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IN THIS EDITION

UK Test Case on Business Interruption Policy Coverage for COVID-19: What's Next For Australia

In a significant judgment affecting the insurance industry which has already received widespread media coverage, the High Court of England and Wales (Commercial Division) recently decided a test case regarding the availability of cover under several insurance policies for business interruption claims with respect to losses arising from the COVID-19 pandemic.

In *The Financial Conduct Authority v Arch Insurance (UK) Ltd & Ors*, Lord Justice Flaux and Justice Butcher considered the proper interpretation of 21 policy wordings issued by 8 insurers. The Court was told by FCA its decision would impact upon 700 types of insurance policies across over 60 different insurers affecting 370,000 policyholders.

The relevant provisions under the 21 policies were divided into 3 categories:

1. Disease clauses.
2. Hybrid clauses.
3. Prevention of access/similar perils clauses.

In this article we summarise a selection of some of the more interesting findings by the Court regarding the interpretation of some of the policy wordings within these 3 categories.

Disease Clauses

These policies contained provisions which in broad terms provided coverage for business interruption in consequence of, following or arising from the occurrence of a *"notifiable disease"* within a *"specified radius"* of the insured premises; in most cases that radius was 25 miles.

There was no dispute that by 6 March 2020, COVID-19 was a *notifiable disease* in all parts of the UK as defined in the relevant legislation enacted by the parliaments of England, Scotland, Wales and Northern Ireland. At issue was whether the restrictions ordered by the various UK governments resulting in business interruption losses was the result of:

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- an outbreak of COVID-19 within the designated radius of the insured premises; or
- the shutdown orders made by the government, whether or not there was a diagnosable outbreak affecting persons within that radius.

In relation to the policies where this was the relevant issue, the Court decided it was sufficient for there to have been an *"occurrence"* of the disease within the specified area when at least one person who was infected with COVID-19 was in the relevant area and that a diagnosis was not required. The justices held the disease occurred when it was sustained, not when it was diagnosed.

The next issue was whether, once the occurrence of the disease within the specified radius of the insured premise was established, was this an effective or proximate cause of the subsequent government shutdown producing the business interruption losses?

Senior Counsel for the FCA argued there was one indivisible cause, namely the disease, of which all the outbreaks across the UK formed part, or that there were many different concurrent causes none of which were excluded.

The insurers argued the government shutdown was the result of widespread occurrences of the disease not confined to the specified radius from the relevant insured premises. Only the effects of the disease occurring locally, and insofar as they can be distinguished, were covered.

The Court rejected the insurers' arguments and held the proximate cause of the business interruption was the notifiable disease of which the individual outbreaks form indivisible parts. Alternatively, that each of the individual occurrences was a separate but effective cause. On either interpretation, once it was established there was at least one person suffering from COVID-19 within the specified radius, it became a notifiable disease within the meaning of the policy which led to the government shutdown and consequent business interruption losses for which cover was available.

Other issues considered by the Court in this category involved:

- whether the occurrence of a notifiable disease was within the "vicinity" of the insured premises (not defined in the policy);
- whether the business interruption was the consequence of the manifestation / occurrence of the disease within the radius as opposed to its manifestation / occurrence outside the radius; and
- the application of policy extensions and exclusions.

The Court held that a notifiable disease may be said to have first *"manifested"* when a person displayed the symptoms of it, or when it was diagnosed.

There would no manifestation of the disease by someone who was asymptomatic and undiagnosed.

Hybrid Clauses

These policies contained terms which referred to the insured's inability to use the insured premises as a result of restrictions imposed by the government and to the occurrence or manifestation of a notifiable disease although not necessarily occurring within a specified radius of the insured premises.

The Court interpreted "restrictions imposed" by the relevant public authority (here, the government) in these policies to mean something which is mandatory which reinforces the conclusion that what is being referred to is something which has the force of law.

Applying this interpretation to the policy wordings, the Court held that only the consequences from restrictions imposed by statutory instrument were covered and did not include guidance, exhortation and advice given by the government, including the Prime Minister, as to social distancing.

Nor would cases be covered by the insurance policy where people decided not to visit the insured premises, notwithstanding they were legally permitted to do so, as these losses were not caused by any *"restrictions imposed"* within the meaning of the policy.

The Court also considered the meaning of an insured being *"unable to use"* its premises as being something more than being hindered in using or similar. There would not be an inability to use premises merely because the insured cannot use all of them. Equally, there would not be an inability to use the premises by reason of any and every departure from their normal use. However, partial use might be sufficiently nugatory or vestigial as to amount to an inability to use the premises. Whether that was so, the Court held, would depend on the facts of each case.

Other policies contained *"enforced closures"* clauses which the Court interpreted to mean when all of a part of the insured premises were closed under legal compulsion which would extend to include closure which either is or is legally capable of being enforced. The Court repeated its findings about advice or exhortations regarding social distancing being insufficient.

Prevention of Access / Similar Wordings

These policies provided cover where there had been a prevention or hindrance of access to or use of the insured premises as a consequence of government or local authority action or restriction.

The scope of cover was narrow in some of the policies within this category whereas it was wider in others. However, common themes emerged during the Court's analysis of each of those policies.

The High Court applied and followed earlier legal authorities concerning the definition of "prevention" and "hindrance" and the distinctions between them,

contrary to the submissions on behalf of the FCA who asked the Court not to follow those authorities.

"Impossibility", the Court found, was the touchstone of prevention as opposed to something being rendered more difficult which is what "hindrance" connotes.

Accordingly, it was held that what has to result from the government action or advice is the closure of the insured premises for the purpose of carrying on the business of the insured as defined within the policy schedule for there to have been a prevention of access to those premises.

By way of illustration, restaurant owners who continued to provide a takeaway service from the insured premises, even though no customers were allowed to dine at or in those premises, were not covered as they had not been prevented from access to the insured premises. They had not been closed down.

Similar findings were made in respect of access to insured premises being *"hindered"* where government restrictions on movement other than for permitted purposes did not impose any denial of or hindrance in access to insured premises.

This was particularly relevant to businesses whose employees worked from home during the pandemic in circumstances where this was government advice (not a restriction) and where the employees could have at any time accessed their office freely.

Further illustrations were given with respect to the 2 metre social distancing rule. The FCA argued there was hindrance in access to essential shops and supermarkets because only so many people were allowed in the shop at any one time and other people had to queue to get in while remaining 2 metres apart.

The Court held that, as the 2 metre rule was not contained in the Regulations or other statutory instrument and was thus only government advice or guidance, it cannot be said to have been imposed by government within the meaning of the relevant policies.

The judgment of the High Court also addressed issues pertaining to the applicability of the *"but for"* or *"proximate cause"* tests of causation, the *"prevalence"* of the disease within the relevant geographical area and the burden of proof on insured and insurer in each case.

Summary

The *"disease clause"* policies enjoyed a more favourable interpretation for insureds than those predicated on hybrid or prevention of access clauses.

The decision is expected to be influential in the Australian insurance marketplace noting there are currently two test cases already before our Courts, one of which was given leave to proceed directly to the NSW Court of Appeal involving AFCA and the Insurance Council of Australia, and another which is proceeding in the Federal Court involving business interruption claims by the Star Entertainment Group.

The Australian cases are also likely to consider the implications upon policy coverage for notifiable diseases, depending on whether the insurance policy referred to the *Quarantine Act 1908* (Cth), which has been repealed and replaced with the *Biosecurity Act 2016* (Cth).

A lot of policies in the Australian market had not been updated to refer to the new legislation prior to the COVID-19 outbreak. Each policy will likely be decided on its own facts and wording.

We await with interest the outcome of the Australian test cases in light of the UK decision.

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Historical Child Abuse Claims Must be Properly Pleaded and Particularised

Personal injury claims involving allegations of historical physical and sexual abuse upon a minor are fraught with difficulty. The alleged abuse may not be reported for several decades which creates a significant evidentiary problem for a claimant to establish an entitlement to damages or for a defendant to investigate those allegations and mount a considered defence.

This is particularly the case if relevant witnesses are deceased or if they are no longer available to respond to the allegations or give evidence.

Until recently, claimants also faced an insurmountable hurdle if their claim was statute barred with no option to apply for leave to extend the limitation period due to the effluxion of time. In 2016, the NSW Parliament abolished the limitation period for claims involving historical child abuse. However, a claimant must still discharge his / her onus of proof which can be difficult if evidence is no longer available. Questions of whether a fair trial can be held may still impede a claim for damages as we have considered in previous editions of GD News.

Another difficulty facing a claimant is that, if the claim is to be litigated in Court, it is necessary for the cause of action to be properly pleaded and particularised in accordance with established legal principles, especially if the claim is brought in negligence which is governed by the Civil Liability Act 2002 (NSW) ("CLA").

These principles regarding proper pleadings and particulars in a claim involving historical child abuse were recently considered by his Honour Justice Garling of the NSW Supreme Court in PWJ1 v The State of NSW.

In 2019, PWJ1 commenced Court proceedings at the NSW Supreme Court claiming damages from the State of NSW in respect of allegations of physical and sexual abuse whilst the plaintiff was a minor, between 1976

and 1979 when he was in the care and custody of various institutions for which the State was responsible.

The claim was brought in negligence and vicarious liability - the latter with respect to the intentional acts by the alleged perpetrators of the abuse.

Several attempts were made by the plaintiff to amend his claim which culminated in a Notice of Motion being filed seeking leave to file a Fifth Amended Statement of Claim joining two other defendants, namely:

- Salvation Army in respect of abuse which allegedly occurred in 1974 at Bexley Boys Home; and
- Anglican Home Mission in respect of abuse which allegedly occurred in late 1974 / early 1975 at the Charlton Boys Home in Ashfield.

The State of NSW and Salvation Army opposed the grant of leave to file the Fifth Amended Statement of Claim. The State however did not oppose the joinder of the additional defendants.

The Salvation Army also opposed being joined as a defendant.

The Anglican Home Mission did not oppose the grant of leave to file the Fifth Amended Statement of Claim nor did it oppose being joined as a defendant.

His Honour considered the relevant legal principles to establish the existence of a common law duty of care and vicarious liability in cases of this nature enunciated by the High Court in NSW v Lepore (2003) and Prince Alfred College Incorporated v AVC (2016). Based on these authorities, his Honour accepted a claim can be made out in certain circumstances.

However, the primary focus of his Honour's judgment dealt with the question of whether the proposed Fifth Amended Statement of Claim properly pleaded and particularised the claims against each proposed defendant, particularly with regard to the CLA and several NSW Court of Appeal decisions which have consistently mandated a requirement for pleadings to refer specifically to the various provisions of that Act.

Several allegations failed to identify with any precision either the identity of the alleged perpetrators or sufficient facts, matters and circumstances of the alleged abuse.

A pivotal issue was the requirement for the Statement of Claim to identify with some precision the relevant risk of harm. Justice Garling considered several NSW Court of Appeal decisions between 2012 and 2020 which consistently mandated this requirement.

His Honour stated:

> *"Because the CLA commences with an acknowledgement that there are a number of separate steps which must be taken to establish a breach of duty, each of these steps must be addressed in a pleading which is to be regarded as satisfactory. I have already called attention to the first step, which is that a plaintiff must identify and then plead the risk of harm against which he (or she) alleges a defendant would be negligent for failing to take precautions. The next step is to address by pleading each of the three elements in Section 5B(1) of the CLA."*

His Honour addressed each of the three elements under Section 5B(1) of the CLA regarding foreseeability, a not insignificant risk of harm and the conduct of a reasonable person with regard to Section 5B(2) and held the proposed Fifth Amended Statement of Claim was defective because it:

- did not include any articulation of the risk of harm to which Section 5B of the CLA applies;
- did not adequately plead the elements required to be pleaded and proved for a claim of negligence to which Sections 5B and 5C of the CLA apply;
- included irrelevant allegations of fact;
- failed to identify with respect to the alleged perpetrators at each of the institutions the existence of any relevant statutory powers being exercised by those institutions and any statutory functions or powers being exercised by the individuals. His Honour stated these statutory powers and functions were a necessary condition in determining the extent of the obligation between the institutions and the plaintiff and whether those institutions ought be held vicariously liable to the plaintiff;
- failed to identify the role of each perpetrator and the nature of their employment or engagement to establish such employment or engagement was sufficient to enable a conclusion of vicarious liability to be reached;
- resorted to generalisations and formulaic words and phrases without reference to particular facts, matters and circumstances;
- paid no regard to the requirements of Section 5D of the CLA regarding causation.

Garling J held the proposed Fifth Amended Statement of Claim failed to enable the Court or any of the defendants to understand satisfactorily the basis of the alleged liability of any of the defendants.

His Honour referred to an earlier High Court decision of Dare v Pulham (1982) in which the Court held:

> *"Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it ... they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial ... they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into Court ... the relief which may be granted to a party must be*

founded on the pleadings ..."

According to Justice Garling, the proposed pleading did not fall within the above description and could not be allowed to be filed. Leave was refused.

However, the Court granted leave for the plaintiff to have another attempt at filing a fresh Motion seeking leave to file a further proposed Amended Statement of Claim if it properly pleaded and particularised the claim against the proposed defendants.

This decision illustrates the necessity to properly plead and particularise a claim which is brought in negligence pursuant to the CLA even in claims involving historical child abuse which can often date back several decades to the time of the alleged abuse.

Evidentiary difficulties that may arise in such claims do not abrogate the requirement for a plaintiff to provide proper pleadings and particulars, especially particulars required to be pleaded under the CLA in compliance with the legal principles enunciated by the NSW Court of Appeal during the last decade, which Justice Garling helpfully summarised in his Judgment.

Identifying the relevant risk of harm is central to any pleading raising a cause of action in negligence under the CLA even if the claim involves historical child abuse dating back several decades. Failure to do so will jeopardise the entire claim and insurers should be on the lookout to ensure the claim has been properly pleaded and particularised where court proceedings have been commenced.

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A Win for Sneaker Lovers: Court considers lease termination during COVID-19

The recent NSW Supreme Court decision of *Sneakerboy Retail Pty Ltd trading as Sneakerboy v Georges Properties Pty Ltd [2020] NSWSC 996* has cast light on how courts may approach applications for relief against forfeiture of a retail lease during the COVID-19 pandemic.

Although the decision is far from being novel, it does provide some interesting commentary on the National Cabinet Mandatory Code of Conduct – SME Commercial Leasing Principles During COVID-19 (**Code**) and the *Retail and Other Commercial Leases (COVID19) Regulation 2020* (NSW) (**Regulations**).

Background

In March 2020, Sneakerboy was two months behind in rent, had failed to comply with its own rental payment plan and had begun removing its stock from the leased premises.

On 25 March 2020, the landlord Georges Properties sought to terminate the lease and re-enter the premises on the basis that Sneakerboy had failed to pay the rental arrears and had abandoned the premises.

Georges Properties also called upon the whole amount of the bank guarantee (which was more than the amount of the rental arrears).

Georges Properties took this action despite Sneakerboy informing it that it had only temporarily ceased trading for the health and safety of its customers and employees in light of the COVID-19 pandemic, and to update its technology in the premises whilst trade was reduced.

The lease was terminated prior to the announcement of the Code on 7 April 2020 and its incorporation into the Regulations on 24 April 2020.

Findings

The Court found that Sneakerboy had not abandoned the leased premises having regard to the COVID-19 pandemic and related public health measures. This then left the rental arrears as the only grounds upon which the landlord could terminate.

The Court granted relief against forfeiture on conditions that Sneakerboy fully reinstate the bank guarantee and pay the costs of Georges Properties in the proceedings.

That being said, the Court acknowledged that it would be unfair and inconsistent with the Code and Regulations to require Sneakerboy to immediately reinstate the bank guarantee and reserved judgment as to the appropriate timing for this to occur.

Commentary

Notably, the Court provided the following commentary on the Code and Regulations:

- if Georges Properties had terminated the lease in the period between the Code being announced and the Regulations coming into effect, it may have fallen foul of the good faith requirements imposed by the Code;
- if Georges Properties had terminated the lease on or after 24 April 2020, it would have been in breach of the Regulations;
- the Court acknowledged that its decision would likely disadvantage Georges Properties because the Regulations would require it to provide Sneakerboy rent relief following reinstatement of the lease from 25 March 2020, however this consideration did not change the Court's view; and
- the Court required the parties to make submissions as to the manner of rental relief that should be granted to Sneakerboy.

Key takeaways

- If a landlord terminates a lease on the basis that the tenant is in rental arrears, a court may grant

relief against forfeiture of the lease if the tenant pays the outstanding rent and the landlord's costs of the application;

- The grant of relief for forfeiture of a lease may be conditional upon the tenant reinstating a bank guarantee or other security;
- A Court may consider a tenant's ability to continue to honour its obligations under the lease when determining an application for relief against forfeiture; and
- Although the retrospective application of the Code and Regulations would prejudice a landlord's position, it is unlikely that these grounds alone will prevent a Court from granting relief from forfeiture.

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CONSTRUCTION ROUNDUP

Causation in loss arising from misleading and deceptive conduct

Section 82 of the Australian Consumer Law entitles a party to recover their loss caused by the misleading and deceptive conduct of another party in contravention of that law. The question arises as to the extent that the loss can be categorised as having been caused "by" the contravening conduct.

This issue was examined by the NSW Court of Appeal in a decision handed down on 24 September 2020.

Mistrina Pty Limited was the developer of a project to construct a mixed-use building at Brighton-le-Sands, NSW in 2010. BankWest provided $7.2 million of financing for the project, with a director of Mistrina (Mr Sikos) guaranteeing the developer's obligations under the loan facility and providing his family home as collateral.

Mistrina engaged Jabbcorp Pty Limited to design and construct the project. Jabbcorp in turn engaged an engineer, Australian Consulting Engineers Pty Limited (ACE), to provide and certify the structural design.

ACE duly produced a design and issued a certificate that the design complied with the Building Code of Australia and relevant Australian Standards, and the project proceeded in accordance with that design.

When around eight storeys of the structure had been erected, a resident of the neighbouring apartment block (who was a practising structural engineer) complained that the ongoing construction had been causing damage to the building. An enquiry established that the structural design of the building under construction was deficient, inappropriately applying loading on to the neighbouring building.

A stop work order was issued, halting construction while a solution could be found. A short while later, BankWest issued a demand for full repayment of the loan facility, although the loan was not yet repayable. Mistrina was not able to meet this demand, and the bank appointed receivers to the company, and took over the project.

A rectification solution was not able to be implemented until more than a year later. After the rectification works had been completed, BankWest sold the uncompleted development to another party for $4.975 million. It also took possession of and sold Mr Sikos' home worth $1.3 million, which it accepted as full satisfaction of the outstanding balance of the loan.

In the meantime, Jabbcorp had gone into administration.

Mistrina and Mr Sikos commenced Supreme Court proceedings against ACE, claiming that their losses on the project had been caused by ACE's misleading and deceptive conduct in issuing the design certificate.

ACE did not dispute that its conduct was misleading and deceptive in contravention of the Australian Consumer Law. Rather, it disputed that the plaintiffs' losses had been caused solely by its conduct. In this regard, ACE relied on the fact that the project had suffered some weeks' delay which had meant that it was unlikely to achieve completion until after the loan facility had expired.

The trial judge, Hammerschlag J, found against the plaintiffs, stating that he was not satisfied that there was sufficient evidence of BankWest's motivation in calling on the loan. However, his Honour held that if he had found for the plaintiffs, he would have applied a 15% discount to their entitlement to damages, to account for their contributory negligence in the way that they had managed the project.

Mistrina and Sikos appealed from Hammerschlag J's decision. ACE cross-appealed, contending that the discount applicable to any recovery of damages for contributory negligence should be 85% rather than 15%.

In the Court of Appeal, the appellants submitted that pursuant to the principles laid down by McHugh J in *Henville v. Walker* (2001) 206 CLR 459, they only needed to establish that ACE's conduct materially contributed to the loss, and it was sufficient that the contravention was "a" cause of the loss. ACE argued that the appellants' loss was not a reasonably foreseeable consequence of this conduct; to hold that it was a foreseeable loss would make the engineer the effective underwriter of a project in which it had a limited part, which could not have been the intent of the legislation.

Ward JA (with whom Leeming and McFarlan JJA agreed) held that the primary judge had erred in not determining that the structural design defect issue was a material cause of BankWest taking over the

development. Her Honour noted that had such a finding been made, the primary judge would have accepted that there was a relevant and requisite causal connection between the misleading and deceptive conduct and the loss that was sustained by the appellants.

Her Honour noted that BankWest's actions in exercising its rights had occurred at a time when:

- the project was almost complete, despite having previously experienced some delays and cost overruns; and
- there were no other serious issues which would have caused the bank concern; however
- the builder was unable to identify when the project would resume.

Ward JA stated that there was "an overwhelming inference to be drawn" that the cessation of the building works due to the structural design defect (and the existing uncertainty as to when the construction would be completed) was "a" material cause of the decision by BankWest to step in and exercise its rights under the security documents. Her Honour stated "*Indeed, to my mind, it might well even be permissible to infer that the defect was, in the events that happened, the only material factor that led to that decision*".

Ward JA also held that the loss suffered by the appellants was a reasonably foreseeable consequence of the misleading and deceptive conduct. Her Honour stated that the "overwhelming inference" that had been drawn on the question of causation applied equally: it was foreseeable even in a general way (if not more so) that the appellants would suffer damage, including the loss of the opportunity to make a profit on the development.

Her Honour noted that a secured creditor calling up its loan is "the very sort of event that could naturally arise" from delays, additional costs and the discovery of such significant structural defects, and she did not see that such a statutory construction could have the effect that professional service providers would thereby become unwitting underwriters of commercial risk, as ACE had suggested.

Accordingly, the decision of Hammerschlag J was set aside, and the appellants were awarded 85% of their losses.

Gillis Delaney Lawyers acted for the successful appellants in this case. At the time of receiving our instructions, the matter had been set down for hearing, but liquidators had been appointed to Mistrina, and Mr Sikos had tragically passed away.

We obtained funding to allow the proceedings to continue, strengthened the claims that had been made by the plaintiffs, supplemented the evidence in support of those claims, and represented the plaintiffs in a hearing conducted approximately ten years after the relevant events. Following the receipt of an adverse judgment at the primary level, we represented the plaintiffs in the NSW Court of Appeal.

Notwithstanding the challenges of the case (particularly the passage of time since the relevant events and the death of Mr Sikos), we were successful in establishing that Mistrina and the estate of Mr Sikos were entitled to compensation for the losses they had suffered as a consequence of ACE's conduct – a result that Mistrina's principals and Mr Sikos' loved ones would view as finally obtaining justice.

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All for One and One for the War Against Illegal Phoenixing

Over the past decade, builders and developers in Australia and particularly NSW have been heavily criticised for the unethical and 'dodgy' practice of illegal phoenixing.

'Illegal phoenixing' occurs when company directors move assets from one company to another to avoid debts or liability for issues like building defects leaving the owners with the bill when the company is liquidated.

In February this year, the Australian government enacted the much-anticipated *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth) which is aimed at curbing illegal phoenixing. The Act, amongst other things:

- introduces new criminal offences and civil penalties for company officers and who fail to prevent the company from making creditor-defeating dispositions and other persons that assist a company in making a creditor defeating disposition;
- allows liquidators to apply for a court order in relation to a voidable creditor-defeating disposition; and
- enables ASIC to make orders to recover, for the benefit of the company's creditors, company property disposed of or benefits received under a voidable creditor defeating disposition.

However, the impact on this legislation is yet to be tested.

In the meantime, parties continue to approach the courts to seek remedies in relation to these types of transactions. Recently the Supreme Court of NSW handed down the decision on *The Owners Strata Plan 97121 v RCBS Devco Pty Ltd* [2020] NSWSC 1247. In this case it was found that the sale of a lot in a strata scheme by the developer and the immediate distribution of the proceeds of sale were intended to defeat creditors.

The proceedings were commenced in the Supreme Court by the Owners Corporation of the strata scheme known as "Altitude" at 1 Boys Avenue, Blacktown against eight defendants. The first defendant, RCBS Devco Pty Ltd, was the developer and builder of Altitude and the second defendant, RCBS Land Co. Pty Ltd, was the original owner of the land. The remaining defendants were entities related to Mr Robert Cassab and Mr Brett Suttor (the directors and/or members of Devco and Land Co) including their family trusts and superannuation funds.

The development was completed in April 2018 with an interim occupation certificate being issued on 5 April 2018. Many of the residential lots had been pre-sold and Land Co had made a substantial profit in the financial year ending 30 June 2018 - most of which (if not all) had been distributed to its shareholders.

There were four commercial lots in the development and as at January 2020, Land Co still owned Lot 3, which had been previously valued at $1.336 million. Entities associated with Mr Cassab had also bought several residential lots in the development.

Between 7 January 2020 and 15 January 2020, the Owners Corporation held a series of meetings and ultimately engaged DEA Lawyers to provide legal advice about potential defects claims. Present at these meetings were Messrs Cassab and Suttor as members of the committee. The advice from DEA Lawyers identified, as one option, pursuing Land Co and Devco for the building defects under the warranty provisions of the *Home Building Act 1989* (NSW).

This is when in the words of Hammerschlag J "*Cassab and Suttor sprang into action*".

In the following week, Messrs Cassab and Suttor lodged an application with ASIC to deregister Devco, created a new company named Altitude G3 (the third defendant) and sold Lot 3 to G3 undervalue with settlement occurred immediately thereafter.

On the same day as the sale, Mr Suttor also authorised Pitcher Partners (their accountants) to immediately pay any monies received from the sale of Lot 3 into a designated bank account. This amount was then distributed between the Cassab and Suttor interests.

On 22 January 2020, with all the assets of Land Co now distributed, Messrs Suttor and Cassab lodged an application with ASIC to deregister Land Co.

On 28 January the Owners Corporation commenced proceedings against Land Co and Devco for breach of warranties under the Home Building Act.

The effect of the above transactions was that each of Mr Suttor and Mr Cassab, through their superannuation funds and family trusts, received back almost the same amount as they had paid for the purchase of Lot 3 (with adjustment for stamp duty and expenses), and Land Co and Devco were deregistered.

The Owners Corporation made an application to the Court for orders vitiating the sale of Lot 3 and to recover the proceeds of that sale.

Mr Suttor told the Court that the purpose of the sale of Lot 3 in January was not to devolve Land Co and Devco of assets, but to free up funds to pay a substantial tax bill incurred by Mr Suttor.

However, Hammerschlag J was not persuaded that this was the motivation for these transactions. The Judge concluded that sale of Lot 3 to G3 and the immediate distribution of the proceeds of sale was done with the intent to defeat creditors. His Honour looked at:

- the sale price of Lot 3 which was significantly lower than market value;
- the fact that "*the concept of deregistration had been the subject of advice from Pitcher Partners as early as 15 May 2019, with the target date of July 2019, but nothing was done until the somewhat frenzied activity after the potential defects claim became live*";
- the fact that no rational or logical explanation was provided for "the breakneck speed at which the transactions complained of were entered into and consummated".
- the fact that the account which held funds to pay the substantial tax liability was only short by $6,697.00; and
- that the transactions resulted in a net loss of approximately $50,000 to Mr Cassab's entities to raise a minimal amount for Mr Suttor's tax bill.

In particular, the Court found that despite the evidence provided by Messrs Cassab and Suttor, the objective contemporaneous circumstances (including the dates of the transaction against the background of the knowledge of Mr Suttor and Mr Cassab of the impending legal proceedings) undermined their credibility.

Whilst the Court has not yet made orders to void the transactions - this will be the likely next step.

As the courts and government continue to crack down on phoenixing activity not only in the construction industry but across all sectors of the economy, it will be incumbent on officers and directors to familiarise themselves with the legislative amendments as they can now be held personally liable for breaches and risk serious civil and criminal penalties.

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One Reason Why a Written Contract is so Important

In our newsletters, we often emphasise the need to properly record the agreed terms of a commercial transaction by means of a formal written contract or similar document. The benefit of doing so is clear: the parties embark on the transaction knowing with certainty their respective rights and obligations, and a dispute is therefore less likely to arise. Since the cost of preparing the formal contract is likely to be a lot less than the cost of litigating a later dispute, it makes commercial common sense to take this step.

Once again, a case has come before the courts highlighting how a failure to reduce to writing the precise terms of an agreement has led to neither party receiving what they wanted (or what they thought they were entitled to).

In Repfix Industries Pty Limited v. FBD Group Pty Limited [2020] NSWDC 514, FBD was the operator of a chain of kebab shops throughout Sydney. In mid-August 2015 FBD engaged Repfix to carry out renovations and new fitout works at three of its outlets: two at Sydney Airport and one at Rhodes.

Upon being approached by FBD to carry out the works, Repfix's Managing Director, Mr Anderson, told Mr Aras, a principal of FBD, that his estimate of the cost of carrying out the works at the three outlets would be $145,000, $300,000 and $80,000 respectively (a total of $525,000). No formal contract was entered into and the works proceeded. The final costings of the three projects totalled $635,435.20 (including GST). After allowing for deposits and additional payments already made by FBD, Repfix claimed the balance owing was $232,315.20.

FBD denied that Repfix was entitled to the amount it had claimed. FBD claimed that the three estimates had in fact been fixed prices for the work, for which Repfix had been overpaid $20,000 (which FBD now claimed back). FBD also claimed that Repfix's work was defective, and that it was entitled to the cost of rectification.

In the absence of a formal written contract, the Court looked at the evidence of the dealings between the parties in order to try to determine the precise terms of their agreement.

Mr Anderson gave evidence that after he had provided an estimate for each project, he and Mr Aras had discussed the basis for each estimate as well as FBD's budget for the work, and Mr Aras had instructed Repfix to proceed but had also said "please keep the costs down".

Mr Aras deposed that he had told Mr Anderson the budget for each project and a set price was agreed within each budget.

The Court also looked at an email Mr Aras had sent to Mr Anderson on 20 December 2015, after the dispute had arisen. By that email, Mr Aras had indicated that FBD was not willing to pay Repfix any more money until certain defects were fixed; however, he was also willing to negotiate a final price for the work. Importantly, in that email Mr Aras had not said that FBD was not entitled under their agreement to claim more than the amount of the estimates; instead he had described the amounts claimed as "unreasonable".

Abadee DCJ noted that contracts and contractual provisions can be inferred from the circumstances: Integrated Computer Services Pty Limited v. Digital Equipment Corp (Aust) Pty Limited (1988) 5 BPR 11. In this regard, a circumstantial inference can be drawn from the behaviour of the parties and the Court must assess the perceptions of a reasonable person standing in the position of each of the parties. Further, to some extent, post contractual conduct may assist in that that conduct might amount to an admission that a contract contained a particular term (as distinct from the separate question of the meaning of that term).

The difficulty in the present case was that it was the payment term (a fundamental provision of the contract) that was disputed. The question arose whether the contract was incomplete or uncertain and whether the Court should imply into the contract an obligation for each party to negotiate the contract price in good faith.

In its pleadings, Repfix had claimed that it was entitled to the amount of the estimate, plus additional payment for items originally excluded from the estimate. However, the obvious difficulty with this claim was that there was no evidence to indicate that FBD had agreed to pay Repfix for those excluded items.

In its submissions in Court, Repfix attempted to characterise the contract as a "cost-plus" one, under which it would be entitled to be paid the actual costs of the project plus a margin for profit and overhead.

However, there was no evidence that the parties had made provision for labour cost or overheads, which is typically part of a cost-plus arrangement.

Abadee DCJ found that the evidence did not support FBD's claim that the contracts included fixed prices in the amount of the estimates. In this regard, his Honour pointed to Mr Aras' email of 20 December 2015 and his statement that the claimed amounts were "unreasonable" as reflecting a mutual understanding that while verbal quotes had been originally provided, that amount might change following negotiations. By comparison, if a fixed price had been reached in relation to the three contracts, there would have been no need to look behind the cost breakdown for each project. Therefore, the Court rejected FBD's argument that the projects were subject to fixed pricing.

Abadee DCJ stated that there was much to be said for the view that the parties commonly intended that Repfix would be entitled to a minimum "floor" or "baseline" price, but that this was subject to being

altered by the parties agreeing, in good faith, to negotiate a higher price in the light of the work actually performed.

However, a further difficulty for Repfix was that there was nothing in the evidence to objectively indicate that the final amounts charged had been the subject of any negotiation rather than having been charged by its own unilateral stipulation (which was insufficient). The Court agreed that it was not appropriate to try to shift to FBD the burden of proving that these charges were unreasonable; however, the evidence adduced by Repfix of its costs contained obvious inaccuracies and was not supported by the appropriate source documents.

In the circumstances, the Court held that although the payment term requiring FBD to pay Repfix the amount of the estimates was not final and was subject to further negotiation, there was insufficient evidence that a binding consensus had been reached for the components of any "costs plus" arrangement or any other basis for payment beyond the agreed estimates.

Accordingly, the Court held that the price for each contract was the amount of the original estimate.

The Court also considered FBD's cross claim for reimbursement of the "overpayment" of $20,000.

Abadee DCJ noted that Mr Aras had given no explanation for making the overpayment, and FBD's action in doing so was inconsistent with its position that the contracts were subject to fixed prices.

It was submitted by FBD's counsel that it would be open to the Court to infer that FBD had made this payment in a fluid commercial context, where it was concerned about meeting its obligations under its lease and it needed to pay money to Repfix in order to prevail upon it to complete the project or to rectify defective works.

However, his Honour stated that if this was the reason for the payment, then there would be no proper basis for FBD to seek repayment of that amount, since FBD would have made that payment on a voluntary basis to protect its commercial interests. Accordingly, the Court held that FBD's cross claim failed and FBD was not entitled to repayment of the $20,000.

This case shows once again the importance of confirming in writing the terms of a commercial agreement. If the parties had entered into a standard form of contract for this type of work (easily and cheaply available), the miscommunication arising out of their initial conversations about the quotes would have been resolved before the work was performed, and before either party incurred or became liable for additional costs. The mechanism in such a contract for claiming and making payments would also have allowed the parties to track the amount that each project was costing, allowing intervention or further negotiation to ensure that the project continued smoothly. Instead, the parties have been subject to the stress and cost of litigation, which undoubtedly would also have been an unwelcome distraction from their core businesses.

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EMPLOYMENT ROUNDUP

Employer Unfairly Dismissed an Employee by Failing to Consider JobKeeper

COVID-19 has imposed on a number of employers significant hardship in continuing their businesses, keeping people employed and financially surviving.

The Australian Government introduced JobKeeper payments to allow employers to keep employees on their books rather than the employees being terminated and facing unemployment.

The Fair Work Commission in a recent matter of *Browne v MySharedServices Pty Limited* considered an Unfair Dismissal Application by the employee following his dismissal.

The employer had dismissed Browne and two other employees on the basis their termination was a genuine redundancy.

The employer raised a jurisdictional objection at the Commission on the basis Browne's unfair dismissal application could not succeed as the termination was a "genuine redundancy".

The employer was able to establish he no longer required the work Browne had done to be done by anyone else.

The Commission noted Section 396 of the *Fair Work Act 2009* sets out matters that must be determined prior to a determination of the merits of an unfair dismissal claim. One of those matters was whether the dismissal was a "genuine redundancy".

A person's dismissal will be a case of "genuine redundancy" if:

(a) the person's employer no longer requires the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and

(b) the employer has complied with any obligations in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

The Commissioner accepted the employer no longer required the role that Browne had performed to be performed by anyone else and as such the requirements of Section 389(a) had been met.

The Commissioner accepted the employer's evidence that the decision that it did not require Browne's work

to be done by anyone else was not made until 8 April 2020.

However the Commissioner was satisfied there was no consultation with any of the employees affected by the changed organisational requirements (including those employees who would have to absorb the work previously undertaken by Browne and others) to determine if any of the employees had anything to say about the change.

There was no evidence of the outcome that a proper consultation would have produced. However the Commissioner noted such consultation could have included:

- a proposed reduction in the hours of other staff which may have kept Browne in employment and/or:
- Browne being offered to take leave with or without pay; and/or
- consideration whether the employer could have benefited from JobKeeper which could have kept Browne employed.

In such circumstances the dismissal of Browne for redundancy was not a valid reason for dismissal as the consultation process did not take place.

The Commissioner noted the employer had also employed two further sales consultants in May 2020 which he considered may well have been opportunities for Browne to be redeployed. Whether Browne would have been suitable or capable of doing the sales work is generally speculative.

The Commissioner accepted at the time of Browne's termination the operation of JobKeeper was known and that the purpose of JobKeeper was to ensure employees and their employer maintained a relationship to minimise job losses and minimise redundancies. He accepted the employer may not have understood the operation of JobKeeper on 8 April 2020 however he concluded the dismissal of Browne was harsh and unjust.

Browne did not seek reinstatement. The Commissioner will consider compensation on receipt of submissions.

Employers, when considering redundancies, must take into consideration the purpose of JobKeeper when consulting with employees concerning redundancies. The downturn in employer's business caused by COVID-19 may well be temporary and Government announcements around JobKeeper clearly indicate it is a measure in place to assist employers not to have to make the decision to dismiss or terminate employment because of redundancy. The alternative to redundancies must be considered, especially where the Government is making the payments on behalf of the employer to keep the employment relationship continuing.

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WORKERS COMPENSATION ROUNDUP

Cruceanu v Vix Technology (Aust) Limited: Court of Appeal Dismisses Injured Worker's Appeal

In our February and March issues of GD News we reviewed an injured worker's unsuccessful appeal against the decision of an arbitrator of the Workers Compensation Commission and the operation of Section 352 of the *Workplace Injury Management and Workers Compensation Act 1998* ("1998 Act").

Our readers will recall that aggrieved with the outcome of the above, the appellant worker filed a Notice of Appeal in the NSW Court of Appeal pursuant to Section 353(1) of the *Workplace Injury Management and Workers Compensation Act 1998* ("1998 Act").

The appellant worker argued the President of the Commission, in dismissing his appeal, had erred in law thereby invoking the jurisdiction of the Court of Appeal.

The appellant worker's core submission was that the arbitrator at first instance had erred in his interpretation of the medical evidence and in effect the President on appeal repeated that error, thereby resulting in a miscarriage of justice.

The outcome of the appeal had significant ramifications for the injured worker who needed to establish a causal nexus between the disputed injury to his cervical spine and the subject work related injury in order to recover permanent impairment lump sum compensation.

If he succeeded , the impairment arsing from his disputed injury which had seen the worker's submission to surgery would likely see him reach the 15% whole person impairment threshold imposed by Section 151H of the 1987 Act so as to enable him to proceed with a claim for work injury damages.

Decision of NSW Court of Appeal

On 3 September 2020, the Court of Appeal comprising Basten JA, Meagher JA and Emmett AJA, handed down a majority decision (Basten JA dissenting) dismissing the appellant worker's appeal.

Meagher JA and Emmett AJA noted that it was submitted by the appellant worker that the arbitrator when dealing with his claim, and the President in considering his appeal, proceeded on a reading of a report by the worker's treating surgeon which was not available.

The appellant argued that as a result there had been a failure by the Commission to address the claim that the work accident had caused or contributed to the worker's cervical condition.

In dismissing the appellant's argument, the majority undertook its own review of the medical evidence in issue. Following that review the Court concluded it was open for the arbitrator at first instance to interpret that evidence as he had and to go on to find against the worker.

Focusing then on the analysis of the evidence by both the arbitrator and the President, the Court of Appeal concluded it was not satisfied the Commission had failed to address the appellant worker's medical case or that the President equally erred in not concluding that the arbitrator had misunderstood or failed to address that case.

Accordingly, there had been firstly no error in law on the part of the arbitrator in failing to respond to a substantial, clearly articulated argument in regard to the medical evidence in issue or a failure by the President on appeal to identify that error: *Dranichnikov v Minister for Immigration and Multicultural Affairs* [2003] HCA 26

Basten JA in a lengthy dissenting judgment agreed that to interfere with the decision of the President, the Court of Appeal must be satisfied the President had made an error in point of law.

That said, Basten JA proceeded to arrive at a different interpretation of the medical evidence which saw him depart from the opinion of the majority.

In the view of Basten JA, both the arbitrator and the President had adopted a reading of the medical evidence in issue which was not available.

Based on his interpretation of the evidence, Basten JA was of the view the arbitrator and then the President had failed to come to terms with the primary basis of the injured worker's appeal and so the appellant's complaint of error in point of law on the part of the President should therefore be upheld.

Comment

Section 353(1) of the 1998 Act provides a right of appeal to the Court of Appeal to a party aggrieved by a decision of the President "in point of law".

The decision of the Court in *Cruceanu* highlights the challenges faced by both employers and injured workers when considering an appeal against a decision of the Commission based on an interpretation of expert medical evidence.

On this occasion the employer and its insurer as represented by Gillis Delaney Lawyers were successful in its defence of the appeal although it cannot be said that a differently constituted Bench may have resulted in a different outcome.

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A Work Trip Injury Found Not To Be "In The Course Of Employment"

Sydney Hoist and Scaffolding Pty Ltd [2020] NSWWCC 290

Background

The worker, suffered a fall of approximately two metres while working with Sydney Hoist and Scaffolding Pty Ltd on 25 November 2016.

As a result of the fall, the worker suffered a serious right ankle injury and it was alleged that the incident had also caused an injury to his lumbar spine.

Liability for the right ankle injury was accepted by the insurer whilst the injury to the lumbar spine was disputed on the basis the worker's back injury did not arise out of his employment.

It was common ground that if there was an award for the respondent in relation to the disputed lumbar spine injury, the whole claim would fail.

On the worker's own medico-legal evidence, his right lower extremity injury did not exceed the 10% whole person impairment threshold for permanent impairment compensation prescribed by s66(1) if the *Workers Compensation Act 1987* (1987 Act).

The Issues

Section 4 of the 1987 Act that defines 'injury" to be – *"(a) …. personal injury arising out of or in the course of employment."*

In Castro, *"an injured worker must demonstrate that they suffered a sudden or identifiable pathological change in the claimed body part."* (*Casto v State Transit Authority (NSW)* [2000] NSWCC 12).

The Arbitrator correctly acknowledged that according to section 9A, the employer is only liable to pay compensation in circumstances where employment was a substantial contributing factor to injury suffered.

In *Rootsey v Tiger Nominees Pty Ltd* [2002] NSWCC [48], Nielson CCJ (as he then was) stated:

"employment must be a substantial contributing factor to the event causing the injury; that is, to the receipt of the injury, rather than be a substantial contributing factor to the ongoing incapacity."

The worker in his statement said he was very active before the accident, training at the gym, running and playing football on a regular basis. The worker submitted that the injury to the lumbar spine was a frank injury rather than a consequential injury. The worker denied any pre-existing lumbar spine injury or obtaining a CT scan for his lumbar spine prior to the accident.

The respondent's position was that the lumbar spine injury was a pre-existing condition based on the following:

- clinical note dated 9 October 2016 stating *"History: Chronic lower back pain flare-up after heavy lifting*" and a CT referral for his lumbar spine prior to the injury.
- there was no complaint of back pain immediately post injury. The first mentioned complaint of back pain after the accident was in January 2018. The first entry on a worker's compensation certificate referring to lower back problems was in July 2019.
- the only medical basis for the lower back being injured in the fall was Dr Conrad's opinion.

The Finding

The Arbitrator noted that treating doctors' notes are to be treated with caution. The arbitrator found it was difficult to believe that the worker carried on duties in the nature of his occupation as a rigger with lower back pain.

Further, the Arbitrator noted there was no other evidence in the six years of clinical records of any other complaint regarding back pain aside from the above mentioned.

The Arbitrator agreed with the worker's submission that the primary focus and that of the worker's treating doctors was the right ankle in the immediate aftermath of the fall and that focus does not preclude the worker from having suffered a lower back injury in the fall. The Arbitrator found that the absence of referral in the clinical notes to a back injury before January 2018 does not mean the worker was without some measure of pain post-accident.

The Arbitrator having found the worker to be a witness of truth, ultimately accepted the worker's explanation concerning his back complaints opposed to the submissions by the respondent which referred to contemporaneous documents.

The takeout from this case is that despite the lack of contemporaneous evidence by the worker and the respondent's evidence of a prior *"chronic"* back complaint, the worker was still successful in his application.

The Arbitrator's reasoning for the decision included the worker being a witness of truth and the notes of treating doctors being treated with caution.

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