- whether the respondent's application for security is oppressive in the sense that it is being used merely to deny an impecunious applicant a right to litigate;
- whether there are any persons standing behind the company who are likely to benefit from the litigation and who are willing to provide the necessary security;
- whether there are aspects of public interest which weigh in the balance against the making of an order.

On the threshold question, Allsop CJ noted there was agreement between the parties that All Class was impecunious. It followed there was reason to believe the company would be unable to pay Chubb's costs in the proceedings if it were ordered to do so.

The threshold having been established, his Honour then turned to consider the discretionary factors addressed by the parties and observed there was agreement that the claim by All Class and Chubb's response were brought in good faith and both could be seen to have reasonable prospects of success.

The factors which received the Court's greatest focus involved whether an order for security would stifle the litigation, the role of parties standing behind the company, namely the creditors, and whether they were able and willing to fund the litigation.

The Chief Justice highlighted that when considering whether the litigation would be stifled, the Court not only looks to the impecuniosity of the litigant but those standing behind the litigant or those who stand to benefit from the litigation if it were to proceed.

Here, there were 26 creditors with outstanding claims totalling in excess of $2 million, all but three of which were insurance underwriters or brokers and one of which was a large insurance company with a debt owing to it of nearly $1 million.

The evidence confirmed that four of the creditors being large insurance companies had agreed to provide funding of approximately $50,000 as security for costs. In those circumstances his Honour was satisfied if he were to grant some security for Chubb's costs, the company's impecuniosity would not be a bar to the continuation of the proceedings.

All Class submitted the seeking of security for costs was inconsistent with the duty of utmost good faith imposed on Chubb by the *Insurance Contracts Act*, Section 13.

Chief Justice Allsop observed the duty of utmost good faith has been held to apply to the conduct of litigation between an insurer and insured although not all Courts have taken this approach. In particular, the Chief Justice referred to an earlier decision of the Full Court of the Federal Court in *Ensham Resources Pty Limited v Aioi Insurance Company Limited* in which it was held the duty continues to operate upon the party in any litigation arising under the contract of insurance.

As to whether the duty of utmost good faith precludes an application for security for costs being made by an insurer, Chief Justice Allsop stated:

> *"The duty of utmost good faith does not, however, automatically preclude an insurer from seeking security for costs against an insured. Rather, the duty requires that the insurer act in accordance with commercial standards of decency and fairness with due regard to the legitimate interests of an insurer, as well as to its own interests."*

His Honour went on to say:

> *"I do not accept that an application for an order for security for security for costs necessarily conflicts with that standard in all circumstances. This is particularly so where, as in this case, the order for security for costs will not stultify the proceedings."*

Chief Justice Allsop held the existence of the duty of utmost good faith may be a consideration relevant to the exercise of the Court's discretion. In any event, his Honour was not satisfied that Chubb had breached its duty.

The Court exercised its discretion in favour of Chubb and granted the order for security for costs. Chief Justice Allsop quantified the amount of security in the sum of $50,000 which was required to be paid into Court within 28 days of the orders being made.

This interesting decision highlights that an insurer in litigation brought against it by an impecunious corporate insured can still bring an application for security for costs despite previous legal authorities suggesting the insurer's duty of utmost good faith under the *Insurance Contracts Act* continues after Court proceedings have been commenced.

In circumstances where an order for security for costs will not stultify the Court proceedings, the view taken by Chief Justice Allsop is that an order for security in those circumstances is not inconsistent with the insurer's duty of utmost good faith.

Each case will depend on its own facts and there may well be circumstances preventing an insurer from obtaining an order for security particularly if the insurer's conduct has contributed to the impecuniosity of the insured.

Those circumstances did not arise in the present case and the insurer was successful in obtaining an order for security for costs albeit for an amount less than half of the sum it ultimately sought.

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To Renew or Not to Renew COVID 19 and Leasing

COVID-19 has brought about significant changes to retail and commercial leasing arrangements in NSW.

Most notably, the National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19 (the "Code") established a set of good faith leasing principles which apply to commercial tenancies (including retail, office and industrial) which satisfy the criteria set out in the Code.

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.

In NSW, the Code was given effect via:

- the Retail and Other Commercial Leases (COVID19) 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 (at this stage) expire on 24 October 2020.

In light of the Code and the current rental market, landlords and tenants alike should consider whether to exercise an option to renew an existing lease or negotiate new leases entirely.

Lease extension or new lease?

The first step in determining whether you should renew an existing lease or negotiate a new lease is to identify imminent lease expiry dates. Imminent lease expiry dates (in particular those occurring prior to 24 October 2020) will undoubtedly affect this decision.

Parties should then consider whether the Code applies to the lease in question. If the Code currently applies to the lease, it will continue to apply to any options exercised prior to 24 October 2020. However, if parties enter into a new lease after 24 April 2020, the Code will not apply.

In light of the above, parties should consider the implications of the Code on their leasing arrangements as it may regulate the exercise of certain rights and require parties to renegotiate rent and other terms having regard to the leasing principles set out in the Code.

If parties elect to negotiate a new lease rather than extend an existing lease, they will be exposed to fresh negotiations which will likely change the dynamics of their current leasing arrangements. Revised leasing models may affect market valuations of investment properties.

Key takeaways

- Landlords and tenants should identify imminent lease expiry dates and consider whether to extend existing leases or negotiate new leases;
- Landlords and tenants should monitor the rental market and 'strike while the iron is hot' and
- Landlords should consider the implications of lease variations on later market rent determinations and market valuations of their investment properties.

Do not hesitate to contact us to discuss lease negotiations and revised rental models.

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May The Force (Majeure) Be With You

Background

COVID-19 and its related public health measures have disrupted supply chains, production capacity and staffing levels across many industries, particularly those reliant on global logistics networks.

In these unprecedented times, many businesses have faced, and will continue to face obstacles in performing

their contractual obligations.

When a business can no longer meet its contractual obligations as a result of an event or circumstance beyond its control such as COVID-19, what are its options?

A starting point for a business is to review any force majeure clauses in its terms of trade.

What is a force majeure clause?

Force majeure clauses relieve a party from contractual liabilities or obligations that are directly caused by an unforeseen event or circumstance beyond that party's control.

However, force majeure clauses are a creature of contract, meaning force majeure is not recognised in Australian common law or equity. As a result, force majeure clauses will vary from contract to contract.

Should a contract not contain a force majeure clause (or an appropriately drafted one at that), a party may be forced to rely on other remedies (such as the doctrine of frustration).

However, depending on a business's circumstances, frustration may not be an entirely useful remedy as the effect of frustration is such that a contract is terminated.

A force majeure clause, on the other hand, generally suspends the performance of those affected obligations for such period of time as they remain affected by the event or circumstance.

Will COVID-19 trigger force majeure?

The operation of a force majeure clause is defined by the language of the clause itself. Parties should determine whether the clause adequately identifies events such as 'infectious disease', 'pandemic' or 'government action' as events giving rise to a force majeure claim.

It is common for force majeure clauses to include the following elements:

- the triggering event or circumstance must be outside of the parties' control;
- performance of a contractual obligation/s must either be prevented in its/their entirety or delayed; and
- the effect of the triggering event or circumstance must be unavoidable and incapable of remedy by reasonable efforts to mitigate their effect.

It is important to note that an inability to perform goes beyond a mere inconvenience or an activity becoming uneconomical. For example, a force majeure clause would generally not enable a purchaser to cancel the supply of goods or services simply because it no longer requires the relevant goods or services as a result of a downturn.

Further, a party must consider whether it has exhausted or can exhaust everything reasonably expected of it to mitigate the effect of the triggering event or circumstance. Unless payment has been prevented and alternative payment methods are unavailable, it is unlikely that a party could withhold payment for the goods or services in question.

If terms of trade contain a force majeure clause, a business should consider whether:

- the triggering event or circumstance falls within the scope of the force majeure clause;
- performance has been materially impacted by the triggering event or circumstance (whether prevented in its entirety or delayed);
- the event or circumstance is avoidable and can be mitigated by reasonable efforts;
- the event or circumstance was unforeseeable at the time of contract formation; and
- the clause excuses performance of the whole contract, or certain obligations.

Moving beyond COVID-19, businesses will need to review their terms of trade to ensure they contain a carefully drafted force majeure clause. A failure to do so may result in a party being unable to excuse delay and/or non-performance and consequently, be in breach of their contractual obligations.

Key takeaways

- Detailed records must be kept that outline the triggering event and mitigation efforts;
- Businesses should review their supply agreements to ensure force majeure clauses appropriately identify a wide range of triggering events (such as pandemics);
- Parties should ensure the language of force majeure clauses correctly allocate commercial risk; and
- Parties should ensure they follow any procedural requirements contained in the force majeure clause (such as giving notice when the event arises as a failure to do so may prejudice that party's right to claim relief under the contract).

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Personal Property Securities Act – Case Law Update

Three recent decisions have confirmed the importance for secured lenders and beneficiaries of trust property of properly documenting and perfecting security interests under the Personal Property Securities Act 2009 (PPSA).

Dalian Huarui Heavy Industry International Company Ltd v Clyde & Co Australia [2020] WASC 132

The Western Australian Supreme Court has recently determined that an interest in trust funds held on escrow may be a "security interest" as defined in the PPSA which is registrable on the Personal Property Securities Register.

The main facts of this decision were as follows:

- A dispute arose between Dalian and Duro and the companies entered into arbitration in order to resolve it.
- Duro provided security in the form of a cash deposit of $27 million pending the outcome of the arbitration. The funds were deposited into the trust account of Duro's solicitors (Clyde & Co) under a trust agreement pursuant to which the solicitors (as trustee) would release the funds as directed by the tribunal.
- Dalian was successful at arbitration and the tribunal ordered the solicitors to release the trust funds to Dalian. Clyde & Co did not do so immediately.
- Dalian did not register its security interest in the funds on the PPSR.
- Duro then entered voluntary administration and its administrators attempted to prevent Clyde and Co from releasing the trust funds to Dalian pending finalisation of the administration.

The main findings of Supreme Court of Western Australia were as follows:

- As at the time the funds were deposited on trust with the solicitors, Dalian and Duro each had an interest in those funds.
- Duro had a "residual equitable interest" in the funds, being entitled to the return of the funds if it had been successful in the arbitration. That interest was "property" for the purposes of the PPSA.
- Duro as grantor had granted an equitable interest (by way of charge or lien) in favour of Dalian pursuant to the terms of the trust agreement.
- Dalian had a security interest that fell within the definition of an in substance "security interest" in the PPSA (namely a transaction that in substance secured payment or performance of an obligation), albeit this interest was contingent on the outcome of the arbitration.
- Dalian's security interest in the trust funds was unperfected and therefore at risk of vesting in Duro under section 267 of the PPSA upon the administration or insolvency of Duro.
- However, Dalian had a fully perfected security interest in the funds from the time the tribunal ordered the solicitors to release the funds to Dalian. Dalian's interest was at that point perfected by "possession", even though the solicitors still held the trust funds.
- The solicitors were considered to have possession of the funds on behalf of Dalian absolutely. Section 24(2) of the PPSA provides that "another person on behalf of the secured party" may have actual or apparent possession.

The decision has not been without criticism, particularly as to whether possession of an intangible asset is possible.

While the case arose in the context of arbitration proceedings, it has potentially wider ramifications for commercial transactions generally where sums may be held in escrow. This is due to the Court's finding that funds held under an escrow arrangement may give rise to an "in substance" security interest requiring perfection under the PPSR. Parties to these types of transactions should therefore ensure that they perfect their interests as soon as possible and be aware of potential competing security interests.

Keon Pty Ltd as trustee for Keon Family Trust v Goldfields Equipment Pty Ltd (In Liquidation) [2020] WASC 6.1

Keon Pty Ltd advanced approximately $300,000 to Goldfields Equipment Pty Ltd. The terms of the loan were contained in a deed which provided that the loan was made 'with an associated floating mortgage over all business assets' of the borrower and also contemplated the execution of a 'charge' by the borrower. No separate charge or security agreement was executed.

The borrower was placed into liquidation and the lender claimed a security interest under the deed. The Court however found that the wording in the deed was insufficient to create a floating charge. In doing so, the Court took into account that under the deed, the parties had clearly contemplated entering into a further security document.

This decision stressed the importance that finance documents must include clear and unambiguous wording to create a security interest or charge. It will not suffice to simply refer to the loan as being secured or to contemplate that a security interest or charge will, or may, be granted by the borrower or security provider. In practice, lenders should therefore, wherever possible, document the security separately from the loan agreement and ensure that the security document is duly executed and registered.

StockCo Agricapital Pty Ltd v Dairy Livestock Services Pty Ltd [2020] NSWSC 318

This case involved a dispute over a sum of money which Dairy Livestock Services Pty Ltd (DLS) had received from selling cattle on behalf of Reid Agricultural (Reid).

Reid purchased stock using funds provided by StockCo. The stock was purchased by DLS as agent for Reid. StockCo's financing arrangements provided that it was the absolute owner of the stock (with Reid buying and selling them as StockCo's agent) but also provided for a grant of security interests by Reid to StockCo over both the purchased stock and other stock. StockCo had made both PMSI and non-PMSI registrations on the PPSR.

DLS also held a security interest from Reid, to secure amounts including the purchase price of stock, feed and agistment fees. DLS had made a PMSI registration before StockCo's registrations.

DLS sold the stock on Reid's behalf, retained part of the proceeds and paid the rest over to Reid which dissipated it. Reid then went into liquidation and StockCo claimed to be entitled to proceeds in priority to DLS and claimed against DLS for amounts which it had retained or paid over to Reid. The New South Wales Supreme Court held as follows:

- StockCo's "ownership" interest was, in substance, a security interest and so the PPSA applied to it. Furthermore the security interest was a PMSI and StockCo had perfected it as such. In some cases Reid had already taken possession of the stock before StockCo's facility was put in place and its PMSI registration made. DLS argued that this meant StockCo had not satisfied the requirement in Section 62(2)(b) that the security interest be perfected before the grantor obtained possession. The Court however held, relying on Allied Distribution Finance Pty Ltd v Sam Wise Holdings Pty Ltd [2017] SASC 163 that "possession" meant "possession as grantor" and this did not arise until the stock was made subject to the security interest, which occurred after perfection.
- While DLS's security interest secured both the purchase price of the stock and the maintenance costs (feed and agistment), DLS had already been reimbursed for the purchase price out of the funds advanced by StockCo. The maintenance costs were not paid "to enable the grantor to acquire" the collateral within the meaning of Section 14(1)(b) of the PPSA nor applied to acquire the collateral and so Section 14(1) did not confer PMSI priority on them. The Court also rejected an argument that Section 14(7) which extended to value given to enable the grantor to use the collateral, applied, noting that use was an inappropriate word to apply to possession or ownership enjoyed by a livestock grazier and that Section 86 (conferring priority ranking after PMSI's for funds provided to enable livestock to be fed and developed) indicated that Section 14(7) was not intended to apply to such funding.
- Accordingly StockCo's PMSI's had priority over DLS's non-PMSI security interest.

Highlights of these decisions

- In *Dalian Huarui Heavy Industry International Company Ltd v Clyde & Co Australia [2020] WASC 132*, the Supreme Court of Western Australia found that a contingent equitable interest in funds held on trust pending is a security interest under the PPSA and once a person becomes absolutely entitled to trust funds, that person's security interest may be perfected by "possession" under the PPSA, despite the funds remaining in the hands of the third party trustee.
- The decision in *Keon Pty Ltd as trustee for Keon Family Trust v Goldfields Equipment Pty Ltd (In Liquidation) [2020] WASC 61* is a reminder that secured parties who enter into a loan agreement without a separate security agreement or clear charging clause are at serious risk.
- *StockCo Agricapital Pty Ltd v Dairy Livestock Services Pty Ltd [2020] NSWSC 318*, confirmed the principle that a PMSI will only be entitled to super-priority from when the grantor obtains possession of the particular collateral as grantor of the security interest and not possession in any other capacity.

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CONSTRUCTION ROUNDUP

Steps to Comply with the Recent Legislative Reform of the Construction Industry

In our last newsletter, we looked at some of the recent legislative reform of the construction industry, including the enactment of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) and the *Design and Building Practitioners Act 2020* (NSW). Each of these new Acts came into effect on 1 July 2020.

Pursuant to the Residential Apartment Buildings Act, the Secretary of the NSW Department of Customer Service and the Secretary's authorised representatives (likely to include the NSW Building Commissioner) have the power to issue stop work orders on construction sites, and to prohibit the issuing of an

occupation certificate if there are any "serious" defects in the work. The Secretary is also empowered to issue an order for the rectification of defective work carried out up to ten years ago.

The Design and Building Practitioners Act is similarly aimed at preventing defective work from being foisted on to an unsuspecting public. Under this Act:

- architects, engineers, consultants, and building contractors must be registered and covered by insurance;
- the main aspects of the design (including all variations) are to be fully documented;
- each design and building practitioner is to provide a declaration that their work complies with the Building Code of Australia (including any performance solution that has been implemented where the relevant item of work is not automatically deemed to comply with the BCA's requirements);
- particularly where the work is "residential building work" within the meaning of the Home Building Act 1989 (NSW), each design and building practitioner is subject to a statutory duty of care owed to (amongst others) owners corporations (which is to have retrospective effect with respect to construction work carried out up to 10 years ago);
- owners corporations will be entitled to recover economic loss suffered by reason of a breach of this statutory duty of care, including the value of an owners corporation's liability to rectify any defects in the common property and any consequential damage to individual owners' lots or third party property.
- The Design and Building Practitioners Act applies to construction work where an application has not yet been made for the issue of an occupation certificate. The Residential Apartment Buildings Act applies to work where an application for an occupation certificate will be made after 1 January 2021. Therefore, the new Acts' provisions apply to projects that are currently underway.
- Since substantial fines can be imposed on those who do not comply with the new requirements (including, in some cases, on the directors of the business), those who participate in the construction industry should be making the necessary changes to their business processes now. Some of the steps that should be taken are discussed below.
- Building contractors and consultants should immediately arrange the formal registration of the businesses and the individuals who will carry out the design and/or construction of buildings, and to arrange adequate professional indemnity insurance (but note that since NSW Fair Trading is still in the process of establishing such a register, they are simply accepting expressions of interest in the meantime).
- All persons involved in the preparation of building design and/or the administration of a building contract should be educated about the new requirements and their individual responsibilities in this regard.
- Contractors and consultants will also need to ensure that they undertake continuing education in order to maintain their registration.
- A process should be put in place by architects, engineers and consultants whereby:
  - ❖ each design drawing is accompanied by a declaration that the design complies with the Building Code of Australia, the applicable Australian Standards and any other relevant code or requirement;
  - ❖ the declaration is made by a person registered as a design practitioner or engineer under the legislation;
  - ❖ a copy of the declaration is provided to the principal design practitioner for the project;
  - ❖ a similar declaration is provided with all revisions of each design drawing.
- Similarly, building contractors should establish a process whereby:
  - ❖ a check is made that the design is being or has been prepared by registered design practitioners;
  - ❖ design compliance declarations are obtained from all relevant design practitioners and from the principal designer before carrying out the work;
  - ❖ all variations to the design are only made by registered designers and are properly recorded, and further design compliance declarations are obtained from those designers in relation to those variations;
  - ❖ prior to applying for an occupation certificate: (a) written notice is provided to each other registered building practitioner on the project that the application is being made; and (b) a formal declaration is made to the builder's client that the work has been carried out in compliance with the BCA, whether the design was prepared by a registered designer, and that the work was carried out in accordance with that design;
  - ❖ following the application for an occupation certificate, further written notice is provided to each other registered building practitioner that the application has been made;
  - ❖ all building compliance declarations received from the registered building practitioners on

the project are passed on to the principal certifier;

- ❖ no later than 90 days after the occupation certificate has been issued, all design drawings and related documents for the building work are provided to the Secretary.

- Where the work is the construction of a class 2 building (such as a medium or high rise residential apartment building), building contractors should also ensure that:
  - ❖ at least six months (and no more than twelve months) prior to an application being made for the occupation certificate, a notification is made to the Secretary (or his or her delegated representative) of the intention to make such an application;
  - ❖ a further notification is made within seven days if the builder becomes aware that the anticipated date of completion of the work is likely to be delayed;
  - ❖ any direction by the Secretary to provide copies of design drawings or other documents is complied with within the time specified in the direction;
  - ❖ any stop work order issued by the Secretary is immediately complied with;
  - ❖ any rectification order issued by the Secretary is complied with within the period specified on the order.

It would also be prudent for all parties to construction contracts or consultancy agreements to ensure that future contractual documents incorporate these new obligations, and that the parties indemnify each other against any liability arising as a consequence of any failure to comply.

Gillis Delaney Lawyers can provide specialist expert advice on the effect of the new legislation. We can also assist construction contractors, consultants and developers with navigating their way around the processes of the new legislation.

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The Utility of Expert Determination: the Proof is in the Clause

Two words that are often associated with litigation are – expensive and slow.

It is a well known fact that litigation is an expensive process and it can often take years for a matter to be resolved either by settlement or determination by the courts.

Alternative dispute resolution processes have long been utilised by parties in order to avoid the cost and duration that traditional court proceedings entail. More recently there has been an influx in the use of expert determination as one avenue for alternative dispute resolution.

Expert determination is a contractual process which involves an independent third party, with recognised expertise in the subject matter, resolving an issue or issues in dispute between the parties by making a determination.

However, unlike arbitration, there is no procedural code and the activities of an expert are subject to little control by the court. If the expert determination clause does not specify a procedure for the expert determination, the procedure is to be decided by the expert.

At the time of entering into the contract, the parties should discuss and agree on the following:

- The identity of experts (or who should nominate the expert);
- What expertise the experts should have;
- The process for the expert determination;
- How the parties will resolve any issues relating to the appointment of the expert or the process; and
- Whether the expert's determination will be binding.

Where the expert determination clause in the contract is drafted properly and it is used in the right circumstances, expert determination can provide a quicker, cheaper and more effective means of settling a dispute. The key therefore remains ensuring that you have a well drafted contract, which clearly sets out the dispute resolution process and the parties' intentions at the time the contract is entered into.

This concept was recently discussed in the decision of *The Illawarra Community Housing Trust Limited v MP Park Lane Pty Ltd [2020] NSWSC 751* which was handed down by the NSW Supreme Court.

In that case, The Illawarra Community Housing Trust (THT) entered into a contract with MP Park Lane to undertake the development of approximately two hectares of land at 91A Byamee Street, Dapto NSW.

By late 2018, the parties had fallen into dispute. On 11 September 2019, THT wrote to MP Park Lane stating that it was terminating the contract for nine specified actual and anticipatory breaches, including failure to meet critical dates which were set out in the contract.

On 25 October 2019, MP Park Lane wrote to THT that it intended to serve a dispute notice pursuant to clause 21 of the contract and did so on 10 March 2020. The dispute notice responded to each of the nine grounds relied on by THT and annexed to it a significant body of documentation.

On 21 April 2020, following the alternative dispute

resolution process set out in clause 21 of the contract, MP Park Lane wrote to the President of the NSW Bar Association, requesting him to select the appropriate institution or association to appoint an expert to carry out an expert determination of the dispute.

The issue therefore became whether, in the events that had occurred, resolution of the dispute between the parties was governed by the expert determination clause of the contract.

Relevantly, clause 21 of the contract provided:

> *"21.1 Dispute*
>
> *Any dispute in connection with this agreement must be dealt with by this clause.*
>
> *…*
>
> *21.4 Referral to expert*
>
> *If the parties cannot resolve the Dispute, then the Dispute may be submitted by either party to an expert agreed between the parties.*
>
> *21.5 Effect of expert's decision*
>
> *(1) The expert's decision is final and binding on the parties."*

THT argued towards a narrow construction of clause 21. They argued that the clause should be construed so as to operate in respect only of discrete subject matter disputes and therefore it did not cover, for example, disputes 'in connection with its frustration, termination or repudiation'.

However, the Court ultimately held that THT's argument failed and that the dispute should be resolved by expert determination under Clause 21. The Court provided the following (amongst other) reasons for its decision:

- The meaning of clause 21 was to be determined objectively by reference to its text, context and purpose, the question being what a reasonable person would have understood them to mean.
- Parties are unlikely to have intended multiple venues or occasions for the resolution of their disputes unless they say so.
- On its plain meaning, if there is a dispute and it is in connection with the contract, it must be dealt with under clause 21 and THT has accepted that by entering into the contract.
- Clause 21 provides a mechanism for the speedy resolution of any dispute in connection with the contract, irrespective of its complexity. This procedure is intended to be quick and to avoid complexity and undue expense. As a matter of public policy, this was a reason to give it full effect.
- THT's argument required there to be read into the provision words such as 'appropriate for determination by an expert', which words are simply not there.

The matter of THT and MP Park Lane is only one of many similar cases that have been determined by the courts. Each of these cases highlights the importance of careful drafting to ensure an expert determination clause achieves the parties' intentions. If the expert determination clause is not carefully worded, it may leave one or both of the parties dissatisfied with the process and/or outcome and lead to further dispute.

Further, it would be prudent for parties to carefully review the dispute resolution clause in a contract from the outset. There are numerous alternative dispute resolution mechanisms and the suitability of each should be evaluated on the basis of the scope of works, the types of disputes likely to arise and the amount in dispute.

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EMPLOYMENT ROUNDUP

Unreasonable Stand Down Direction COVID 19

A recent decision of the Full Bench of the Fair Work Commission gives valuable guidance as to when a "JobKeeper Enabling Directions" will be reasonable, and hence, enforceable.

In response to the current COVID-19 pandemic, the *Fair Work Act 2009* (Cth) (***the Act***) has been amended to insert a new *Coronavirus economic response*. The object of this Part includes making temporary changes to assist Australians to keep their jobs, and maintain their connection to their employers, during the economic downturn.

Part 6-4C authorises employers to give "jobkeeper enabling directions" to employees in respect of whom it is entitled to receive the wage subsidies provided by JobKeeper.

In outline, JobKeeper Enabling Directions cover:

- Stand down directions;
- Directions changing duties; and
- Direction changing the location of work.

Stand down directions can encompass a direction not work on a day or days on which the employee would usually work; to work for a lesser period than the employee would ordinarily work on a particular day or days; or work a reduced number of hours (compared with ordinary hours of work).

An employee is required to consider and not unreasonably refuse a request made by their employer

to make an agreement to perform duties on different days or at different times.

The validity of a direction is subject to an overriding critical requirement that it be reasonable in all the circumstances (section 789GK).

How is reasonableness assessed?

In *TWU v Prosegur* [2020] 3655 the facts were these.

The COVID-19 pandemic and its economic effects caused a serious reduction in the employer's work and revenue - in the order of 35 percent. On 3 June 2020, employees were sent correspondence entitled "*JobKeeper Enabling Direction*", which set out the intended direction in the following terms:

> *"… Prosegur intends to reduce your normal working hours to 50 hours per fortnight effective from Tuesday 9th June 2020. This would continue up to and including 27 September 2020 unless the direction is withdrawn or replaced by a new direction in writing prior to that date."*

The TWU contended that the direction was invalid because, amongst other things, the direction was unreasonable within the meaning of s 789GK in that:

- the direction imposed an unfairly disproportionate reduction of hours on permanent employees as compared to casual employees, as full-time employees and part-time employees had regularly worked, pre-COVID-19, up to 50 hours and 30-35 hours respectively including overtime; and
- employees were only being advised of their start time the day before commencing work and did not know how long they would be working for until they attended the workplace the following day.

A Deputy President of the FWC found that the direction was not unreasonable in all the circumstances. Essentially, he adopted a test which equated "unreasonable" with the meaning of senseless, irrational, illogical, immoderate, disproportionate, unconscionable, unnecessary, unjustified, unwarranted, uncalled for or unwise. He said:

> *"In my opinion the meaning of 'unreasonable' in s 789GK of the Act can be ascertained when it is viewed from the standpoint of what a reasonable person would conclude in the context of the unparalleled circumstances (COVID-19) to be not credible or sensible, illogical, implausible or impractical."*

Factors which the Deputy President considered relevant to determining that the stand down direction was not unreasonable included:

- overtime, even regular overtime, is not, and should not be viewed as a permanent fixed arrangement, and that by its very nature, overtime is variable;
- Full time and part time employees can also supplement their income by accessing accrued annual leave and RDOs, and accrual of leave is obviously ongoing at three hours a week and is available to be taken up
- some casual employees are losing more hours than permanent employees
- all full time and part time employees are working in excess of 30 hours a week, and 2 are over 38, and no casual employees are working over 30 hours a week.

Appeal

The TWU appealed to the Full Bench of the FWC. The appeal was upheld, essentially for two reasons.

First, the Full Bench held that the proper meaning of the phrase "unreasonable in all the circumstances" was akin to inequitable, unfair, or unjustifiable. The Deputy President's adoption of an "irrationality" type test was in error.

It was important to consider *all of the circumstances*. These circumstances necessarily include the relevant circumstances of the employee, not just the employer.

The second basis on which the Full Bench allowed the appeal was that the Deputy President did not direct himself to the substance of the direction itself, which in terms reduced the hours of work of all remaining employees to 50 per fortnight, but rather assessed the reasonableness of the direction by reference to an record of hours were prior to the directions.

As a result, the direction was held to be invalid.

The take-away from this is that a JobKeeper Enabling Directions needs to be assessed having regard to its reasonableness both from the employer's point of view, and also as it affects employees subject to it.

With the very real prospect of such directions continuing to be available after the end of September, a proper regard to this is critical.

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Casual Employment Period Included in the 12 Month Minimum Employment Period for an Unfair Dismissal Claim

Recently the decision of *WorkPac Pty Limited v Rossato* confirmed that where a casual employee has worked regular and systematic hours they were also entitled to the paid leave entitlements of a permanent employee.

A recent decision in the Fair Work Commission examined whether a period of regular and systematic casual employment could be included in the minimum threshold employment period required to bring an unfair dismissal claim.

Section 382 of the *Fair Work Act 2009* ("FWA") provides that a person must have completed the

minimum employment period to bring an unfair dismissal claim.

Section 383 of FWA provides that the minimum employment period is:

"(a) if the employer is not a small business employer – six months ending at the earlier of the following times:

(i) the time when the person is given notice of dismissal;
(ii) immediately before the dismissal; or

(b) if the employer is a small business employer – one year ending at that time."

An employee's period of employment with an employer at a particular time is the period of continuous service the employee has completed with the employer at that time as an employee.

However:

"(a) a period of service as a casual employee does not count towards the employee's period of employment unless:

(i) the employment as a casual employee was on a regular and systematic basis; and

(ii) during the period of service as a casual employee the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis."

In *Purcell v Aspen Living Villages Pty Limited*, Deputy President Sams, determined a jurisdictional objection by the employer against an unfair employee dismissal claim where the employee was engaged as a casual food and beverage attendant from 6 December 2018 to 17 June 2019 and was then employed as a permanent employee from 17 June 2019 to 6 December 2019. The employer claimed in its jurisdictional objection that the employee had not completed six months employment as a permanent employee.

The Commissioner identified the correct approach was outlined in *Chandler v Bed Bath N' Table Pty Limited* where the Full Bench considered whether Chandler a casual employee had a reasonable expectation of continuing on a regular and systematic basis. The Court in that case concluded:

- that expectation was engendered by a written contract and monthly roster system where the employee indicated her availability to work in advance, along with the frequency and amount she was allocated over the course of her employment,
- the "engagement" itself must be "regular and systematic"; not the hours or days worked,
- the term "regular" should be construed liberally. It is intended to imply some form of repetitive pattern rather than being used as synonym for "frequent" or "often",
- a regular basis may be constituted by frequent although unpredictable engagements and thus a systematic basis need not involve either predictability of engagement or any assurances of work at all,
- the employee had a reasonable expectation of continuing employment from the conduct of both parties.

Applying this the Commission in *Purcell v Aspen Living Villages Pty Limited* concluded that it had jurisdiction to determine the claim as the threshold period had been satisfied in circumstances where:

- from 6 December 2018 to 17 June 2019, the applicant was engaged as a casual Food and Beverage Attendant under the FreeSpirit Employment Agreement 2015,
- on 17 June 2019, the applicant commenced full time employment as a Guest Services Team Leader and signed a new Employment Agreement that day (the 'Permanent Agreement'). The majority of her terms of employment were the same as the earlier Casual Agreement save, of course, for the Hours of Work and Remuneration,
- On 29 November 2019 she was terminated,
- An Employee Exit Form, dated 6 December 2019, describes the applicant as working out her notice to that date (although the applicant said her employment ended on 29 November 2019). Either way, it will be apparent that her full time engagement was for less than six months, by either one or two weeks.
- the intention of both parties was apparent when in a meeting on 29 November 2019, there was discussion about the redundancy of the full time role, including by reversion to a casual bar role. Notwithstanding the employee did not accept that casual role.

The Commission observed the mere fact casual employment was offered was evidence that ongoing, regular and systematic employment was available, and the worker was told so by the employer.

The Commission noted:

"The worker held a reasonable expectation of ongoing casual engagements. Accordingly, the second leg of s 384(2) of the Act is satisfied.

The worker had been hired in the off season, and would have had a reasonable expectation of working again in the 2019 off season.

The worker would have had no reason to believe that a similar pattern of employment and rosters would not apply in the next year's busy period."

The Commission dismissed the jurisdictional objection to allow consideration of the merits of the unfair dismissal claim. The period of service met the minimum employment period as required by s 383(a) of the Act, being in excess of 6 months.

Casual employment can and does count towards the minimum threshold employment period required to bring an unfair dismissal claim.

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WORKERS COMPENSATION ROUNDUP

Developments in COVID-19

The COVID-19 Pandemic continues to have significant impact in both Australia and around the world. Legislative changes continue to be enacted to keep up with developments as much as possible.

On 14 May 2020 the NSW Government enacted the *COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Act 2020* which amended a number of pieces of legislation including the *Workers Compensation Act 1987*.

Section 19B was inserted into the *Workers Compensation Act 1987* to provide that if a worker, during a time when a worker is engaged in prescribed employment, contracts COVID-19 it is presumed (unless the contrary is established) that COVID-19 was contracted by the worker in the course of employment subject to satisfying the medical criteria.

When the legislation was initially enacted prescribed employment included the retail industry (other than businesses providing only online retail), the healthcare sector including Ambulance Officers and Public Health employees, disability and aged care facilities, educational institutions including pre-schools, schools and tertiary institutions (other than establishments providing online teaching services), Police and Emergency Services, refuges, halfway houses and homeless shelters, passenger transport services, libraries, Courts and Tribunals, correctional centres and detention centres, restaurants, clubs and hotels, the construction industry, places of public entertainment or instruction, the cleaning industry and any other type of employment prescribed by the Regulations.

On 24 July 2020 the *Workers Compensation Amendment (Consequential COVID-19 Matters) Regulation* 2020 took effect and extended the workers compensation presumption to include additional categories of prescribed employment. Pursuant to the amendment, the presumption will now apply to employment in cafés, supermarkets, funeral homes and childcare facilities.

As the pandemic and its impacts continue we expect that further Regulations will be passed to keep up with developments as they occur,

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Section 60 of the *Workers Compensation Act 1987* – Commission Goes to Pot !!

On 25 June 2020 an arbitrator of the Workers Compensation Commission determined *in Clark v The Secretary, Department of Transport* [2020] NSWWCC 210 that the cost of medicinal cannabis incurred by an injured worker was compensable.

Section 60 of the *Workers Compensation Act 1987* ("1987 Act") extends an employer's liability to pay medical or related treatment expenses which are reasonably necessary as a result of a work related injury.

Section 60(5) of the 1987 Act confirms that the jurisdiction of the Commission extends to a proposed treatment or service.

Section 59 of the 1987 Act defines "medical or related treatment" relevantly to include therapeutic treatment given by the direction of a medical practitioner.

Background

The worker sustained multiple injuries including fractures to his right femur, both left and right tibia and fibula, right ankle and right wrist in addition to an injury to his lumbar spine in a motor vehicle accident whilst on a periodic journey home from work on 6 January 1988.

In 2019 he sought and established an entitlement to permanent impairment compensation for his extensive injuries in accordance with Section 66 of the 1987 Act assessed to the former Table of Disabilities applicable for injury suffered prior to 1 January 2020.

The worker subsequently made a claim against his employer for reimbursement of the cost of medicinal cannabis which had been provided to him since June 2018, contending the treatment had been prescribed by his treating doctor and was reasonably necessary for the purposes of Section 60 of the 1987 Act.

Further, the injured worker sought an order from the Commission for the employer to meet the payment of medicinal cannabis on an ongoing basis in accordance with Section 60(5) of the 1987 Act.

Liability was declined by the insurer pursuant to Dispute Notices issued in accordance with Section 78 of the *Workplace Injury Management and Workers*

Compensation Act 1998 ("1998 Act") in August 2018 and February 2019.

The insurer notably did not take issue as to whether the treatment in dispute met the definition of "medical or related treatment", instead confining the dispute as to the reasonable necessity of that treatment for the purpose of Section 60 of the 1987 Act.

Commission Proceedings

The matter came to arbitration hearing in the Commission on 18 June 2020.

In support of his claim the injured worker relied on evidentiary statements in which he asserted he had continued to suffer pain in many parts of his body as a consequence of the injuries he sustained in the motor vehicle accident of 6 January 1988.

Further, it was his evidence that conventional pain relieving medication including Oxycontin and Tramadol had seen him suffer "very excessive" side effects including ongoing nausea, drowsiness and confusion and had proven to be of limited effect in controlling his symptoms in any event.

The injured worker conceded he had previously "self medicated" with the use of cannabis which he maintained had been extremely effective in reducing his chronic pain. In mid 2018 the injured worker sought advice from his general practitioner who in turn referred him to a specialist in the area of medicinal cannabis.

The arbitrator then considered medical evidence put forward in the injured worker's case including a general treatise on the benefits of medicinal cannabis as a method of pain relief.

The arbitrator noted the evidence established the injured worker had trialled multiple pharmacological agents without significant improvement in his symptoms.

Accordingly, the injured worker was considered eligible for medicinal cannabis as he was not responding to conventional pharmaceutical agents.

Further, the arbitrator noted the assertion by the injured worker's treating doctors that the claimant had responded well to the treatment in dispute reporting improved pain levels, sleep, mood and overall quality of life.

The Commission then considered the specialist medical evidence put forward on behalf of the employer on which the liability dispute was raised in accordance with Section 60 of the 1987 Act.

The arbitrator noted a consultant anaesthetist and pain management specialist qualified on behalf of the employer who noted a history of cannabis use. It was noted the injured worker had availed himself to four different types of narcotics in addition to Cannabis and regular use of alcohol yet it was the worker's evidence he remained distressed and disabled.

Also in support of the employer's position was an expert pharmacological opinion. The expert noted the injured worker's ongoing use of opioid agents exceeded the recommended range for non – cancer patients.

The expert was of the opinion that the employer should not meet the cost of any further medicinal cannabis treatment as there was no clear pathway in terms of duration for the treatment, being mindful also of the injured worker's history of illicit drug use.

The employer also had the benefit of a medico-legal opinion from a consultant psychiatrist. The psychiatrist noted in addition to the injured worker's use of opioid medication, he consumed alcohol on a daily basis, used a variety of Marijuana and was heavily addicted to nicotine.

It was the opinion of the psychiatrist that the injured worker's pain management would be improved by his detoxification from narcotic analgesics, cannabis, alcohol and cigarette use.

Based on the above, it was submitted on behalf of the employer the use of medicinal cannabis for pain relief was not appropriate in the injured worker's case as those medical practitioners who had supported its provision had not given due consideration to the injured worker's history of substance abuse.

Decision of Arbitrator

In finding for the injured worker, the arbitrator noted the decision of Bourke CCJ of the former NSW Compensation Court in *Rose v Health Commission (NSW)* [1986] NSWCC 2, remained a "textbook explanation" as to the purpose and application of what is now Section 60 of the 1987 Act.

The arbitrator noted prima facie if the treatment falls within the definition of 'medical treatment" and is given by or at the direction of a medical practitioner then it is presumed to be reasonably necessary and compensable.

The presumption is rebuttable if it can be shown the particular treatment afforded is not appropriate or not competent to alleviate the effects of the particular injury in issue.

The arbitrator noted that *Rose* was authority for the proposition that treatment is to be considered reasonably necessary where its purpose and potential effect is to alleviate the consequences of the injury.

This involved deciding on the facts that the particular treatment is essential to, should be afforded to should be afforded to and should not be forborne by the worker.

The arbitrator accepted the injured worker's evidence that for a period of over 30 years he had been coping with the effects of serious injury sustained in a compensable journey in accordance with the provisions of the 1987 Act.

Accordingly, it was his view the injured worker was entitled to have the employer meet the cost of such reasonable treatment by way of pain relief and this included the provision of medicinal cannabis which the injured worker had taken since June 2018.

In dismissing the injured worker's claim for ongoing payments, the arbitrator noted there was no expert opinion before the Commission as to how long the trial of this treatment should last.

Whilst the arbitrator accepted that cannabis had improved the worker's response to pain thereby alleviating the consequences of his injury, he was not prepared to award an entitlement to that treatment on an ongoing basis in the absence of a proposed treatment plan in regard to future management of the injured worker's condition.

Comment

The decision by the arbitrator in *Clark* confirms the willingness of the Commission to consider and approve alternative medicine as an appropriate means to manage a workplace injury for the purposes of the 1987 Act.

The decision arguably represents an extension of what has traditionally been considered 'medical and related treatment" in accordance with Section 60 of the 1987 Act and more particularly, what comes within the ambit of "therapeutic treatment" in accordance with Section 59(b).

Be that as it may, as identified in *Rose*, liability for treatment is not absolute and so it remains appropriate for employers and their insurers to obtain expert opinion to seek to rebut the assumption in favour of treatment in appropriate cases.

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Arbitrators can determine medical disputes without referral to an AMS

Cancelled medical examinations during the COVID-19 pandemic have led to Arbitrators in the Workers' Compensation Commission (WCC) in some circumstances, exercising their power to determine a claim without referring an injured worker to an Approved Medical Specialist (AMS).

Background

The 2018 amendments to the Workers Compensation Act 1987 (NSW) (the 1987 Act) repealed the requirement that in a dispute heard by the WCC on the degree of permanent impairment of an injured worker, an award for permanent impairment compensation could not be made unless their degree of permanent impairment had been assessed by an AMS.

In the recent case of *Thompson v Bernipave Pty Ltd [2020] NSWWCC 169* determined on 21 May 2020, Arbitrator Bamber determined a claim based solely upon the injured worker's medical evidence.

Commission Proceedings

The worker was employed as a Truck Driver. The worker suffered a bilateral inguinal hernia injury at work in September 2018.

The worker made a claim for permanent impairment compensation under section 66 of the 1987 Act. The employer did not respond to his claim nor obtain a competing assessment of his whole person impairment (WPI) within the required time period.

The worker commenced proceedings in the WCC for permanent impairment compensation.

There was no dispute as to whether his employer was liable for his work injury. The dispute was limited to the extent of the worker's WPI. Accordingly, the Arbitrator referred the Applicant for assessment by an AMS.

The worker's AMS assessment was cancelled due to the COVID-19 pandemic and the Commission's suspension of in-person examinations.

Subsequently, the claim came before Arbitrator Barber for a further teleconference at which time the worker made an application that the Arbitrator determine the claim for WPI without an AMS assessment.

The employer argued the matter should be referred to an AMS rather than being determined by the Arbitrator. The employer noted prior of the commencement of proceedings a conversation took place between the parties' solicitors where it was agreed the matter was likely to be referred to an AMS. It argued on that basis it did not arrange its own medical examination.

The Decision

The Arbitrator accepted the opinion of the worker's medical examiner and determined the claim in his favour by ordering that the employer pay the applicant permanent impairment compensation consistent with his medical evidence.

The Arbitrator stated the following points were relevant to her decision:

- The approach the applicant's independent medical examiner (IME) took with his assessment was in line with the relevant assessment guidelines.
- That the IME had made similar findings in two separate assessments and explained how he had arrived at his assessment with clarity.
- The IME applied the correct criteria and demonstrated no error.
- The applicant was a witness of truth.
- The employer had not complied with its obligations to determine the claim within the specified time limits.

- The “the model litigant policy” and its application to insurers.

Comment

Cancelled medical examinations due to the COVID-19 pandemic have led to insurer’s failing to determine claims and/or not obtaining competing medical assessments.

This case is a timely reminder of the practical implications of the 2018 amendments to the 1987 Act which permits Arbitrators in the WCC to determine an injured workers’ WPI without first referring the matter to the AMS.

In some circumstances Arbitrators will determine a claim by making an award for compensation on the unchallenged evidence of an injured worker a necessary exercise of their power relying on the opportunity afforded by the 2018 amendments to the 1987 Act.

Insurers need to ensure the WCC is satisfied reasonable steps have been taken to arrange independent medical assessments where necessary. If an in-person assessment cannot be undertaken insurers should look to arrange alternatives such as assessments by telephone and/or video link.

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