GD NEWS / NOVEMBER 2020

IN THIS EDITION

Editors:


David Newey


Amanda Bond

GILLIS DELANEY LAWYERS
LEVEL 40, ANZ TOWER
161 CASTLEREAGH STREET
SYDNEY NSW 2000
AUSTRALIA
T: + 61 2 9394 1144
F: + 61 2 9394 1100
www.gdlaw.com.au

Who Left the Dogs Out?
Strata by-laws and Animals

The right to keep pets such as cats and dogs in apartment buildings has always been a controversial issue. More traditional Owners Corporations have been strongly against the idea and have had by-laws in place for many years banning pets. However, with the passage of time, the increasing prevalence of companion animals and the benefit of animals as companions generally (particularly where the traditional family unit is perhaps not as prevalent as it once was), in recent times the issue has become even more contentious.

The NSW Government is in the process of passing legislation that will have a profound impact on by-laws that prohibit animals being kept in strata premises.

In addition, the Court of Appeal recently considered the validity of a by-law banning pets in *Cooper v The Owners Strata Plan No 58068.*

Johanna Cooper and Leo Cooper, owners of an apartment in the Horizon Building, kept their miniature Schnauzer in their apartment in contravention of By-Law 14 of the Strata Scheme that stated:

> *"An owner or occupier of a Lot must not keep or permit any animal to be on a Lot or on the Common Property."*

The Coopers initially commenced proceedings in the NSW Civil and Administrative Tribunal ("NCAT") seeking a declaration the by-law was invalid. The Coopers argued that the ban on animals on a lot or common property contravened Section 139 of the *Strata Schemes Management Act 2015* (NSW) which provides that a by-law must not be harsh, unconscionable or oppressive. The Coopers were initially successful before NCAT however the Appeal Panel of NCAT set aside the initial Orders made by the Senior Member.

The Coopers appealed to the Court of Appeal.

That appeal was successful.

The Court of Appeal noted that Section 139 of the

Strata Management Act specifically prohibits by-laws from preventing the keeping of a companion or assistance animal in an apartment.

In addition, Justice Basten in his judgment noted that the Coopers' argument was that Section 153 of the *Strata Management Act* created an obligation on owners and occupiers of lots not to *"use or enjoy the lot or permit the lot to be used or enjoyed in a manner or for a purpose that causes a nuisance or hazard to the occupier of any other lot".*

Evidence was also called in relation to the identity, size and nature of the Cooper's dog. Importantly, the dog was not creating any issues for other apartment residents.

In his judgment, Macfarlan JA stated:

> *"For a by-law to restrict a lot owner in the enjoyment or exercise of his or her rights incident to ownership would in my view be "harsh, unconscionable or oppressive" at least where the restriction could not on any rational view enhance or be needed to preserve the other lot owners' enjoyment of their lots and the scheme common property.*
>
> *The by-law at issue in the present case (by-law 14) imposes a blanket prohibition (save in respect of assistance animals) on keeping any animal, or permitting it to be, on any lot or the common property. Its scope is broad enough to prevent lot owners using their lots in a way which could not, on any rational view, adversely affect other lot owners' enjoyment of their lots or the common property. The keeping of goldfish in a secure aquarium was an obvious example given in the course of submissions in this Court. Other examples, such as the keeping of a small bird in a cage, could also be given.*
>
> *The keeping in units of many other types of animals could however of course adversely affect other lot holders' enjoyment of their unit, barking dogs being an obvious example. ...*
>
> *The Court's role does not extend to reformulating an invalid by-law or making suggestions as to alternative forms of by-law that might be valid. It is sufficient that the subject by-law is readily capable of operating in a manner that is "harsh, unconscionable or oppressive". That it may in some circumstances operate fairly cannot save it from invalidity. ...*
>
> *I agree with Basten JA that the possible administrative convenience for the Owners Corporation or Strata Committee that might result from a blanket ban could not justify interference with the ordinary rights of lot owners by means of the subject by-law."*

So, what in fact does the decision mean?

Contrary to some media reports, the decision does not mean that any apartment resident can go out and buy an adorable dog like Elmo.

Good news for Elmo as long as he behaves

That is made clear by Justice Macfarlan in his judgment. A barking dog or loudly squawking bird will obviously affect neighbouring apartments. Further, tenants who rent properties that are part of a strata scheme will still require their landlord's permission to keep a pet.

What is however clear is that it will no longer be sufficient to draft a by-law that provides a blanket ban on pets. By-Laws in place providing a blanket restriction are invalid. New by-laws will need to be made by strata owners to restrict the entitlement to keep pets and for those by-laws to be effective they will need to limit restrictions to animals that adversely affect other lot *owners.* Care will need to be taken by strata committees in drafting by-laws to replace the invalid by-laws so that any replacement by-laws are not found to be harsh and unconscionable and therefore invalid.

It remains to be seen whether special leave to appeal the decision to the High Court will be sought by the Owners Corporation but we doubt that will be the case with new legislation before parliament.

The *Strata Schemes Management Amendment (Sustainability Infrastructure) Bill* 2020 is currently before NSW Parliament which when passed will also have an impact on the right to of owner corporations to pass by-laws restricting the right to keep animals. The Bill originated in the Legislative Assembly and the following amendment has been consented to by the Legislative Council:

137B Keeping of animals

(1) A by-law has no force or effect to the extent that it purports to unreasonably prohibit the keeping of an animal on a lot.

Parliament has considered but rejected a further provision to be included in s137B which was in the following terms:

(2) The keeping of a particular animal on a lot is reasonable unless the owners corporation can show that it is not in the best interests of the animal taking into the accounts of the animal, including exercising feeding and toileting.

The reverse onus of proof that would have been placed on owner corporations to prove it was not in the

interests of an animal to be kept is unlikely to find favour with the majority of Parliament.

The Bill will be further considered by the Legislative Assembly shortly.

It will be interesting to see how this story develops.

Amanda Bond
asb@gdlaw.com.au

Opal Tower: Federal Court finds builder entitled to indemnity under two insurance policies

Queen Elizabeth II gave a famous speech in which Her Majesty described the year 1992 as her *"annus horribilis".* As we approach Christmas, many people may feel the same way about 2020!

For residents of the Opal Tower in Sydney Olympic Park, 2018 may have been their own *annus horribilis* the effects of which are still being felt. On Christmas Eve 2018 major cracks were observed across three floors of the building. The incident forced the newly moved in residents to be evacuated. On Christmas Day most residents were permitted to return to their apartments but they were evacuated again two days later.

The builder for the Opal Tower Project was Icon Co (NSW) Pty Limited ("Icon"). Following the above incident, Icon entered the site and undertook rectification works. Residents were progressively allowed to return to their apartments throughout 2019.

A class action has been commenced in the NSW Supreme Court by certain lot owners of the Opal Tower against Sydney Olympic Park Authority which has filed a cross claim against Icon. As at February 2020, Icon has paid out in excess of $31 million as a result of the incident including approximately $17 million in property rectification costs, $8.5 million in alternative accommodation costs and $530,000 in legal fees associated with defending the cross claim in the class action.

Icon sought indemnity under two insurance policies regarding the above costs. The first policy was effected with Liberty Mutual Insurance Company Australian Branch t/as Liberty Special Markets ("Liberty") in 2015/16. Relevantly, the Liberty policy was in place at the time of commencement of the Opal Tower contract.

The second policy was effected with QBE Underwriting Limited as managing agent for Underwriting Members of Lloyds Syndicates 386 and 299 ("QBE") for the period 20 September 2018 to 31 December 2018. Relevantly, the QBE policy was in place at the time of the incident.

Liberty declined indemnity on the basis that the incident occurred after the date of practical completion and the policy did not extend cover to include damage occurring during the defect liability period. QBE declined indemnity on the basis that the damage to the Opal Tower building did not constitute damage to a "product" of the insured within the meaning of the insuring clause.

Icon brought proceedings at the Federal Court in Melbourne to challenge the decisions by each insurer. The matter proceeded to hearing before his Honour Justice Lee over six days in May and June 2020, with judgment recently delivered on 19 October 2020 (*Icon Co NSW Pty Limited v Liberty Mutual Insurance Company Australian Branch t/as Liberty Specialty Markets*).

The Liberty Policy

Between 2012 and 2018 Icon engaged Austbrokers to obtain material damage contract works and third party liability insurance. During that period Liberty engaged Chase Underwriting Pty Limited ("Chase") to effect insurance policies on Liberty's behalf. Icon did not deal directly with Liberty in relation to its insurance program. All communications as to the Liberty policy were between Austbrokers and Chase.

In September 2012, Austbrokers issued Chase with a quotation slip seeking a quotation for both contract works and liability policies of insurance. Chase then forwarded the quotation to Liberty. Between 2012 and 2017, Austbrokers notified Chase by email of any new construction projects to be included in the Liberty policy. Chase would notify Liberty. Chase would then issue a policy endorsement to confirm the addition of the new project to the policy.

In November 2015 Austbrokers sent Chase an email confirming that Icon had been awarded the Opal Tower contract. The email provided particulars including that the project had a 12 month defect liability period. On the same day, Austbrokers sent Icon Certificates of Insurance confirming that contract works and public and product liability insurance had been arranged for the project for the period of insurance between 16 November 2015 to practical completion which was estimated to be 10 August 2018 plus a 12 months maintenance period.

However, when Chase informed Liberty of Austbrokers' notification to include the Opal Tower Project in the annual Liberty policy, Chase did not refer to the 12 month defect liability period. In December 2015, Chase sent Austbrokers an email confirming cover was in place for the period 16 November 2015 to 10 August 2018 but made no mention of cover including the additional 12 months defect liability period.

Icon mounted three arguments at the hearing before Justice Lee, two of which were unsuccessful. This article will focus on the third argument in which Icon claimed equitable relief to rectify a mistake in the insurance contract and to reflect the common intention of the parties to include cover for damage occurring during the 12 months defect liability period. Icon bore

the onus to establish, by clear and convincing proof that, at the time of execution of the insurance contract, the parties had a common intention to conform to an agreement and that the written instrument did not reflect the agreement because of a common mistake.

Justice Lee was satisfied that Austbrokers was an agent of Icon such that the intention of the Austbrokers manager, when entering into the Liberty policy and in negotiating and contracting with Chase, should be attributed to Icon as principal. Similarly, his Honour held that Chase had actual authority to place insurance on behalf of Liberty and, as such, its intentions were to be attributed to Liberty to ascertain whether there was a common intention held between the parties for the purpose of the rectification claim.

The Court heard evidence from an experienced insurance broker in the insurance construction sector in Australia and UK who stated it was common knowledge amongst insurance professionals that:

- public and products liability insurance for the construction industry, when purchased on an annual basis by contractors and builders, is purchased in one of two ways: either a "contracts commencing" basis or a "turnover" basis;
- contracts commencing policies provided cover for the project until works are completed plus the relevant defects liability period even if the latter occurs after the annual period of insurance has expired.

The Austbrokers' manager said he understood the Liberty policy to be a "contract commencing policy" as opposed to a "turnover policy". There was evidence before the Court that the Chase manager held the same view even though the insurance documents he issued failed to reflect this. Liberty did not call evidence from anyone at Chase.

The Liberty manager gave evidence suggesting the policy was never intended to include the defect liability period contrary to clear and unequivocal statements he made in several email communications with Chase to the effect that the Liberty policy was understood to be a contracts commencing policy rather than a turnover policy.

Justice Lee preferred the evidence of the Austbrokers manager over that of the Liberty Manager and held that when the Liberty policy was effected there was a common intention between Icon and Liberty that the policy would cover Icon for damage to the Opal Tower Project including during the 12 month defect liability period. A declaration was therefore made that Icon was entitled to have the contract of insurance rectified to reflect the common intention of the parties.

The QBE Policy

Austbrokers also effected a liability policy with QBE for a three month period between September and December 2018. The incident occurred during that period. QBE declined to indemnify Icon on the basis that the damage to the building did not constitute a "product" within the meaning of the insuring clause.

"Product" was relevantly defined in the QBE policy to be *"any product or thing ... sold, supplied, erected, repaired, altered, treated, installed, processed, grown, manufactured, assembled, tested, serviced, hired out, stored, transported or distributed ..."*

Icon argued the Opal Tower building and each of its parts was a thing that was supplied, installed, manufactured or erected by Icon in the course of Icon's business. Icon relied upon a decision of the Victorian Supreme Court in *Metricon Homes v Great Lakes Insurance*, in which it was held that a residential house constructed by an insured builder and each of its component parts was an insured product for the purpose of an insurance policy.

QBE contended that a building is not a "product" or "thing" in their normal ordinary usage. QBE further relied upon the absence of the words "built" or "constructed" in the definition of "product". Justice Lee rejected QBE's contentions. His Honour stated:

> *"I simply cannot see how the Opal Tower and its constituent parts cannot be supplied, installed, manufactured or erected. Icon is a construction company. Such companies erect buildings, and in doing so, they supply to their clients a completed building, which involves it installing many components which have been manufactured by a number of different subcontractors. The absence of the words "built" or "constructed" are therefore of no moment."*

For these reasons, the Court held the incident was in connection with a product of Icon with the consequence that Icon was entitled to indemnity under the QBE policy.

This interesting decision is significant for Icon noting the quantum of the claim and illustrates how a Court can rectify a contract of insurance if the insurance documents fail to reflect the parties' common intention regarding policy coverage. Also significant was the policy interpretation adopted by the Court to find the "building" to be a "product", consistent with previous authorities which held a residential house was a "product" within the meaning of an insuring clause.

Darren King
dwk@gdlaw.com.au

NSW Supreme Court sheds more light on Child Sexual Abuse Claims

During the past month there have been two further decisions of the NSW Supreme Court involving claims for damages arising from allegations of historical child sexual abuse.

Case 1

In PM v The Council of Trinity Grammar School, PM commenced proceedings in 2018 claiming damages for physical and sexual assault from the school with respect to sexual and physical assault by a teacher in about 1975 whilst PM was a Year 6 student. The school is the only defendant. The alleged perpetrator has not been sued.

PM filed a Motion seeking leave to file and serve a Fourth Amended Statement of Claim. The school opposed the order for leave on the basis the proposed pleading was defective. The Motion proceeded to hearing before Justice Garling.

His Honour observed the proposed pleading included particulars of PM's claim against the school in negligence and vicarious liability. Garling J noted that, in respect of the claim in negligence, the *Civil Liability Act 2002* (NSW) ("CLA") applies and the legal principles regarding proper pleadings and particulars, which his Honour outlined in his earlier decision of *PWJ1 v The State of NSW* were equally applicable to this case.

We summarised his Honour's earlier decision in *PWJ1* in last month's edition of GD News. In short, Justice Garling emphasised that a claim for damages involving allegations of historical child sexual abuse must still be properly pleaded and particularised and where the CLA applies, the pleadings must articulate the statutory requirements under Sections 5B and 5D.

In particular, the pleading must articulate the risk of harm and set out the relevant facts which will, if proven, establish foreseeability within the meaning of Section 5B.

The proposed Fourth Amended Statement of Claim failed to articulate the risk of harm and was, according to his Honour, deficient with respect to allegations sufficient to establish foreseeability.

Garling J stated:

> *"The absence of a risk of harm being pleaded specifically means that the proposed pleading is defective and would, if allowed, be likely to be struck out. The second reason for refusing a grant of leave is that the pleading does not contain any clear allegation that the risk of harm was foreseeable."*

The Court refused to grant leave but permitted PM, if so advised, to file a further Motion seeking orders permitting the amendment of the Statement of Claim once properly particularised. His Honour made a further curious statement:

> *"Whether a claim for vicarious liability against an institution, such as Trinity, is caught by the CLA is a question which is as yet unresolved by any authority ... I regard the question of whether the CLA applies to claims for vicarious liability as being, at present, an open one."*

It is unclear whether his Honour had regard to Section 3C of the CLA which states:

> *"Any provision of this Act that excludes or limits the civil liability of a person for a tort also operates to exclude or limit the vicarious liability of another person for that tort."*

It would appear that Section 3C of the CLA is determinative of the question raised by his Honour. Civil liability for an intentional tort committed by a perpetrator involving sexual assault upon a minor is excluded by Section 3B of the CLA. It follows that Section 3C excludes the vicarious liability of an institution for the acts of the perpetrator in that event.

Case 2

The day after judgment was delivered by Justice Garling in *PM*, her Honour Acting Justice Schmidt delivered judgment in *Plaintiff A and B v Bird; Plaintiff C v Bird; Plaintiff D v Bird*.

A is the mother of B. C is the mother of D. B and D attended the Footprints Childcare Centre owned by Little Pigeon Pty Limited, a company of which Bird was a 1% shareholder and his daughter was a 99% shareholder (and director).

B and D attended the childcare centre between 2008 and 2010. Bird was arrested and charged with two offences involving another child who had made disclosures about him. B and D were removed by their mothers after those disclosures were made. B and D and other children later made disclosures about Bird which resulted in Police investigations and criminal charges being laid against him in relation to B and another child, although no charges were laid in relation to D.

A, B, C and D sued Bird, Little Pigeon and its director for damages in negligence and vicarious liability. A and C also pursued claims for breach of contract against Little Pigeon. B and D also claimed damages against Bird in assault.

Her Honour's judgment went into considerable detail regarding the admissibility of evidence arising from statements and other materials obtained during the criminal investigation and prosecution against Bird including statements by Bird and the children.

In this article we focus on how Acting Justice Schmidt approached the Court's task of determining whether the claims in negligence and vicarious liability were made out.

Negligence – B and D

There was no issue that B and D were owed a duty of care which required Little Pigeon to exercise reasonable care to prevent the foreseeable risk of harm by exposing the children to sexual abuse by Bird. It was alleged there was a failure to properly supervise Bird and that he should never have been left alone with the children.

Schmidt AJ was satisfied these allegations were made out and found Little Pigeon (and its director, Bird's daughter) breached their duty of care to the children. Her Honour also had little difficulty finding causation was established.

Negligence – A and C

Section 32 of the CLA applies to pure mental harm claims. The section provides that a duty of care is not owed to another person to take care not to cause mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken.

In relation to A, Schmidt AJ noted that when B started at the Centre, A asked the staff to ensure extra precautions were taken to avoid her child being left alone with male staff. These fears were heightened when B began to display inappropriate behaviour towards her. Her Honour was satisfied that Little Pigeon and its director ought to have foreseen that a person of normal fortitude in A's position might suffer a recognised psychiatric illness if reasonable care were not taken.

Acting Justice Schmidt reached the same conclusion in relation to C. The Court found that breach of duty and causation were established for the same reasons as the claims involving B and D, and further held each mother suffered a recognised psychiatric illness within the meaning of Section 32 of the CLA.

Vicarious Liability

Little Pigeon and its director argued that Bird was a volunteer, not an employee, and as such there could be no finding of vicarious liability.

Each plaintiff relied upon UK authorities to submit that vicarious liability ought to apply to harm done by an individual who carried on activities as an integral part of a business and for its benefit rather than as part of the conduct of a recognisably independent business of his/her own, or of a third party, where the commission of the wrongful act is a risk created by the assigned activities.

This principle was applied in a decision of the High Court of England and Wales earlier this year where the Court held a football club vicariously liable for abuse committed by an unpaid volunteer (*DSN v Blackpool Football Club Ltd*).

According to Acting Justice Schmidt it was unnecessary to decide that issue because her Honour found Bird to have been an employee in accordance with principles established by Australian High Court authority in *Hollis v Vabu*, even though he was not paid a wage. Applying the principles in *Prince Alfred College v ADC*, her Honour held Little Pigeon and its director were vicariously liable for Bird's acts of abuse upon B and D.

However, Schmidt AJ also stated:

> *"If I had not reached this conclusion [that Bird was an employee] I can see no reason, in principle, why there should not have been vicarious liability for his acts, given the tests discussed in Prince Alfred College and 'the orthodox route of considering whether the approach taken in decided cases furnishes a solution to further cases as they arise' there discussed."*

The Court proceeded to assess significant damages at common law for the claims by B and D and under the CLA for the claims by A and C.

Although the Court did not need to consider whether the Australian common law would recognise vicarious liability for the acts of a volunteer, this case illustrates how the law continues to develop in this area given her Honour's comments suggesting she would have so found had that issue arisen for consideration.

Plaintiffs are increasingly relying on UK decisions concerning vicarious liability which is likely to be tested at some point in our High Court. When that happens, it will be interesting to see if the Court will expand on the principles enunciated in *Prince Alfred College* and consider following recent UK developments. This issue has become even more interesting with this week's announcement of two new High Court justices being appointed to take their seats on the Court in December 2020 and March 2021.

Darren King
dwk@gdlaw.com.au

Tenancy Relief Scheme Extended – Important Updates for Landlord and Tenants

The new *Retail and Other Commercial Leases (COVID-19) Regulation (No 2) 2020* (**No2 Regulation**) came into effect on 24 October 2020 and extends the current regime for commercial landlords and tenants to negotiate rent relief in respect of leases which have been affected by COVID-19.

The main effect of the No2 Regulation is to extend the restrictions on lessors exercising certain rights during the COVID-19 pandemic until 31 December 2020.

Set out below is a brief summary of the No 2 Regulation including the material changes which have been introduced.

Restrictions on Landlord Rights

The No2 Regulation continues the principles contained in the Federal Government's National Mandatory Code of Conduct for commercial tenancies. Consequently, a landlord under a commercial tenancy may not do any of the following until 31 December 2020:

- terminate or evict a tenant for failing to pay rent;

- terminate or evict a tenant for not operating businesses during the hours specified in a lease; and
- increase the rent during the prescribed period.

Eligibility of Tenants for Relief and Landlord Concessions

It is important to note however that rent relief arrangements which were obtained under the No1 Regulation will not be automatically extended. Tenants who may be eligible for rent relief will need to approach their landlord and re-establish their eligibility for rent relief until 31 December 2020. Furthermore, such negotiations may not relate to a period where rent has already been reduced, waived or deferred.

From 24 October 2020, in order to be eligible for rent relief under the No 2 Regulation, a tenant must be an "impacted lessee" which will be determined by whether it is eligible under JobKeeper 2.0. The threshold requirement for turnover in the 2018-2019 financial year at less than $50 million assessed at a group level has been retained. Consequently, tenants must. 'retest' and qualify under JobKeeper 2.0 in order to remain eligible for rent relief under the No 2 Regulation.

However, Tenants who did not qualify for relief up to 24 October 2020 may be able to qualify if the Tenant meets the eligibility criteria during the extended period.

Landlords will also be able to receive a land tax concession of up to 25 per cent where they provide additional rent relief to commercial and residential tenants who have suffered financial hardship during the extended October-December 2020 period. Landlords who reduced rent between April-September this year will be eligible for this additional concession.

Lessor's obligation to renegotiate

Under the No 2 Regulation, either party (i.e. landlord or tenant) to an impacted lease may make a second or subsequent request for the other party to renegotiate the rent payable. Unless the parties agree otherwise, a second or subsequent request may be made only if:

- that request is made during the prescribed period; and
- that request does not relate to rent for a period for which the rent has already been reduced, deferred or waived under a regime relating to tenancy relief.

If a request to renegotiate is made, a party to an impacted lease is now required to commence renegotiations within 14 days of receipt of the request, or another period agreed to between the parties.

The No 2 Regulation also clarifies that where a renegotiation is commenced but not concluded before 31 December 2020, the renegotiation may be continued and concluded after that date.

Key Takeaways

The ability for tenants to an impacted lease to initiate a second or subsequent request to renegotiate, is likely to lead to landlord's experiencing an influx of requests for rent relief.

Additionally, landlords must be conscious of their obligations to commence renegotiations within 14 days of receipt of the request. A failure to respond to these requests within the prescribed period will lead to a risk of compliance with the No2 Regulation.

Gerald Carides
gpc@gdlaw.com.au

Could Temporary Changes Allowing Virtual AGM's and Electronic Execution Stick?

Following temporary changes to meeting and execution requirements implemented in response to the COVID-19 pandemic, the Commonwealth Government has released draft legislation to extend the changes and make them permanent.

The *Corporations Amendment (Virtual Meetings and Electronic Communications) Bill 2020* (Cth) (**Bill**) proposes to allow electronic means or alternative technologies to:

- execute company documents (including deeds) and documents relating to meetings;
- hold meetings of directors and shareholders of a company;
- record, keep and provide minutes; and
- provide notice of a meeting and give other documents relating to meetings to the prospective attendees.

Key Changes

The Exposure Draft Explanatory Materials provide the following comparison of the key features of the new law and current law.

New law	*Current law*
Company documents executed both with and without a seal may be executed using electronic means. If the document is executed by affixing a company seal, electronic means may be used to witness the fixing of the seal.	To execute a company document, all persons must physically sign the same hard copy. Temporary relief was granted previously.
Directors meetings and shareholders meeting may be held using electronic means provided that all persons have a reasonable opportunity to participate.	Meetings must generally be held at a physical location. Temporary relief was granted previously.

New law	*Current law*
Documents relating to a meeting may be given electronically if it is reasonable to expect that the document would be readily accessible so as to be usable for subsequent reference at the time that it is given.	Documents relating to a meeting must be posted unless the member has agreed to the document being sent via email or fax and the specific requirements in the Corporations Act are met. Some documents may only be provided by post.
The document must either be sent to the electronic address provided by the member or another electronic address that the sender believes on reasonable grounds to be the person's electronic address. Alternatively, the sender could provide the person with details sufficient to allow them to view or download the document (either electronically or via traditional means).	Temporary relief was granted previously.
The minutes for meetings of shareholders may be taken electronically and the minute book may be provided to shareholders and kept electronically.	In general, minutes must be kept in hard copy.
The minutes for virtual meetings of shareholders must include any questions or comments submitted by a shareholder (before or during the meeting).	No equivalent.

Key takeaways

If legislated:

- electronic execution of company documents (including deeds) would be permitted (subject to certain criteria);
- the decision in Bendigo and Adelaide Bank Limited & Ors v Kenneth Ross & Anor [2019] SASC 123 where it was held that all persons needed to sign the same single, static document would be reversed;
- meetings of companies can continue to be held as virtual meetings (subject to certain criteria); and
- "split execution" (i.e. where directors and/or the company secretary print out and sign separate copies of the same document) will continue to be expressly permitted.

Further information on virtual meetings and electronic execution (namely procedural requirements) is contained in our June 2020 newsletter.

Jack Tasker
jwt@gdlaw.com.au

Administrators Trading on in Premises and Lessors Rights in the Event of Liquidation

With the rise of illegal phoenix activity, the recent decision of Federal Court provides useful guidance as to when search and seizure warrants will be granted to liquidators under section 530C of the *Corporations Act 2001* (Cth) (the **Act**). While this provision may be helpful to overcome a lack of cooperation from directors, the decision in *Scott (Liquidator) v Southern Highlands Waste & Recycling Pty Ltd, in the matter of All City Recyclers Pty Limited (in liq)* [2020] FCA 712 makes it clear that such warrants will be granted as a last resort and only where there is sound and persuasive evidence that company property has been removed and its return to the custody of the liquidator will be prevented or delayed.

Section 530C of the Act

A Court has a discretion to order a search and seizure warrant under section 530C of the Act, if it is satisfied that the following elements have been met:

- a company is being wound up or a provisional liquidator of a company is acting; and
- on application by the liquidator or provisional liquidator (as the case may be) or by ASIC, the Court is satisfied that a person:
  - has concealed or removed property of the company with the result that the taking of the property into the custody or control of the liquidator or provisional liquidator will be prevented or delayed; or
  - has concealed, destroyed or removed books of the company or is about to do so.

Facts

All City Recyclers Pty Limited (in liq) (**ACR**) and ACN 106 976 354 (in liq) (formerly named Anderson Waste Services Pty Ltd (**AWS**)) were placed into liquidation on 18 December 2018 and 13 February 2019, respectively. The companies were involved in a waste

management and metal recycling business and had operated from the same premises.

ACR and AWS ceased operating their businesses in March 2016 and shortly thereafter, the respondent, Southern Highland Waste & Recycling Pty Ltd (**SHW**), was incorporated in April 2016. SHW, ACR and AWS all shared a former director and sole shareholder. SHW operated the same type of business, namely waste management and metal recycling, from the same premises being a yard in Moss Vale, traded under the same name of 'Anderson Waste Services' and operated on a website owned by ACR.

During their investigations, which had been frustrated by a lack of cooperation from the directors of ACR and AWS, the liquidators ascertained that SHW was using plant and equipment including trucks, trailers and forklifts belonging to ACR and AWS for which there had been no transfer under contracts of sale.

The liquidators had requested details of all of SHW's assets and sought a formal undertaking from SHW not to dispose of them. SHW's solicitors (who had also previously acted for ACR and AWS) failed, despite repeated requests to provide a list of those assets or a formal undertaking not to dispose of them.

On 30 April 2020, the liquidators sought an order of the Court for the issue of a warrant to search and seize plant and equipment which they claimed was property of the two companies.

The Court's decision

The Federal Court considered that it was appropriate for the application to be brought *ex parte* as providing notice of the possibility of the application for a warrant may have frustrated its purpose and led to a risk of the respondent dealing with the assets.

As to whether the elements of s530C of the Act were met, the Court found that the first two elements were clearly met, as both ACR and AWS had been wound up and the application for the warrant was brought by its liquidators.

The Court held that the third element, requiring property to be concealed or removed, will be satisfied if there is "*a very real possibility the assets of the company have been taken over without any proper accounting*"[3] or if "*property has been transferred to another company without proper accounting and is being used in another company's business*".[4]

Justice Jackson held that the third element, which requires property to be concealed or removed, will be satisfied where there is *"a very real possibility the assets of the company have been taken over without any proper accounting" (Vartelas v Kyriakou* [2009] FCA 1489 at [7] or if *"property has been transferred to another company without property accounting and is being used in another company's business" (Crisp, in the matter of Bucahan Group Holdings Pty Ltd v Iliopoulos* [2011] FCA 1521 at [11].

In considering whether the discretion ought to be exercised, the Court held that as a general principle, the discretion to issue a warrant ought to be "*exercised judicially having regard to all relevant circumstances, while bearing in mind that an execution of a warrant to enter premises*, *'break open a building, room or receptacle' and seize asset or records, is a serious incursion on the rights of the person affected by it and should not be authorised lightly'* at [32].

Justice Jackson was satisfied that the assets of ACR had been, and continued to be, used in the business of SHW without proper accounting, on the basis of the following facts:

- an acknowledgment from ACR's solicitors that certain assets were likely to be in the possession of SHW;
- evidence demonstrating that certain items of equipment at SHW's registered premises were either registered in the name of ACR or appeared on ACR's draft depreciation schedule; and
- evidence obtained during the liquidators' examinations that SHW had begun to use ACR's equipment at their former business premises, without purchasing them.

His Honour was furthermore satisfied that it was appropriate to issue a warrant on the basis of the following factors:

- the Court's finding that SHW was in possession of assets of ACR and failed to cooperate with the liquidators to identify them. This had already delayed the taking of those assets into the control of the liquidator and if the warrant was not issued, such delay would continue;
- the fact that the recovery of plant and equipment was the only chance of obtaining a return for ACR's substantial creditors; and
- the evidence gave rise to an inference that SHW was being used as a vehicle for phoenix activity in respect of the former business of ACR because of the involvement of members of the same family in both companies, the fact that SHW took over equipment that ACR was using, had commenced trading from the same premises and was also using the same business name.

Takeaways for Liquidators

The decision confirms the availability to liquidators of useful mechanism to take control of company property. Relevantly, the Court will also take into account any reasonable inferences of illegal phoenix activity when deciding whether to exercise its discretion to order search and seizure warrants.

With that said, the decision reinforces the principles that an application pursuant to section 530C of the Act will not be granted lightly and will only be a remedy of last resort for liquidators, once all other avenues have been exhausted. It will therefore be necessary for liquidators to demonstrate a pattern of non-cooperation and evasion by directors, including a failure to provide undertakings not to deal with those assets.

Gerald Carides
gpc@gdlaw.com.au

CONSTRUCTION ROUNDUP

The ongoing Maple Village saga - invalid suspension of work and the calculation of damages

Regular readers will be familiar with the ongoing dispute between Grandview Ausbuilder Pty Limited and Budget Demolitions & Excavations Pty Limited. Recently the Supreme Court delivered judgment on yet another episode in this saga, providing some interesting commentary on what is required to serve a valid Notice of Suspension under the *Building and Construction Industry Security of Payment Act 1999* (NSW) and on how to calculate damages in a construction dispute.

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

Budget served two payment claims under the Act totalling $1,024,573.36. Grandview failed either to serve a payment schedule in response to the payment claims or to pay the amount claimed by Budget, which meant that Budget became entitled to immediate payment of the amount of the claims. On 31 January 2018 Budget also served a notice under section 15 of the Act suspending its work.

Instead of recovering the outstanding amount in court as a debt due as it was entitled to do under the Act, Budget issued a statutory demand to Grandview. Grandview made an application to Court to set aside the statutory demand on the basis that it had three offsetting claims: an entitlement to liquidated damages for late completion of the work; general damages for failure to reach milestone dates; and loss of bargain damages calculated as the cost to complete the subcontract work.

In the Supreme Court Parker J considered that Grandview had a potential claim for liquidated damages, but commented that Budget had a "strong case" that its liability to pay liquidated damages ceased before 31 January 2018, since Grandview had actively taken steps to exclude it from the site on 4 January 2018. Parker J also held that the other two claims were not viable.

Parker J ordered that the amount of the statutory demand be reduced by the amount of Budget's potential liability for liquidated damages of $220,000, but only if Grandview undertook to commence proceedings as quickly as reasonably practicable to prosecute its offsetting claim.

Grandview however was not prepared to provide such an undertaking and instead filed an appeal challenging Parker J's decision.

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

The Court of Appeal examined Grandview's offsetting claims and held that Grandview did not have any offsetting claim or contractual entitlement (including the claim for liquidated damages which Parker J had held was arguable) as a credible or plausible answer to Budget's statutory demand. In particular, the Court of Appeal commented that the issuing of the Notice of Suspension under the Act meant that Grandview was no longer entitled to liquidated damages for that period. As a result, the Court of Appeal dismissed Grandview's appeal.

Budget then pursued winding up proceedings against Grandview, based on its failure to pay the balance of the statutory demand. These winding up proceedings were adjourned in order to allow Grandview's creditors to consider whether to accept a Deed of Company Arrangement (which they did).

In the meantime, in the substantive proceedings, the parties had agreed consent orders for the filing of an Amended Statement of Claim, and Amended Defence, and a Cross Claim. Following a failure by Grandview to lodge with the Court security for Budget's costs, Budget filed a motion seeking to summarily dismiss Grandview's Amended Statement of Claim and for judgment on its Cross Claim (for amount of the outstanding payment claims).

This motion was heard by Henry J.

Her Honour noted that Grandview had belatedly provided security by way of a bank guarantee, and therefore Budget's application could not succeed on this point.

However, Budget had also submitted that Grandview's claims as pleaded had already been observed by Parker J and by the Court of Appeal to be untenable, and therefore Grandview's pleading disclosed no reasonable cause of action or was otherwise embarrassing.

Henry J noted that for a pleading to be embarrassing and struck out, it must be unintelligible, ambiguous, vague or too general so as to embarrass the opposite party who does not know what is alleged against them: *McGuirk v. University of NSW* [2009] NSWSC 1424. Her Honour commented that Budget did know what had been alleged: it had prepared and filed a defence to the claim and its submissions showed that it understood Grandview's claims.

Instead, her Honour embarked on an exercise of considering whether Grandview's pleadings disclosed viable causes of action.

Grandview had claimed liquidated damages from the date for practical completion of 12 December 2017 to April 2018, when the contract had been terminated. Budget relied on its earlier argument to Parker J and the Court of Appeal that by excluding it from the site from 4 January 2018 onwards, pursuant to the "prevention principle" Grandview was not entitled to receive liquidated damages after that date. However, the success of this argument for the period from 31 January onwards depended on whether Budget's Notice of Suspension had been validly served on 31 January, or whether Budget had wrongly suspended its work.

The Notice of Suspension had been attached to an email sent to Mr Jason Zhang. Mr Zhang was the sole director of Grandview but was not identified in the contract as Grandview's official representative.

Budget relied on the contract provisions entitling the service of notices by email, and on s.109X1(b) of the Corporations Act 2001 (Cth). This section provides that a document may be served by "delivering a copy of the document personally to a director of the company".

However, Henry J stated that she considered it reasonably arguable that by merely sending an email to Mr Zhang, the Notice of Suspension had not been properly served - either under the contract or under the Corporations Act. She also considered that there were triable issues of fact as to whether Budget's 31 January email had been brought to Mr Zhang's attention at or around the time that that email had been sent, particularly given that Budget had first mentioned it in correspondence from its lawyers in April 2018.

Her Honour noted that the question of the validity of the Notice of Suspension had not been considered by either Parker J or the Court of Appeal, and therefore their observations on the viability of Grandview's claims were not determinative.

Since there were triable issues of fact, the issues relating to the validity and effect of the Notice of Suspension and the question of whether Grandview had a cause of action for liquidated damages could not be resolved on a summary basis.

In its pleading, Grandview had also included a claim for restitution of alleged overpayments to Budget. In support of this claim, Grandview pleaded that the amount of this overpayment was the cost to complete the subcontract works less the unclaimed balance of Budget's subcontract price.

Budget submitted that this claim had been described by the Court of Appeal as conceptually difficult and further complained that it was based on the faulty premise that overcharging can be measured by what it might cost Grandview, using a third party, to complete the works. Instead, Budget submitted, Grandview should have assessed Budget's progress claims, and identified what should, and should not, have been charged for the work that was the subject of the claim.

Henry J disagreed that the claim was conceptually difficult but agreed that Grandview's approach to calculating the quantum of its claim was in error. Her Honour stated that the issue with the way it was pleaded by Grandview was that it failed to identify the works, and their value, claimed to be overcharged compared to the works, and their value, for which Budget was entitled to be paid under the subcontract, other than by reference to a calculation of the cost to compete the works.

However, her Honour considered that this could be salvageable by amending the pleading.

Accordingly, the Court ordered that Grandview should be given an opportunity to replead its claims.

The Court also granted Budget judgment on its cross claim and ordered that the moneys lodged with the Court to be paid out to it.

This dispute has been protracted to an extent by Budget's failure to avail itself of the right provided by the Act to recover the unpaid payment claims as a debt in court proceedings. Its failure to validly serve its Notice of Suspension also appears to have weakened its defence against Grandview's claims. For its part, Grandview will need to replead its claims to properly calculate the alleged overpayments. Arguably, both parties could have avoided incurring the significant costs in this latest hearing if they had addressed these issues as and when they arose. No doubt, however, there will be further instalments in this dispute.

At Gillis Delaney we have expert construction lawyers who have in depth knowledge and expertise with respect to the making and enforcement of payment claims under the SOP Act, and who can provide advice on the strategy to follow when a dispute arises in order to obtain the best outcome for our clients.

Linda Holland
lmh@gdlaw.com.au

Errors in adjudication process a salient reminder to comply with the Act

The security of payment regime under the *Building and Construction Industry Security of Payment Act 1999* has been in effect in NSW for over 20 years. During the last two decades, there have been numerous challenges to the validity of payment claims purported to be issued under the processes of the Act, and to the jurisdiction of adjudicators who have made formal determinations of those claims

Notwithstanding the lessons that have been leaned over the years by participants in the construction industry, the ongoing stream of successful challenges to adjudication determinations shows that many contractors and principals (and indeed many adjudicators) still do not fully understand the strict requirements of the Act.

This was illustrated in the recent decision of Hammerschlag J in *Acciona Infrastructure Australia Pty Limited v. Holcim (Australia) Pty Limited* [2020] NSWSC 1330.

Acciona was the contractor engaged by the NSW Government to deliver Sydney's light rail project. Holcim (a large concrete supplier) was engaged by Acciona to supply concrete for the project.

The contractual arrangements between Acciona and Holcim were that Acciona would issue a purchase order for each delivery of concrete, and the purchase order would be governed by contractual terms set out in a Goods Supply Agreement executed by the parties in September 2016. Clause 2(c) of this GSA provided that upon the issue of each purchase order, a separate contract would come into existence between the parties.

Over the life of the GSA, Acciona delivered around 12,500 purchase orders, and Holcim issued 36 payment claims.

In July 2019, the relationship between Acciona and Holcim soured. On 25 July 2019, Holcim issued a payment claim for $683,808, but Acciona responded with a payment schedule asserting the right to set off in excess of $2 million for wrongly charged plant opening fees and delay costs (which had previously been paid by Acciona) and scheduling nil payment. Holcim's August, September and October payment claims were met with similar payment schedules.

In response to Holcim's November 2019 payment claim, Acciona asserted a right to set off damages of over $36 million for late deliveries.

In May 2020, Holcim prepared to take the matter to adjudication under the Act. It issued a payment claim for $2.7 million which included the amounts claimed in its payment claims from July 2019 to April 2020, as well as the further work it had carried out in May 2020,and plant opening charges from March 2016 to February 2020 that it had not previously charged.

Acciona served a payment schedule which set off an amount of $38,240,718.50 against the value of Holcim's work and scheduled a nil amount of payment. Holcim made an application under the Act for adjudication of its payment claim.

In its adjudication response, Acciona raised a jurisdictional issue that had not been raised in its payment schedule. It submitted that since the payment claim was for multiple purchase orders, which constituted separate contracts between the parties, the adjudication was for more than one payment claim, which was not permitted under the Act.

The adjudicator rejected this submission on the basis that Acciona had not raised this issue in its payment schedule. The adjudicator proceeded to determine that Acciona was liable to pay Holcim an amount of $2.9 million, plus interest and adjudication fees.

Acciona commenced proceedings in the NSW Supreme Court seeking an order that the adjudication determination was void and liable to be quashed. In these proceedings, Acciona raised several grounds as to why the determination was void, including that the payment claim had not been valid for the purposes of the Act and therefore the adjudicator had lacked the requisite jurisdiction to make her determination.

Hammerschlag J agreed with Acciona. His Honour noted that Acciona was entitled to raise in its adjudication response a jurisdictional issue that had not been included in its payment schedule: *Olympia Group v. Hansen Yuncken; Rail Corporation v. Nebax Constructions.*

His Honour also cited several notable authorities (such as *Trinco v. Alpha* and *Nebax*) that confirmed that only one payment claim per contract could be submitted each month, and it had not been suggested that any of these authorities had been wrongly decided.

His Honour considered that the effect of clause 2(c) was clear: each time a purchase order was issued a separate contract came into existence between the parties for discrete work with a separate payment date. Holcim's payment claim had straddled numerous purchase orders (and therefore numerous contracts) with separate payment dates and therefore did not constitute a valid payment claim under the Act.

Accordingly, his Honour held that the determination was void and would be quashed.

Having made such a finding, the Court did not need to make findings with respect to Acciona's other challenges to the adjudication determination. However, Hammerschlag J did state how he would have hypothetically determined the remaining grounds of challenge, and in doing so his Honour made some interesting observations.

One of the additional grounds of challenge was that

the adjudicator had denied Acciona procedural fairness by valuing Holcim's payment entitlements on a basis that had not been advanced by Holcim, without allowing Acciona the opportunity to make submissions on this point.

In its adjudication response, Acciona had submitted that pursuant to clause 23 of the GSA Holcim's entitlement to payment was to be valued by reference to the delivery dockets it had provided in substantiation of its claim, and this was how the parties had historically valued Holcim's payment claims. For its part, Holcim's submissions had not identified the precise basis on which its entitlements were to be assessed.

The adjudicator, however, took a different approach. She stated that since pursuant to s.9 of the Act Holcim was entitled to the value of the concrete it had supplied, in the absence of dockets to support the whole of the amount claimed, Acciona could use other means to assess the amount of concrete supplied, and therefore Holcim's entitlements were not confined to the value of the dockets.

Hammerschlag J pointed out that the adjudicator had sought (and received) extra time to deliver her adjudication determination but she had not invited submissions from the parties on this alternative approach to assessment. In those circumstances, the adjudicator had denied Acciona procedural fairness and natural justice.

Another additional ground had been that the adjudicator had failed in her duty to satisfy herself that Holcim had sufficiently substantiated that it had carried out the work as claimed. Acciona had submitted that it was unable to dispute on a factual level whether Holcim had carried out the work, because Holcim had not provided enough information to allow such an assessment to be made. However, the adjudicator stated in her determination that Holcim only bore the burden of proof in relation to *disputed* facts.

Hammerschlag J noted that this point had been discussed in *Laing O'Rourke v. Monford Group* [2018] NSWSC 491 and *Pacific General Securities v. Soliman* [2006] NSWSC 13. In the latter, Brereton J had stated at [82] that:

> "*the absence of [material put forward by the respondent] does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value*."

Applying these statements of principle, Hammerschlag J stated that the absence of a dispute of a fact does not establish that fact, and that Holcim still bore the onus of establishing its claim, including those elements where Acciona had adduced no material to dispute it.

By her approach, therefore, the adjudicator had failed in her duty to satisfy herself that the claimed work had been done and of its value.

This case reminds us that adjudications need to be approached carefully by all parties to ensure compliance with the requirements of the Act.

While parties cannot prevent errors being made by the adjudicator, they can at least ensure that their claims or responses are valid for the purposes of the Act. For example, if Holcim had submitted separate payment claims and adjudication applications with respect to each purchase order (adopting the same set of submissions to cover all the claims), then arguably these payment claims and adjudication applications would have been valid.

At Gillis Delaney we have expert construction lawyers who have in depth knowledge and expertise with respect to the security of payment processes under the Act and who can assist in obtaining the best outcome for both contractors and principals in construction claims and disputes.

Linda Holland
lmh@gdlaw.com.au

EMPLOYMENT ROUNDUP

Extension to JobKeeper

The ongoing measures to alleviate the Covid-19 economic impact create many benefits for employer, but also a considerable amount of complexity. This skeleton outline highlights key items of the recent changes.

On 1 September 2020, legislation to extend the JobKeeper scheme passed Parliament. As part of this, the JobKeeper provisions in the *Fair Work Act* were also extended with some changes. The extended provisions take effect from 28 September 2020. The last day the extended provisions will apply is 28 March 2021.

The JobKeeper scheme helps employers who have been significantly affected by coronavirus to keep paying their employees. It also gives certain employers increased flexibility to help manage their business by using the *Fair Work Act* "JobKeeper provisions".

Extension of the Fair Work Act JobKeeper provisions

Under the extended provisions, qualifying employers who are receiving JobKeeper payments for their employees (and continue receiving them after 27 September 2020) can continue using the JobKeeper provisions to:

- give their employees JobKeeper enabling stand

down directions (for example, a direction to work fewer or no hours)

- give their employees JobKeeper enabling directions (for example, a direction to change duties or work location)
- make agreements with their employees to change their days or times of work (for example, an agreement that an employee will work on different days).

Employers who qualify for the JobKeeper scheme and who receive JobKeeper payments on behalf of employees for the first time on or after 28 September 2020 can also use these JobKeeper provisions.

Employers are no longer be able to use the JobKeeper provisions to make agreements with their employees to take annual leave (including at half pay). Those provisions stopped applying from 28 September 2020.

Any JobKeeper enabling directions or agreements to change an employee's days or times of work already in place on 27 September 2020 keep applying after this date as long as the employer continues to qualify for the scheme and the requirements to give a direction or make an agreement continue to be met.

For these employers, JobKeeper enabling directions or agreements stop applying when they are cancelled, withdrawn, or replaced (including by a Fair Work Commission order), or on 29 March 2021 (whichever comes first).

Legacy employers

The extended provisions allow some employers, known as legacy employers, to continue using some of the JobKeeper provisions (with some changes) if they meet certain conditions. These conditions include:

- previously participating in the JobKeeper scheme, but no longer participating from 28 September 2020
- demonstrating at least a 10% decline in turnover for a relevant quarter, by obtaining a certificate from an eligible financial service provider, or a statutory declaration for small businesses.

Legacy employers can only use these JobKeeper provisions in relation to employees they received JobKeeper payments for before 28 September 2020 (previously eligible employees).

Employers don't need to have received JobKeeper payments every fortnight between 30 March and 28 September 2020 to be considered a legacy employer. For example, a childcare sector employer who previously received JobKeeper payments can be a legacy employer even though they were ineligible for JobKeeper payments after 20 July 2020.

Satisfying the 10% decline in turnover test each quarter

Legacy employers will need to satisfy the 10% decline in turnover test and have a certificate (or statutory declaration) for each relevant quarter. If they don't, all JobKeeper enabling directions or agreements will automatically end on:

- 28 October 2020, if the above conditions aren't met for the September 2020 quarter
- 28 February 2021, if the above conditions aren't met for the December 2020 quarter.

JobKeeper directions and agreements

Under the extended provisions, legacy employers can, for their previously eligible employees:

- issue JobKeeper enabling stand down directions (with some changes)
- issue JobKeeper enabling directions in relation to employees' duties and locations of work
- make agreements with employees to work on different days or at different times (with some changes).

Any legacy employer issuing directions or making agreements must follow the enhanced notice and consultation requirements under the JobKeeper provisions.

Legacy employers also need to give their employees who are subject to a JobKeeper enabling direction or agreement written notice about whether:

- they've obtained a certificate or statutory declaration for the relevant quarter
- the JobKeeper enabling direction or agreement will continue or end.

Directions or agreements in place on 27 September 2020

Any JobKeeper enabling directions or agreements that legacy employers already have in place will end on 27 September 2020. They'll need to reissue or make new directions and agreements.

While legacy employers can only give a JobKeeper enabling direction under the extended JobKeeper provisions that starts on or after 28 September 2020, they can give notice and start consultation before this date.

JobKeeper enabling stand down directions

Legacy employers can continue to issue JobKeeper enabling stand down directions to their previously eligible employees after 27 September 2020, provided the direction doesn't:

- result in an employee working less than 2 hours on a work day
- reduce a full-time or part-time employee's hours of work to less than 60% of their ordinary hours as at 1 March 2020.

Legacy employers can continue to give a direction to change a previously eligible employee's duties or work

location.

Legacy employers can continue to make agreements to change a previously eligible employee's days or hours of work. The agreement can't result in the employee working less than 2 hours on a work day.

Agreements to take annual leave

Under the original JobKeeper provisions, qualifying employers could make agreements with eligible employees to take annual leave. This included taking annual leave at half-pay.

These provisions have been repealed and stop applying from 28 September 2020. From this date, any agreement that was made under these provisions stops applying.

From 28 September 2020, employers and employees need to follow the usual rules for taking and requesting annual leave, including those set by an award or agreement.

David Collinge
dec@gdlaw.com.au

Corporation liable to pay Superannuation Guarantee to Independent Contractor

The *Superannuation Guarantee (Administration) Act 1992* (Cth) ("SGA") deems certain workers to be employees for the purpose of the Superannuation Guarantee contributions even if the worker is engaged pursuant to an independent contractor agreement.

Dr. Moffatt was a dentist and instituted proceedings in the Federal Court of Australia for sham contracting, unpaid annual leave, unpaid long service leave and superannuation. The key enquiry was whether Moffatt was engaged an employee or rather was engaged under a contract for services.

Moffatt sold his dental practice to Dental Corporation Pty Limited in 2007. As part of the sale, Moffatt was engaged by Dental Corporation to provide dental services under an agreement entitled "Services Agreement". Moffatt resigned in November 2014 claiming he had been the subject of bullying by two key persons of the employer.

In the Federal Court hearing, Justice Flick observed the authorities established consideration as to whether a relationship is one of employment or contractor involves a holistic assessment by which regard is given to indicia that are commonly indicative of either a contracting or employment relationship. It was noted that not one factor alone should be considered conclusive.

His Honour noted there was nothing in the Service Agreement governing Moffatt's hours of work or the nature of work to be undertaken other than that he was to provide dental services. There was no requirement for Moffatt to seek consent of the Dental Corporation to take annual leave or reduce his working hours. Moffatt also dictated the amount he charged his patients for his services.

The Dental Corporation also provided administrative services and equipment necessary for Moffatt to undertake his dental services.

Moffatt was remunerated by reference to the monthly revenue he generated. He was reimbursed for his expenses in connection with providing these dental services. Income tax was not deducted by the Dental Corporation. Moffatt held an ABN number and he deducted expenses in his tax returns for expenses that he had not already been reimbursed by the Dental Corporation.

His Honour found the relationship was one of principal and independent contractor. The Dental Corporation had little or no control over the manner in which Moffatt conducted his practice. His Honour observed that:

> *"An employee is normally paid a salary or hourly, daily or other periodic wage, free of deduction for expenses incurred in the performance of their work. The prospect of cash flow being less than otherwise anticipated is a risk normally borne by an employer."*

Flick J determined Moffatt was not a worker as defined under the *Long Service Leave Act* which classified a worker as a person employed whether on salary or wages or piecework rates.

Moffatt was successful in his claim to be entitled to superannuation payments under the SGA. Flick J determined the interpretation of Section 12(3) of the SGA was to extend the application of the SGA to "employment-like" relationships that would otherwise not be recognised at common law as employment relationships. His Honour principally relied on the decision of Bromberg J in *On Call Interpreters & Translators Agency Pty Limited v Federal Commissioner of Taxation (No.3)* [2011] FCA 366, who found that payments to an independent contractor under a contract for personal services are captured by the SGA where the relationship has an employment-like character.

Bromberg J stated:

> *"Whether an employment-like setting exists may be best answered by asking; whether, in all the circumstances, the labour component of the contract in question could have been provided by the recipient of the labour employing an employee?"*

The Dental Corporation appealed to the Full Court of the Federal Court. The Full Court found that Bromberg J's interpretation of Section 12(3) of SGA was not correct as it had no textual anchor in the provisions and constitutes a gloss on the provision.

The Full Court held that Section 12(3) of SGA required that:

"(a) there should be a contract; and

(b) which is wholly or principally "for" the labour of a person; and

(c) that a person must work under a contract."

The Full Court considered that for the purposes of the Services Agreement, Moffat was required to provide dentistry services to patients and practice management. As such Moffat was confirmed to be an employee for the purposes of the SGA as the Services Agreement was wholly or substantially for Moffat's labour.

Employers may look to contractor agreements rather than employment arrangements for many commercial reasons. However, employers must be aware of potential obligations under the SGA if the purpose of the contractor engagement is wholly or substantially for the labour of a person.

Michael Gillis
mjg@gdlaw.com.au

WORKERS COMPENSATION ROUNDUP

JobKeeper, PIAWE and Weekly Payments: How do they Interact?

In March 2020, in response to the job losses and economic situation created by the COVID-19 pandemic, the Federal Government introduced the JobKeeper payment to eligible employers. In order to be eligible for the JobKeeper Payment Scheme an employer had to, as at 1 March 2020, run a business in Australia, employ at least one eligible employee during the JobKeeper fortnight and satisfy the original decline in turnover test/actual decline in turnover test.

There were also a number of criteria that would render an employer ineligible for receipt of JobKeeper, such as if the entity is a Local Governing Body, is a company in liquidation or an individual who has entered bankruptcy.

If eligible as at 1 March, the employer would receive $1,500 gross per fortnight to pass onto eligible employees.

From 28 September 2020 the rate was to be stepped down in two stages. The first payment rate decrease started from 28 September 2020 and a further payment rate decrease starts from 4 January 2021. Further, from 28 September 2020 either Tier 1 or Tier 2 rates will apply.

What happens if an injured employee in receipt of workers compensation also receives JobKeeper? How does the JobKeeper payment interact with weekly payments of compensation?

The *Workers Compensation Amendment (COVID-19 Weekly Payment Compensation) Regulation 2020* has been introduced to deal with this issue.

Schedule 2 inserts Clause 10, which applies to an injured worker who is in receipt of or has received JobKeeper Scheme payments from an employer.

The provision provides that:

- for the purpose of determining pre-injury average weekly earnings of a worker who received JobKeeper Scheme payments during the relevant earning period for the worker, for each week for which a JobKeeper Scheme payment applies, the worker's earnings in the employment to which the payment relates are taken to be the amount of income the worker is entitled to receive for work performed in the employment in that week;
- JobKeeper payments received by an injured worker after the date of the injury are taken to be part of the worker's actual gross earnings in relation to that week for the purpose of the definition of current weekly earnings in Clause 8.

Presumably therefore it can also be argued that JobKeeper payments have the effect of earnings which ought to be taken into account in work injury damages proceedings and in claims for weekly payments of compensation.

The Regulations also insert Clause 8EA which provides that the relevant earning period for a worker is to be adjusted if there is a change in a worker's employment arrangements as a direct result of the COVID-19 Pandemic resulting in a financially material reduction. If so, that period is not to be taken into account when calculating earnings.

Clause 8EA(2) provides that if the change to the worker's employment arrangements resulted in a financially material reduction to the worker's earnings during the period on and from 23 March 2020 to 14 June 2020 the relevant earning period is to be adjusted by excluding the first prescribed period (the period from 23 March 2020 to 14 June 2020).

Clause 8EA(3) provides that if the change to the worker's employment arrangements results in no earnings in employment being paid or payable to the worker for a period of 2 or more days commencing on the first day of the second prescribed period, that is, the period commencing on and from 15 June 2020 to 27 September 2020.

8EA(4) provides that in relation to subclause (3), the relevant earnings period is to be adjusted by excluding each day, whether or not that day was a usual work day, of the period commencing on 15 June 2020 and ending on the earlier of the day immediately before the day on which earnings in any employment once again became payable to the worker and 27 September 2020.

So what is the effect of this? If for example, in May 2020 an employee sustained injury and that employee

was previously working fulltime but from 31 March 2020 was working 3 days a week, any earnings in the period from 31 March 2020 to 14 June 2020 inclusive will be excluded when calculating earnings and calculations will be based on full time employment only.

If incapacity continues throughout the period commencing on 15 June 2020 then that second period will also be excluded when calculating earnings.

The COVID-19 pandemic has required constant adaptation throughout the year, including from the legislature.

Amanda Bond
asb@gdlaw.com.au

COVID-19 Update: WCC Moves closer to Pre-Pandemic Procedures for Medical Disputes

On 20 July 2020 President Judge Phillips of the Workers Compensation Commission confirmed the return of in-person assessments to determine medical disputes in view of the low incidence of the COVID-19 cases by community transmission.

At that time the Commission continued with its interim procedure of listing all medical disputes for teleconference before an arbitrator in an attempt to resolve matters where liability was not in dispute or proceed to video assessment by an Approved Medical Specialist ("AMS").

In line with the easing of community restrictions generally in New South Wales, the President has confirmed that on and from 21 September 2020, medical disputes regarding physical injury which do not entail a liability dispute will be referred directly to an AMS for an in-person assessment.

The Commission will continue to adopt a two part process for in-person assessments of physical injuries which involves a pre-examination conference followed by an in-person physical examination.

The President has confirmed an injured worker may be exempt from the pre-examination conference if it is determined necessary for the AMS to conduct the full assessment with the worker in person such as in cases where the worker would have difficulty participating by telephone or video due to the nature of their injury.

A different régime will continue to be observed for medical disputes involving psychiatric/psychological disorders.

In those matters the Commission will continue to arrange for AMS assessments to be conducted by video unless advised by the injured worker or his or her legal representative that the worker is unable to participate by that means.

Comment

The return of direct AMS referrals of medical disputes which do not encompass a threshold liability issue represents a positive development for all stakeholders.

In recent editions of GD News we identified the emerging trend of arbitrators determining an injured worker's whole person impairment based on their own interpretation of the medical evidence.

Of particular concern to employers and their insurers was the willingness of arbitrators to so proceed even when the disparity in the available specialist assessments of permanent impairment raised an issue as to whether the injured worker satisfied the permanent impairment threshold prescribed by Section 66(1) of the *Workers Compensation Act 1987* ("1987 Act") and in the case of serious injury, whether the injured worker's impairment was at least 15% so as to satisfy the work injury damages threshold imposed by Section 151H of the 1987 Act.

The return of direct referrals should also result in medical disputes that proceed to the Commission being determined at a faster rate, subject of course to any adverse community developments in relation to the COVID-19 Pandemic.

At this stage there would appear to be no plans to resume in-person conciliation/arbitration hearings or mediations in the Commission at any time soon.

It may transpire that the current procedure will remain in place until the New Year coinciding with the commencement of the Personal Injury Commission.

Brad Quillan
bfq@gdlaw.com.au

A worker or not a worker ? That was the issue

A claim for compensation brought by a tertiary student ("Applicant") who suffered injury whilst undertaking her Medical Science studies at the University of NSW ("Respondent") under a Commonwealth Scholarship has failed in the Workers Compensation Commission.

In dismissing the claim, the Arbitrator determined that the Applicant was not a "worker" within the meaning of s4 or a "deemed worker" under Schedule 1 of the *Workplace Injury management and Workers Compensation Act 1998* ("1998 Act") at the time of injury.

Background

The Applicant completed her Higher School Certificate in 2013 before undertaking a Bachelor of Medical Science as well as a Bachelor of Science (Honours). She was subsequently offered a place in the PhD program with Respondent in November 2017 and granted a Commonwealth scholarship stipend to cover living expenses for the period of the PhD study which

commenced on 12 February 2018.

On 9 May 2018, the Applicant was injecting a virus into the tail of a laboratory mouse as part of her research course. The syringe failed to find a vein and the viral fluid sprayed into her face. She washed her face and continued with the task but the same incident occurred with the fluid impacting her lips and mouth.

The Applicant subsequently suffered debilitating symptoms consistent with a diagnosis chronic fatigue syndrome. Due to her illness the Applicant was unable to return to her course and her Scholarship was terminated.

Issues for Determination

The insurer of the Respondent declined liability and the dispute proceeded to the WCC.

The Arbitrator noted that the following issues remained in dispute and required the Commission's determination:

- Was the Applicant a worker for the purposes of s 4 of the Workers Compensation Act 1987?
- In the alternative, was the Applicant a deemed worker under Schedule 1 of the 1998 Act?
- If so, had the Applicant suffered an incapacity for employment by reason of a work injury?
- If so, was the Applicant partially or totally incapacitated for the purposes of assessing her entitlement to weekly compensation?

The Legislation

Section 4 of the 1998 Act defines "worker" to mean "*a person who has entered into or works under a contact of service or a training contact with an employer"*

Schedule 1 Clause 2 of the 1998 Act provides that "*where a contract to perform work exceeding $10 in value (not being work incidental to a trade or business regularly carried on by the contractor in the contractors own name) is made with the contractor , who neither sublets or the contract nor employs any worker, the contractor is taken to be a worker employed by the person who made the contract with the contractor.*

Applicants case

The Applicant argued that her relationship with the University was one of worker and employer and that the stipend she received under the scholarship was subject to satisfactory progress, and the offer of the scholarship being contingent on her performing research.

The Applicant asserted that there was a contract with the University setting out payment of a stipend and that her research could attract funding so she should be taken as performing work for which the University.

Accordingly, the relationship came withing the definition of a worker as provided by s4 of the 1998 Act.

The Arbitrator was asked to accept that as per the "indicia test" espoused by the High Court in *Stevens v Brodribb Sawmilling Company Pty Ltd* [1986] HCA 1, the University had control and direction of her 'work'. The University retained rights over the intellectual property associated with her research. These facts indicated on balance that the relationship between the Applicant and the Respondent was one of employer/employee.

Noteworthy, the Applicant submitted that it was immaterial that other students attended the course without a scholarship. As the Applicant received a stipend she was not in the same position as other students who did not.

In the alternative it was argued that she satisfied the definition of a deemed worker in accordance with Schedule 1, Clause 2 of the 1998 Act.

Respondents Case

The Respondent argued that in the absence of the Scholarship there would be no basis for the Applicant to contend that she was a worker or deemed worker as opposed to a student.

There was no contract under which the Respondent sought anything specific from the Applicant. It was submitted that the reason for a contact for enrolment was for the student to obtain a Degree, and that was the reason Applicant carried out her research.

The contract between the parties related to the award of the Scholarship as opposed to creating a contract of service indicative of an employer/employee relationship.

Further, and with reference to the test in *Brodribb,* it was noted that tax was not taken out of the stipend by the Respondent. The letter of offer to the Applicant from the Respondent was for admission to study, not employment. The scholarship was separate to admission to the course of study and was a benefit paid by the Australian Government. The Respondent was administering a Government scheme to ensure the student received the benefit.

It was submitted that the Applicant was not a deemed worker and that the student/university relationship does not attract Schedule 1, Clause 2 of the 1998 Act.

This was so as there was no contract between the applicant and respondent to perform work, but to reach the standards necessary for the award of a degree. The stipend was to assist with the Applicant's living costs, so it was not a contract to perform work.

Reasoning of Arbitrator

The Commission stated the following:

- The Applicant was a full-time student and was enrolled in a course of study to gain academic qualification at the time of injury. The 'worker' indicia relied upon by her did not assist in the circumstance because it was not relevant to the true nature of the relationship.
- The stipend related to living expenses and did not

alter her status as a student. The stipend was paid by the Commonwealth government. The money was transferred to the University to administer as per Commonwealth Guidelines.

- The Applicant submitted that the Scholarship was an 'award' under which she received payment. The Arbitrator found that the Scholarship was not an 'industrial award'.
- There was no 'control' in the sense of paid work undertaken by the Applicant for the benefit of the Respondent as part of a contract for service. There was a degree of control and direction of Applicant as a student, but the same control was applied to all students in such courses whether on a scholarship stipend for living expenses or not.
- The laboratories and equipment of the Respondent was clearly the main offering for students. It is not a worker being provided 'tools' or other tools of trade by an employer.
- The required minimum 35 hours study per week applied to all students in the research PhD program and was not indicative of a contract of service.
- The evidence fell short of establishing the elements for employment of the Applicant by the Respondent as there must be an identifiable employment contract before there is employment relationship.

Commission's Findings

The Arbitrator upheld the dispute and found in favour of the Respondent, concluding:

1. The Applicant was not a worker for the purpose of s 4 of the 1987 Act at the time of injury.
2. The Applicant was not found to be a deemed worker by Schedule 1, Clause 2 of the 1998 at the time of injury as there was no contract between Galal to perform work. Further, there was no intention to create legal relations, mutually, or contractual consensus for employment between the Applicant and the Respondent.
3. The claim for weekly compensation therefore failed.

Dulan Perera **dnp@gdlaw.com.au**
Brad Quillan **bfq@gdlaw.com.au**

Analysis of Medical Evidence: Court of Appeal Dismisses Injured Worker's Appeal

Cruceanu v Vix Technology (Aust) Limited [2020] NSWCA 203

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 arising 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.

Brad Quillan
bfq@gdlaw.com.au