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Shake Up For the Construction Industry in NSW

The 2019/2020 financial year is set to be a challenging one for the construction industry in NSW with the government now favouring the big bang theory and the commencement in one go of all of the changes it has introduced by the Building and Construction Industry Security of Payment Amendment Act 2018 (NSW), which will provide greater financial security and prompter payments for subcontractors.

The Act was assented to on 28 November 2018 and contains reforms to the Building and Construction Industry Security of Payment Act 1999 (the SOP Act), which the Government hopes will "promote cash flow in the supply chain, increase transparency of payments and provide greater protections to subcontractors". The Act has not commenced.

The Government sought feedback on the phased commencement of the changes however feedback suggested it would be preferable to have a single commencement date for the reforms and the staggered commencement of changes is off the cards. On 21 June 2019 the Government concluded consultation on proposed offences which will be created by the Act. The legislation is likely to commence shortly, we speculate in the early part of the second quarter of the 2019/2010 financial year. Buts that's not all. The Government has announced the industry can look forward to further changes with:

- building designers, including engineers, being required to declare that building plans specify a building that will comply with the Building Code of Australia;
- builders being required to declare that buildings have been built according to their plans;
- requiring building designers and builders to be registered; and
- the law clarified to ensure there is an industry-wide duty of care to homeowners and owners corporations so that they have the right to compensation where a building practitioner has been negligent.

The Government will move quickly with these additional changes hot on the heels of the Opal Tower and Mascot Apartment failures which have served to undermine the public's confidence in building professionals and construction companies involved in high rise residential developments.

So what will the landscape look like when it comes to payment claims in the construction industry.

Security of payment claims will remain a feature of the landscape.

Payment claims will be able to be made at the end of each month. The concept that the "reference date" specified in the contract triggers the payment claim has been tossed to the bin.

Payment claims will be due and payable within 20 days after the claim is made (or earlier if provided in the contract). This will have significant impacts around financing for construction projects, and the timing of the valuation of works by project financiers.

A payment claim can be made on the date of termination of a contract.

Payment claims can be withdrawn, a party can object to the withdrawl and an adjudicator can uphold the objection if it is the best interests of justice.

A corporation in liquidation cannot serve a payment claim or seek an adjudication determination.

Where an adjudication is challenged in the Supreme Court on the grounds of jurisdictional error and the Court finds that a jurisdictional error has occurred the Court may make an order to set aside the whole or part of any determination.

Where a corporation commits an offence under the SOP Act, individuals involved in the management of a corporation will be exposed to personal liability. There will be executive and accessorial liability. The liability applies to:

- a director of the corporation; or
- a person involved in the management of the company who is in a position to influence the conduct of the corporation in relation to the commission of an offence.

This exposure will arise from:

- being knowingly concerned in the commission of the offence (whether by aiding and abetting, inducing, conspiring with others or otherwise).
- being 'recklessly indifferent' as to whether the offence is committed.

It will be a defence to a prosecution if a director or manager takes all reasonable steps to prevent or stop the commission of that offence.

Directors and managers will need to be on top of their game with accessorial liability for directors and managers for all offences under the Regulation imposed on a corporation (for example, where a head contractor fails to pay retention moneys into a qualifying trust account, where a head contractor has supplied a false or misleading supporting statement or has not supplied a supporting statement with a payment claim).

Penalties for a corporation have increased from 200 penalty units ($22,000) to 1,000 penalty units ($110,000).

The maximum penalty for a director or manager is the maximum penalty specified for an individual for the offence. In some instances the maximum penalty includes 3 months imprisonment.

The maximum penalty for a person committing an executive liability offence is 200 penalty units ($22,000).

Corporations seeking to avoid the risk of personal liability for their directors and managers should put systems in place compliance processes, audit procedures and training programs to support any 'reasonable steps' defence.

And finally the threshold for the statutory trust regime for retention monies will be dropping. Currently, the Act requires head contractors to pay subcontractor retention money into a trust account on construction projects valued over $20 million. The threshold will be reduced to $10 million.

It won't be long before we herald in these changes in NSW and these changes will bring additional challenges for all in the construction industry.

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Who owes a duty of care to a security guard injured by a criminal third party?

In 2000 the High Court of Australia handed down its decision in *Modbury Triangle Shopping Centre Pty Limited v Anzil & Ors* in which it was held an occupier does not owe a duty of care to a lawful entrant injured by the criminal activities of a third party.

The High Court also held that exceptional circumstances may give rise to a duty of care notwithstanding the above proposition, usually due to what were identified as "special" relationships such as employer / employee, school / student and bailor / bailee where one party has the power to exercise control over the other's activities.

In *Adeels Palace Pty Ltd v Moubarak* (2009) the High Court confirmed such a duty is owed by the operator of licensed premises to patrons to prevent the risk of injury caused by the criminal activities of third parties. The pivotal factor in that case, which distinguished it from *Modbury*, was the power of the licensee to control the serving of alcohol on licensed premises pursuant to its statutory obligations and its ability to control the

activities of patrons and others who entered such premises.

In *Lesandu Blacktown Pty Ltd v Gonzalez* (2013) the NSW Court of Appeal rejected the finding of the primary judge who sought to extend the categories of special relationship under *Modbury* principles to include retailer / customer.

What about a security guard injured by a criminal intruder during the course of his employment duties at commercial premises after business hours?

This scenario was recently considered by his Honour Justice Bellew of the NSW Supreme Court in *Capar v SPG Investments Pty Limited t/a Lidcombe Power Centre & Ors (No.5)*.

Gengiz Capar was employed by Dynamite Security Protection Services Pty Limited ("Dynamite") as a security guard.

Dynamite provided labour including Capar to Business Protection Group Pty Limited ("BPG").

BPG provided security services for SPG Investments Pty Limited t/as Lidcombe Power Centre ("SPG").

SPG was the owner of the Lidcombe Power Centre ("LPC").

In March 2010 Capar was carrying out his duties as a security guard at LPC between 10.00pm and 6.00am the following day. Whilst he was in the security control room having a meal he observed on a CCTV monitor an intruder outside the premises who ran towards one end before disappearing out of range.

Capar left the control room to investigate the intruder's presence. Having reached level one he waited for a short time before the intruder appeared in front of him brandishing an axe and verbally threatening to kill Capar.

Capar immediately ran back to the control room and locked himself inside before calling the police. The police later attended and apprehended the intruder.

Capar developed a severe reaction that was diagnosed to be a chronic PTSD and associated depression.

He brought proceedings at the NSW Supreme Court against SPG, BPG and the Workers Compensation Nominal Insurer ("WCNI") on the basis that Dynamite had become deregistered.

Each defendant denied liability.

It should be noted at the outset that Capar's claims against SPG and BPG failed primarily due to the operation of *Civil Liability Act 2002* (NSW), s32 which provides a defendant does not owe a plaintiff a duty of care not to cause a plaintiff mental harm unless the defendant ought to have foreseen that a person of normal fortitude might suffer a recognised psychiatric illness if reasonable care were not taken.

Justice Bellew held the claims against SPG and BPG failed under this section because a person of normal fortitude would not have suffered a recognised psychiatric illness in the circumstances.

The focus of this article is not upon his Honour's consideration of CLA, s32. Rather, we analyse his Honour's consideration of the common law duty of care and the principles he applied from *Modbury* to the circumstances of this case.

Bellew J held SPG was at the time of the incident the occupier of LPC. There was no issue Capar was a lawful entrant on SPG's premises.

However, SPG according to his Honour had no relationship with Capar other than that of occupier / entrant. SPG did not employ Capar and had no control over the manner in which he discharged his duties and responsibilities.

Further, SPG had no control over the intruder.

In these circumstances, Justice Bellew applied *Modbury* and concluded SPG did not owe Capar a duty of care. Accordingly, his case against SPG also failed on this basis.

In relation to BPG, however, his Honour would have found differently on the existence of a common law duty of care, had CLA, s32 not applied.

Justice Bellew accepted the evidence did not establish BPG was an occupier of LPC. The question was whether BPG owed Capar a duty of care analogous to that of employer / employee.

His Honour observed Capar wore a uniform which bore the BPG logo. Further, the BPG Operations Manager was at least partly responsible for Capar's training and BPG issued to Capar the relevant training manuals for his security procedures.

This evidence, it was held, established there was a relationship between BPG and Capar which extended to matters regarding the system of work, training and reporting. Accordingly, as BPG exercised some control over Capar's conduct, it was appropriate to impose a duty of care on BPG to provide Capar with a safe system of work, even though it was not his actual employer (that being Dynamite).

The issue was whether this duty extended to protect Capar from the criminal behaviour of the intruder. Justice Bellew held it did on the basis that the relationship between BPG and Capar was analogous to that of employer / employee.

However, his Honour went on to find that BPG did not breach its duty of care as the system of work provided sufficient instruction to prevent the very risk which eventuated. Instead, Capar did not follow express instructions which ultimately led to his psychiatric injury.

Further and more interestingly, Justice Bellew also found CLA, s5I applied such that both SPG and BPG could not be liable for Capar's injury as it arose in

consequence of the materialisation of an inherent risk.

As against WCNI being the insurer for Dynamite, Capar's employer, there could be no dispute the employer owed Capar a non-delegable duty of care. However, for the same reasons applied in his claim against BPG, Justice Bellew also found Dynamite did not breach its duty of care to Capar as it provided him with a safe system of work which included specific instructions of which Capar was plainly in breach.

The result was that Capar failed in his claims against all three employer and non-employer defendants.

Justice Bellew applied the principles enunciated by the High Court in *Modbury* and confirmed, insofar as Capar's claim against the occupier was concerned, there was no common law duty of care owed to Capar to prevent the risk of injury from the criminal activities of third parties such as the intruder in this case.

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Why Not Obtain Documents From a Potential Defendant Before You Sue – Preliminary Discovery

In New South Wales a person who believes they may have a claim against a person or entity can seek production of documents from a prospective defendant to assist them to assess whether their perceived claim is viable.

Section 5.3 of the Uniform Civil Procedure Rules provides:

"5.3 Discovery of Documents from Prospective Defendant

(1) If it appears to the Court that:

(a) the applicant may be entitled to make a claim for relief from the Court against a person (the "prospective defendant") but, having made reasonable enquiries is unable to obtain sufficient information to decide whether or not to commence proceedings against the prospective defendant, and

(b) the prospective defendant may have or have had possession of a document or thing that can assist in determining whether or not the applicant is entitled to make such a claim for relief, and

(c) inspection of such a document would assist the applicant to make the decision concerned,

the Court may order that the prospective defendant must give discovery to the applicant of all documents are or have been in the person's possession and that relate to the question of whether or not the applicant is entitled to make a claim for relief."

This Rule also provides that unless a Court otherwise orders, a person seeking preliminary discovery must file an application for preliminary discovery supported by an Affidavit stating the facts on which the applicant relies and specifying the kinds of documents in respect of which the order is sought.

Preliminary discovery can be sought to ascertain a prospective defendant's identity or whereabouts.

Preliminary discovery can also be sought from other persons other than those who are potential defendants.

When considering a claim for preliminary discovery it is necessary for a person to assert there is a prospective claim. However the hurdle is not high and generally the Court will be predisposed to make an order for preliminary discovery.

In a recent decision of the Supreme Court of NSW in *Arnaout v Arnaout* the Court was called on to consider a claim for preliminary discovery made by a venturer in a business following the exit of one of the participants in circumstances where the exiting party believed that he had received less than fair value for his interests.

Over a period of 14 years two brothers worked together in commercial operations where they together bought, operated, developed and sold businesses including hotels and real estate through various corporations.

The brothers entered into an agreement to facilitate an exit from the business for approximately $20 million. At the time that the agreement was executed the exiting brother was suffering from a medical condition diagnosed as severe depression and subsequently he formed the view he was bought out at significantly less than the true value of his interest.

The exiting brother sought preliminary discovery in respect of perceived claims for relief from:

- his brother, being his former business partner;
- the law firm who acted for both parties in connection with the agreement;
- the accountants for the venture.

The law firm and the brother reached agreement on the production of documents leaving the brother to commence proceedings seeking an order for preliminary discovery from the accountant and his brother with the application for an order being determined by Lindsay J.

Lindsay J observed the following principles apply to preliminary discovery:

- "An order for preliminary discovery may be made against a prospective defendant where the factors enumerated in UCPR rule 5.3(1) appear to the Court.
- The threshold set by UCPR rule 5.3(1) is low: it must appear to the Court that an applicant *may be entitled* to make a claim for relief, that a

prospective defendant *may have or have had* possession of relevant documents or things, and that inspection would assist the applicant to decide whether to commence proceedings.

- Although mere assertion of a case against a prospective defendant is insufficient to warrant an order for preliminary discovery, there is no requirement that an applicant for preliminary discovery establish a *prima facie* case for relief. Nor is it necessary that such an applicant specify with precision the cause of action proposed, beyond particularisation of the nature of the relief in contemplation.
- Given the interlocutory character of an application for preliminary discovery, the Court should not lightly conclude that an application should be dismissed as not supporting a conclusion that the applicant "may have been entitled to make a claim for relief".
- Determination of an application under UCPR rule 5.3 does not involve a determination of the merits of any claim for relief the applicant might propound.
- Information bearing upon an applicant's decision "whether or not to commence proceedings against [a] prospective defendant" may include questions such as: (i) whether there exist defences that might defeat a claim; and (ii) whether a claim would potentially be worthwhile in the sense of yielding an award of damages or other order sufficient to justify the commencement of proceedings.
- Accordingly, an order for preliminary discovery may extend to an order for discovery for documents going only to the quantum of relief that might be claimed.
- whether an applicant has "sufficient information to decide whether or not to commence proceedings" against a prospective defendant requires an objective assessment of the information already held by the applicant.
- if the preconditions for the making of an order for preliminary discovery are made out, the making of such an order remains in the discretion of the Court."

The Court observed that an applicant for preliminary discovery must disclose what information he, she or it already has which is relevant to making the decision whether or not to commence proceedings against prospective defendants.

In this case where there was evidence that:

- the plaintiff was suffering from a medical condition diagnosed as severe depression;
- the first defendant knew his brother was suffering from the medical condition and of its nature and the potential defendant insisted his brother relinquish any interest in the group and that he retire from management;
- the first defendant made representations that the amount paid was a fair estimated value;
- that the accountants acted for both brothers;
- expert advice had been sought by the brother after his exit and before seeking preliminary discovery on the valuation of the business that showed the brother had made reasonable enquiries to assist his decision making about whether he should bring a claim against his brother.

In these circumstances the Court determined an order for preliminary discovery was appropriate.

Persons who believe they have claims against others are entitled to seek production of documents from potential defendants and others which will assist them to determine whether or not they have a viable claim.

Preliminary discovery can be utilised to obtain documents to assist in determining whether there is a claim or the likely quantum of the claim and whether it bringing proceedings is likely to be worthwhile.

Whilst costs orders can be made in favour of the party that must provide discovery, the forensic advantage obtained from preliminary discovery is significant and can be used before the significant costs of commencing full blown proceedings are incurred.

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Proper interpretation of a "spontaneous combustion" exclusion clause in an ISR Policy

The industrial special risks ("ISR") policy wording has been standardised across the insurance industry for some time.

The ISR policy wording is commonly issued by insurers based on the industry Mark IV or Mark V versions. A leading commentator in the insurance industry has stated that:

> *"…the base wording of the Mark IV provides greater cover for the Insured in many areas, but the drafting and construction of the Mark V wording is superior."* (Allan Manning circa 2005)

Whether it is the Mark IV or Mark V version the standard ISR policy provides cover to the Insured for material damage and business interruption losses arising from certain events including fire.

One of the more interesting perils exclusions contained in the ISR policy is the "spontaneous combustion" clause which excludes loss or damage occasioned by spontaneous combustion, fermentation or heating.

The application of this clause and the correct

interpretation to be given to the word "spontaneous" was recently considered by the Full Federal Court of Australia in *Dalby Bio-Refinery Ltd v Allianz Australia Insurance Limited*.

Dalby Bio-Refinery Ltd ("DBR") carried on business as a manufacturer and distributor of ethanol including a bio-refinery in Dalby, Queensland.

In 2016 fire and emergency services attended DBR's premises in respect of damage which occurred and was continuing to occur to stockpiles of dry distillers' grain and soluble in four bays.

Tests conducted by emergency services indicated the product was unlikely to develop into large scale flaming combustion although some product had significant discolouration and other significant damage resulting in a large quantity of product being discarded.

DBR claimed indemnity for material damage under its Mark IV ISR policy issued by Allianz and other insurers.

Insurers declined indemnity by reason of perils exclusion 6(c)(i) and/or 6(c)(ii) which was expressed in the following terms:

> ***"Perils Exclusions:***
>
> *The Insurer(s) shall not be liable … in respect of:-*
>
> *6. physical loss, destruction or damage occasioned by or happening through:-*
>
> *…*
>
> *(c) (i) spontaneous combustion;*
>
> *(ii) spontaneous fermentation or heating or any process involving the direct*
>
> *Provided that Perils Exclusions 6(c)(i) and 6(c)(ii) shall be limited to the item or items immediately affected and shall not extend to other property damaged as a result of such spontaneous combustion, fermentation or heating process involving the direct application of heat."*

DBR commenced proceedings in the Federal Court of Australia to claim an entitlement to indemnity under the ISR policy for damage to its products arising from the above incident.

The matter came on for hearing at first instance before his Honour Justice Lee where the parties agreed the issues of liability ought be determined separately before all other issues.

The hearing therefore proceeded before Lee J to determine the proper construction of Perils Exclusion 6(c) of the ISR Policy and whether insurers were entitled to decline indemnity.

Justice Lee found in favour of insurers and dismissed the proceedings.

DBR appealed to the Full Federal Court.

By a unanimous judgment the Full Court comprising Allsop CJ, Beach & Anastassiou JJ dismissed the appeal.

The Court observed that a referee was appointed in the proceedings before Lee J to determine the circumstances giving rise to the damage. Key questions that were referred included whether, in the opinion of the referee it was more likely than not the damage to the products was occasioned by or happening through:

- Spontaneous combustion of the product;
- Spontaneous fermentation;
- Heating;
- Any process involving the direct application of heat;
- Some other process and, if so, what that process was.

The referee issued a report in which he referred to the term "self-heating" instead of "spontaneous combustion" or "heating". Accordingly, a further direction was issued requiring the referee to explain by a second report whether his conclusions meant the damage was occasioned by or happened through spontaneous heating.

The Full Court noted the referee's conclusions indicated the damage was caused by self-heating though he could not be precise about a cause or mechanism which brought about the self-heating.

In his second report the referee distinguished between spontaneous heating and self-heating based on his understanding of the English language meaning of the word "spontaneous". In that sense the referee considered "spontaneous heating" and "self-heating" were not quite synonymous because he understood spontaneous to mean sudden.

DBR sought to highlight this distinction by the referee and contended for the proposition that "spontaneous" meant something sudden. As there was no sudden event giving rise to the damage, DBR contended the insurers' interpretation of the perils exclusion was wrong and indemnity ought to have been granted under the ISR policy.

However, insurers relied on dictionary definitions which referred to spontaneous being something occurring without external influence and did not require a "sudden" or immediate element.

Lee J agreed with insurers.

The Full Court upheld insurers' arguments on this issue.

The following passage demonstrates the Full Court's findings:

> *"Perils exclusion 6(c)(i) 'spontaneous combustion', is a phrase encompassing actual 'combustion'. Its spontaneous character may manifest itself in a sudden event of fire or ignition, but spontaneous does not mean sudden; rather as the dictionaries show, it means self-generated or from within."*

Next, the Full Court considered whether "heating" in 6(c)(ii) was to be qualified by the adjective "spontaneous".

At first instance, Lee J accepted insurers' arguments and held it was not to be so qualified. His Honour also held that, in the event he was found to be wrong on this point, he considered the referee's descriptions of "self-heating" fell within the meaning of "spontaneous heating" to enliven the perils exclusion clause.

The Full Court decided differently and held the structure of the subclause tends to confirm that "spontaneous" in the sense of self-generated heating was intended to qualify heating.

Although the Full Court departed from the primary judge's interpretation on this point, it agreed with Justice Lee's alternative interpretation that the referee's descriptions of "self-heating" fell within the meaning of "spontaneous heating" in the exclusion clause.

Therefore, the Full Court held the following to be the correct interpretation of relevant terms in the spontaneous combustion perils exclusion:

- "spontaneous combustion" in 6(c)(i) refers to actual combustion and refers to a self-generated process from within which does not require a sudden event.
- "spontaneous fermentation" in 6(c)(ii) also means a self-generated process which does not require a sudden event.
- "heating" in 6(c)(ii) is to be qualified by the adjective "spontaneous" such that it refers to a self-generated process which does not require a sudden event.
- the balance of 6(c)(ii) "or any process involving the direct application of heat" refers to the external application of heat.

This interesting and significant decision provides clarity for the insurance industry regarding the proper construction of the spontaneous combustion perils exclusion contained in the industry standard ISR policy wordings.

The Full Court has confirmed an ISR insurer is not liable to indemnify an insured for property damage occasioned by combustion, fermentation or heat involving a self-generated process.

Each of the above instances is to be qualified by the adjective "spontaneous" which means a self-generated process without any external factors, rather than a sudden event.

The perils exclusion also excludes liability for damage occasioned by external factors where it involves the direct application of heat.

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CONSTRUCTION ROUNDUP

The Lacrosse Tower Fire – Liability of Subcontractors and Consultants

This is the third article in our series on the findings of Woodward J with respect to the liabilities of the various parties who constructed the Lacrosse Tower, which was subsequently damaged by a fire spread through its combustible cladding: *Owners Corporation No. 1 of PS613436T & Ors v. LU Simon Pty Limited & Ors* (Building and Property) [2019] VCAT 286.

In our previous articles, we looked at how Woodward J determined whether the aluminium composite cladding (ACP) installed on the outside of the building was in breach of the Building Code of Australia, and the builder's liability to the owners corporation for its damages as a consequence of the fire.

In this issue, we look at the types of claims made against the consultants who participated in the design and construction of the Lacrosse Tower, and consider the liability of the building surveyor who certified that the cladding complied with the Building Code of Australia, notwithstanding its combustibility.

The claims against the consultants

The Owners made claims against the consultants and certifiers on the basis that they had each owed the Owners a duty of care, which they breached.

LU Simon agreed that the consultants and certifiers owed the Owners such a duty of care, and also claimed that the consultants and certifiers had breached their respective consultancy agreements with LU Simon.

LU Simon also claimed that each of the consultants and certifiers engaged in misleading and deceptive conduct in contravention of the Australian Consumer Law.

As a threshold issue, Woodward J considered whether the consultants' and certifiers' obligations under their respective consultancy agreements were absolute, or whether a breach would only have been established if it had been shown that the consultant or certifier had not acted with due care and skill.

In this respect, it had been submitted by the certifier's senior counsel that the contractual obligations owed by a professional are co-extensive with the common law duty to exercise reasonable care, and as such Part X of the *Wrongs Act 1958* (Vic) applied, and they cited section 46 of the *Wrongs Act* and *Midland Bank PLC v. Messrs Cox McQueen (A Firm)* [1999] PNLR 593 as authority for this proposition.

[Part X of the *Wrongs Act* sets out the principles applicable to a common law duty of care in Victoria.

Section 46 provides that Part X does not prevent parties to a contract from making express provisions for their rights, obligations and liabilities under the contract.]

However, Woodward J did not agree with this submission. His Honour stated that in his view the authority cited by senior counsel at most might support the proposition that any imposition of absolute liability on members of a profession must be stated in clear terms; however it did not follow from section 46 that a contract that did not expressly exclude Part X necessarily engaged all the provisions of that Part.

Accordingly, it was necessary for the court to consider the actions of each of the consultants and decide whether that consultant had acted negligently in the circumstances, and whether that conduct also constituted a breach of the consultant's consultancy agreement.

Gardner Group – building certifier

Mr Stasi Galanos was the building surveyor who issued certifications allowing the construction of the Lacrosse Tower to be commenced and progressed, and for the building to be occupied.

Gardner Group Pty Limited was Mr Galanos' employer. Each was sued independently by the Owners, but since Gardner Group was vicariously liable for a breach of duty by Mr Galanos, Woodward J considered their liability on a joint basis.

The Owners claimed that Mr Galanos had breached his duty owed to them by issuing a Stage 7 Building Permit in circumstances where:

- the design documentation approved by him provided for combustible cladding which was possibly in breach of the BCA; and
- he did not have sufficient information to assess whether the cladding was in fact compliant with the BCA.

LU Simon similarly claimed that Gardner Group had breached its duty of care to the Owners, in that it had been involved in the various design phases of the tower, but had failed to provide any advice or warning during those phases that the ACPs were non-compliant with the BCA and not fit for the purpose of being installed on the outside of the tower.

LU Simon also claimed that Gardner Group breached its consultancy agreement, by:

- issuing the Stage 7 Building Permit in the circumstances pleaded by the Owners;
- failing to identify the deficiencies in the relevant Fire Engineering Report; and
- failing to properly inspect the work during construction for compliance with the BCA.

Woodward J was satisfied that the evidence established that Gardner Group had breached its contractual obligations, and these breaches had resulted from a failure to exercise reasonable care.

In particular, Gardner Group had been aware of the proposed use of Alucobond ACPs on the external facades and balconies of the tower at the time that Mr Galanos had issued the Stage 7 building permit, in circumstances that these ACPs did not meet the "deemed to satisfy" provisions of the BCA.

While Gardner Group had argued that since it had not been the architect it had not been responsible for the specification of the ACPs, his Honour noted that it had been clear that from early on in the development of the design Gardner Group had seen no difficulty with this particular design decision "from a BCA-compliance perspective", and this had infected the whole design process.

Woodward J looked at Mr Galanos' apparent reliance on a test certificate of the performance of the Alucobond ACPs as being "evidence of suitability" as required by BCA A2.2. BCA A2.2(a) sets out the forms of evidence that a builder *may* rely on as part of the process of satisfying himself or herself of the suitability of particular materials. However, it was evident from the terms of A2.2 itself that it is not intended to operate as a fixed checklist of pre-requisites to compliance.

Conversely, in an appropriate case, a building surveyor may need to go further than the information about the material provided by one or more of the documents identified in A2.2(a). Whether or not one of the items listed in A2.2(a) is sufficient evidence in a particular case requires the professional judgment of the building surveyor.

In this regard, his Honour found that Mr Galanos probably held a genuine belief that ACPs with a polyethylene core were BCA compliant but had not undertaken any robust or critical analysis of this issue, and had thus failed to give adequate or reasonable consideration to whether the specified ACPs were compliant or suitable for installation on the Lacrosse Tower.

His Honour also suggested that it would have been reasonable for Mr Galanos to consult a fire engineer in order to confirm or test their reliance on how they construed the BCA's requirements with respect to laminates in order to establish a pathway for the ACPs to comply with the BCA. His Honour noted that the evidence was clear that if Mr Galanos had consulted a fire engineer, the response would have been likely that they considered that ACPs with a 100% polyethylene core did not meet the "deemed to satisfy" provisions of the BCA.

Woodward J also considered whether Gardner Group was entitled to rely on the defence of "peer professional opinion". Pursuant to this defence (in section 59 of the *Wrongs Act*), a professional is not negligent if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by a significant

number of respected practitioners in the field as competent professional practice in the circumstances. [NSW has an equivalent provision in section 5O of the *Civil Liability Act*.]

In response to an argument that building surveying was not a "profession", his Honour's view was that it required a level of skill and expertise such that by 2010 and 2011 (when the Lacrosse Tower was under construction), building surveying as a vocation had comfortably reached the point where the ordinary reasonable person or "community perception" would view it is a profession. In this regard, Woodward J noted that while the Victorian Parliament had not included the Australian Institute of Building Surveyors in the list of professionals engaged with when considering the enactment of section 59, section 135 of the *Building Act 1993* (Vic) did mandate that building surveyors hold professional indemnity insurance. Accordingly, his Honour held that building surveying was a profession for the purposes of section 59.

However, while Gardner Group's evidence established that its practice of reliance on BCA A2.2 was "essentially uniform", his Honour stated that it did not follow that Gardner Group was thereby absolved from a finding of negligence. In this regard, there may be a particular obligation imposed by Gardner Group's consultancy agreement or some conduct by the surveyor that did not permit the application of the defence.

Woodward J held that the reliance of Mr Galanos on his interpretation of the BCA without further enquiry or consulting with fire engineers to check that interpretation was conduct that was unreasonable for the purposes of section 59 and thus the Gardner Group were not entitled to the defence afforded by that section.

Turning to the question of whether Gardner Group had breached the terms of its consultancy agreement with LU Simon, Woodward J held that the duties of Gardner Group under their consultancy agreement were co-extensive with their duties at common law to exercise reasonable care.

His Honour held that as the consultant with contractual responsibility for liaison with the Metropolitan Fire and Emergency Services Board, Gardner Group should have noticed and queried the specification of the external cladding systems for the walls. Since this was a specific obligation in its consultancy agreement, this obligation had been breached.

His Honour noted that this was in contrast with his finding (discussed in last month's newsletter) that LU Simon had breached its statutory warranties that were owed to the Owners by being implied into its contract, but without being negligent.

Finally, considering whether Gardner Group had engaged in misleading and deceptive conduct in contravention of the Australian Consumer Law, Woodward J was satisfied that Gardner Group had failed to exercise reasonable care when issuing the Stage 7 Building Permit, thus representing that the specification of Alucobond ACPs was compliant with the BCA, and by doing so it had also engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of the Act.

From Woodward J's analysis of the evidence, it appears that Mr Galanos' and Gardner Group's liability to the Owners and to LU Simon arose because they relied too heavily on their own interpretation of the provisions of the BCA and did not take any (or sufficient steps) to check or test that interpretation. If Mr Galanos had asked a fire engineer to confirm whether Alucobond ACPs complied with the BCA, it is likely the Stage 7 Building Permit would not have been issued until different cladding was specified and installed, and the fire spread through the combustible cladding could thus have been avoided.

It is clear from this case that a certifier must use his or her professional judgment to decide whether further enquiry is necessary, rather than approaching the question of compliance with the BCA as an exercise of just "ticking the boxes".

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The Freedom Of An Adjudicator To Commit An Error In Assessing Payment Entitlements

The timings of the security of payment processes set out in the *Building and Construction Industry Security of Payment Act 1999* (NSW) have been described as "brutally fast" in order to facilitate essential cash flow to participants in the construction industry: *Probuild (Aust) Pty Limited v. Shade Systems Pty Limited* [2018] HCA 4 at [40] citing with approval Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (2017) at 1070.

Disputes over payment claims may be referred to adjudicators for determination of payment entitlements, with such determinations to have interim effect. Notwithstanding various attempts to argue otherwise since the implementation of the Act, the High Court in *Probuild* confirmed that an adjudicator's determination is not reviewable by the courts unless the adjudicator acted outside the scope of the jurisdiction afforded to him by the statute. Accordingly, if the adjudicator makes an error of law when reaching his or her conclusions, this will not by itself render the adjudicator's determination invalid or void, and the amount determined by the adjudicator to be payable must be duly paid in full. This makes the receipt of an adjudicator's determination in one's favour a valuable tool in subsequent negotiations to wrap up a construction project.

Notwithstanding the relative freedom given to the adjudicator when assessing the contractor's

entitlement to an interim payment, the adjudicator is still required by the Act to comply with certain conditions. These include the requirement to take into account:

- the provisions of the construction contract;
- the submissions and supporting information provided by the claimant; and
- the payment schedule and relevant documentation provided by the respondent.

In the recent cases of *MMRI Pty Limited v. Iskra* [2019] NSWSC 35 and *Iskra v. MMIR Pty Limited* [2019] NSWCA 126), the Supreme Court (at first instance) and the Court of Appeal considered whether an adjudicator had properly complied with these conditions when delivering his determination, and whether his determination was liable to be quashed as a result.

MMIR was the owner of a restaurant and function centre in Wollongong. It engaged Mr Iskra's business to carry out various construction works at the venue. While MMIR contended in court that Mr Iskra's fixed quote of $220,000 had been accepted by it and this constituted the contract between the parties, Mr Iskra claimed that the contract was oral and provided for the work to be carried out on a "do and charge" basis.

Mr Iskra submitted a payment claim under the Act consisting of a two page invoice with a number of supporting documents. The claim identified 15 items of work plus a six per cent "project management fee" of $31,689.36. The covering invoice allowed a credit of $450,000 for amounts already paid, leaving the sum claimed as $165,829.95.

In response, MMIR served a payment schedule proposing to pay $nil. This was stated to be on four bases: (a) the works were not undertaken on the basis claimed by Mr Iskra; (b) payment had already been made with respect to some of the claimed items; (c) the claim had not been "progressed"; and (d) MMIR was entitled to a set-off with respect to the works.

Mr Iskra referred his claim to adjudication. In its adjudication response, MMIR asserted that:

- the construction contract arose from the acceptance of a written quote rather than being an oral "do and charge" contract;
- it had not had an opportunity to properly analyse Mr Iskra's claim, but the amounts claimed by Mr Iskra were grossly excessive;
- Mr Iskra had either fraudulently made his claim, duplicated his claim, inflated his claim or acted negligently in carrying out the building works.

In his determination, the adjudicator stated that he was not satisfied that MMIR's allegations had been established since these allegations had not been particularised or supported with sufficient evidence.

Turning to Mr Iskra's submissions and materials in support of the adjudication application, the adjudicator stated that:

> *"The claimant has demonstrated that it has an entitlement in accordance with the contract and has provided sufficient information and methodology as to how it arrived at the amount for the works claimed. I have before me by way of submissions, statutory declarations and numerous pieces of correspondence between the parties indicating the works progressing on the project …*
>
> *Based upon the materials before me, I am satisfied that the claimant is entitled to a payment."*

The adjudicator thus determined that the amount owing to Mr Iskra was $159,829.95 (including GST) after taking into account a deduction of $6,000 which both parties had agreed had already been paid.

MMIR commenced proceedings in the Supreme Court of NSW seeking an order that the adjudicator's determination was either void or should be quashed, on the basis that the adjudicator had failed to conduct his own valuation of the builder's work, and had instead simply adopted Mr Iskra's claim.

Before Parker J, counsel for MMIR argued that the adjudicator's reasons showed that he considered that MMIR bore the onus of proof, and once the adjudicator had concluded that there was nothing to support MMIR's assertions about Mr Iskra's claim, he had automatically awarded the amount that had been claimed.

In his judgment, Parker J noted that there were various authorities consistent with the Act that it was an essential requirement of conducting an adjudication that the adjudicator undertake an independent valuation of the work. In *Pacific General Securities Limited v. Soliman & Sons Pty Limited* [2006] NSWSC 13 Brereton J had stated:

> *"…[T]he absence of relevant material from a respondent does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which at a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value. Adoption of the other approach by an adjudicator – by allowing a claim in full just because a respondent's submissions are rejected, without determining whether the construction work the subject of the claim has been performed and without valuing it – would bespeak a misconception of what is required of an adjudicator. In traditional terms, it would be a jurisdictional error resulting in invalidity*.'

Parker J stated that he understood Brereton J's statement to be a minimum requirement which the adjudicator must address whether or not he is expressly referred to it by the parties.

In order to apply this principle, Parker J considered the nature of the contract between the parties. While Mr Iskra's counsel had submitted that a "do and

charge" contract was the same thing as a "cost plus" contract, his Honour took a different view. He held that a "do and charge" contract is not necessarily a "costs plus" contract, but gives rise to an entitlement by way of quantum meruit to reasonable payment. His Honour noted that there may be some circumstances in which the reasonable payment would be determined as being the costs plus some appropriate margin, but his was not necessarily so in every case.

Turning then to the adjudicator's determination, Parker J stated:

> "*In my view, the tenor of the adjudication is clear. The Adjudicator treated the issue before him as one which depended upon the owner sustaining the claims and assertions made in the payment schedule and the adjudication response, rather than turning on the validity of the claim made in the payment claim and pursued in the adjudication application.*"

His Honour held that there was nothing in the adjudicator's determination that expressly stated that the adjudicator had considered whether the amount claimed was a proper amount, or even that the adjudicator had appreciated that this was his task. Further, the determination did not include any consideration of the reasonableness of the six per cent mark up for project management fees. In his Honour's view of the nature of a "do and charge" contract, a proper consideration of the claim would require an evaluation of the reasonableness of this margin.

Parker J held that, based on the authorities considered in the trial (including Brereton J's statement in *Pacific General*), the way which the adjudicator conducted the adjudication was a jurisdictional error, and the determination would thus need to be quashed.

Mr Iskra appealed to the Court of Appeal, on the basis that Parker J had erred in his findings that:

- the adjudicator had determined the progress amount claimed by Mr Iskra simply because he had rejected MMIR's submissions;
- the adjudicator had thus failed to determine the value of the work; and
- the adjudicator had thus committed jurisdictional error.

Gleeson JA (with whom Bathurst CJ and Payne JA agreed) cited *Hossain v. Minister for Immigration and Border Protection* [2018] HCA 34 at [23]-[24] as authority for the approach that "jurisdictional error" is where a decision-maker has not complied with the preconditions and conditions imposed by a statute in order to give the decision-maker the authority to make the decision.

His Honour noted that the adjudicator's determination had expressly stated that the adjudicator had considered all of Mr Iskra's materials, and had concluded that the builder had demonstrated that it had an entitlement in accordance with the contract and had provided sufficient information and methodology. Accordingly, and contrary to MMIR's submissions, the process adopted by the adjudicator did not warrant the description that he had done no more than simply make the observation that he has "seen" the builder's methodology with respect to the amount claimed.

Gleeson JA stated that the primary judge had erred when he had held that the adjudicator had failed to consider whether the amount claimed was "proper" having regard to both the terms of the contract and the "reasonable value" of the works performed.

His Honour noted that there was no requirement in the Act for legally correct language and a fine tooth comb approach was to be avoided: *Cockram Construction Limited v. Fulton Hogan Construction Pty Limited* [2018] NSWCA 107. The primary judge had therefore erred in basing his finding on the precise wording of the adjudication determination, rather than looking at it holistically.

Further, the primary judge had erred in substituting his own construction of a "do and charge" contract. Gleeson JA noted that even if the adjudicator's construction of the contract was wrong, this would not be a jurisdictional error requiring review by the court: *Icon Co (NSW) Pty Limited v. Australia Avenue Developments Pty Limited* [2018] NSWCA 339.

Gleeson JA held that, when read as a whole, the adjudication determination "makes plain" that the adjudicator considered the amount claimed having regard to the terms of the contract and the payment claim, and any error by the adjudicator in construing the terms of the contract or in assessing the value of the work was not a jurisdictional error that permitted the court's review. Accordingly, the adjudication determination could not be quashed.

The different judicial approaches at first instance and on appeal in *MMIR v. Iskra* illustrate the fine balance between an enforceable adjudication determination and a determination liable to be held void or quashed.

While they do not need to be legalistic or pedantic in their assessment (as confirmed in *Cockram Construction*), adjudicators would be well advised to state with some particularity the conditions with which they must comply pursuant to the Act, and how these conditions have been met.

If you are in receipt of an adjudication determination which you are not sure has complied with all the requisite conditions set out in the Act, our expert lawyers can advise on whether the determination would, if challenged in court, be likely to be quashed or held to be void.

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EMPLOYMENT ROUNDUP

How To Properly Consult Before A Redundancy

Change is endemic in employment. Employers nowadays – more than ever – need to be able to take swift, low-risk staffing decisions to effectively tailor their business to meet market needs.

When some or all of a workforce is no longer need, it is imperative to know whether the termination of workers will involve a redundancy. Essentially, redundancy happens when an employer either:

- doesn't need an employee's job to be done by anyone, or
- becomes insolvent or bankrupt.

Common examples of when a redundancy can occur are where a business:

- introduces new technology (eg. the job can be done by a machine)
- slows down due to lower sales or production
- closes down
- relocates interstate or overseas
- restructures or reorganises because a merger or takeover happens.

The Fair Work Act 2009 (Cth)(FW Act) has important rules relating to redundancy. These include provisions about qualification for redundancy pay, and circumstances where an employer can seek to avoid paying redundancy entitlements,

Importantly the FW Act also has provisions which mean that redundancy can have an effect on the unfair dismissal.

Critically, a person cannot be unfairly dismissed if the dismissal was a case of genuine redundancy. This is the effect of subsection 385(d) of the FW Act which relevantly states:

"385 What is an unfair dismissal

A person has been unfairly dismissed if the FWC is satisfied that:

(a) the person has been dismissed; and

…

(d) the dismissal was not a case of genuine redundancy."

Section 389 of the FW Act gives meaning of genuine redundancy:

"389 Meaning of genuine redundancy

(1) A person's dismissal was a case of genuine redundancy if:

(a) the person's employer no longer required 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 obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

(2) A person's dismissal was not a case of genuine redundancy if it would have been reasonable in all the circumstances for the person to be redeployed within:

(a) the employer's enterprise; or

(b) the enterprise of an associated entity of the employer."

The provisions of s.389 of the FW Act identify three specific elements which, if satisfied in combination, determine whether or not a dismissal was a case of genuine redundancy.

Subsection 389(1) contains two affirmative elements, both of which must be established, in order to allow for a finding that a dismissal was a case of genuine redundancy, and subsection 389(2) contains one negatory element which, if established, renders the dismissal not to be a case of genuine redundancy.

The second element contained in s.389 of the FW Act requires a positive finding that the employer has complied with any Award or Agreement obligations to consult about the redundancy.

The consultation required will vary – depending on the terms of any relevant Modern Award or Enterprise Agreement.

The consultation process sets out the things the employer needs to do when they decide to make changes to the business that are likely to result in redundancies. This has to be done as soon as possible after the decision has been made to make these changes

At a minimum, consultation requirements include:

- notifying the employees who may be affected by the proposed changes
- providing the employees with information about these changes and their expected effects
- discussing steps taken to avoid and minimise negative effects on the employees
- considering employees ideas or suggestions about the changes.

It is imperative to keep adequate records which demonstrate that each employee was the subject of the necessary consultation.

Failure to properly consult can undermine a reorganisation process. It can expose an employer to a costly unfair dismissal claim.

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WORKERS COMPENSATION ROUNDUP

Does a Notional Assessment of Damages Create an Estoppel?

In New South Wales Section 151Z of the *Workers Compensation Act* 1987 provides a right of recovery against a negligent tortfeasor in certain circumstances.

Prior to the amendments to the worker's compensation legislation on 19 June 2012 there was a statutory entitlement to compensation arising out of injuries sustained on the way to and from work (journey claims). It was therefore quite common for recovery to be sought by a worker's compensation insurer from a CTP insurer. Sometimes payments would be made by agreement. On other occasions, if there was a dispute as to the extent of damages, it would be necessary for proceedings to be commenced. If the injured worker did not commence their own proceedings and proceedings were solely commenced by the worker's compensation insurer then it would be necessary for the Court to undertake a notional assessment of damages as if the worker had commenced proceedings.

But what happens if a notional assessment of damages is undertaken and the worker subsequently brings their own claim?

Justice Adamson in the Supreme Court recently considered this issue (*IAG Limited t/as NRMA Insurance v Lucic*).

Steven Lucic was injured during the course of his employment with Robert Bookman Enterprises Pty Limited when he was involved in a motor vehicle accident on 31 August 2005. Lucic made a claim for workers compensation against his employer and also a claim for damages pursuant to the *Motor Accidents Compensation Act 1999* ("MACA 1999") against NRMA. NRMA, the CTP insurer of the negligent driver, admitted liability.

As NRMA did not agree to repay the compensation, in 2007 Allianz commenced proceedings in the District Court against the negligent driver pursuant to Section 151Z of the *Workers Compensation Act* 1987. Judgment was handed down by Truss DCJ on 3 October 2007. At that time judgment was handed down in favour of the worker's compensation insurer Allianz in the sum of $91,096.75 being the amount of compensation payments made at that time. Damages were notionally assessed at $196,800.00. This meant that Allianz could recover any additional payments made up to that notional assessment. NRMA reimbursed Allianz up to that amount however refused to make any payments beyond that figure.

Ultimately the worker's own claim for damages against NRMA proceeded for assessment by CARS. The claims assessor assessed damages at $1,548,026.00. At the assessment NRMA argued there was an issue estoppel and also argued it was an abuse of process for the worker to seek to be entitled to greater damages than Truss DCJ had determined in the recovery proceedings.

The CARS assessor disagreed with these arguments.

NRMA appealed to the Supreme Court. NRMA again argued that in the recovery proceedings there was a full contest on damages in which the worker had given evidence and was cross examined. NRMA argued that the judgment in the recovery proceedings created a binding estoppel in relation to the quantum of damages recovered.

Her Honour Adamson J referred to the fact that in the Court of Appeal decision of *Grant v Royal Rehabilitation Centre* where the concept of the notional assessment of damages was discussed, the Court of Appeal referred to the fact that the *"determination will be binding as between the employer paying compensation to the injured worker, and the wrongdoer".*

Her Honour also referred to the decision of the High Court in *Tomlinson v Ramsey Food Processing* in which it was held the orders made by the Federal Court did not create an issue estoppel as the worker was not a party to those proceedings.

Her Honour stated:

> *"I consider that Tomlinson v Ramsey Food Processing is not relevantly distinguishable from the present case. Allianz was enforcing the statutory indemnity in its favour when it brought the Recovery Proceedings; it was not bringing a claim on behalf of the Claimant. Its interests were distinct from his. The issues in the Recovery Proceedings were materially different from the issues involved in the Claims Assessor's assessment of the claimant's damages, as were the parties. Although in both matters there was a consideration of the Claimant's damages, in the Recovery Proceedings this assessment was notional and was assessed as at the date of the judgment of the Recovery Proceedings, which were within the control of the WC insurer….*
>
> *"It is difficult to see how there could be any privity of interest between the Claimant and the WC insurer given their different interests and the different causes of action against the NRMA."*

Her Honour also noted that if NRMA's argument was accepted then the worker would be bound by the result of proceedings in which he had no opportunity to be heard as a party. In those proceedings his only involvement was as a witness. The Heads of Damage claimed by the worker in his own claim against NRMA included damages for non economic loss, past and future medical expenses, past and future gratuitous assistance and future commercial care which were not claimed as part of the recovery proceedings.

Her Honour therefore concluded the worker was not bound by the finding as to notional assessment of damages in the recovery proceedings.

Her Honour stated:

> *"The effect of the judgment in the Recovery Proceedings is to create a res judicata between the Employer and Allianz (who are relevantly privies) and the driver and the NRMA (who are also relevantly privies) as to the payments to the date of judgment and an issue estoppel as to the limit of the statutory indemnity, being the notional damages determined in those proceedings. Thus, irrespective of the assessment by the claims assessor, the limit of the statutory indemnity is $196,800, as found by Truss DCJ in the Recovery Proceedings. The claimant, though a witness in the Recovery Proceedings, was neither a party nor a privy. Therefore there is no res judicata or issue estoppel against him arising from the Recovery Proceedings. The Claims Assessor was, accordingly, both entitled and obliged to assess the claimant's damages without regard to the limitation on the statutory indemnity which bound the NRMA and the WC insurer."*

The worker was therefore entitled to proceed with his claim against the CTP insurer unfettered by the judgment in the Recovery Proceedings

NRMA were also unsuccessful in challenging the CARS's assessor's damages assessment.

Presumably therefore the worker's compensation insurer would be entitled to recover any additional compensation payments made over and above the notional assessment under section 151Z(1)(b) of the legislation as the worker is not entitled to retain both compensation and damages.

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Setting Aside an Election Between Lump Sum Compensation and Work Injury Damages

In NSW workers injured prior to 27 November 2001 were obliged to elect to receive lump sum compensation or common law work injury damages. They were not entitled to both. However where there was a deterioration in a medical condition and no cause to believe further deterioration of the medical condition would occur the election could be set aside.

The grounds for setting aside an election were recently examined in the District Court judgement in *Glogoski v Workers Compensation Nominal Insurer* [2019] NSWDC 154. In that case the injured worker applied to the District Court to revoke an election he made in 2001 as he wished to pursue a claim for work injury damages. The injured worker argued he sustained an exacerbation of his injury due to a separate incident after making his election and should be allowed to set aside his election to receive lump sum compensation.

The worker was employed by Ansett Australia Limited as a freight handler. He sustained an injury to his back on 28 February 2000. On 21 August 2001 he elected to receive lump sum compensation from the employer. In October 2001 he assisted in lifting a 65kg weight at work and as a result developed severe lower back pain and never returned to work after this event.

At the relevant time Section 151A(5) of the Workers Compensation Act 1987 provided:

> *"If,*
>
> *(a) a person elects to claim permanent loss compensation in respect of an injury; and*
> *(b) after the election is made, the injury causes a further material deterioration in the person's medical condition that, had it existed at the time of the election, would have entitled the person to additional permanent loss compensation; and*
> *(c) at the time of the election, there was no reasonable cause to believe that the further deterioration would occur,*
>
> *the person may, with the leave of the court and on such terms (if any) as the court thinks fit, revoke the election and commence proceedings in the court for the recovery of damages in respect of the injury."*

Russell SC DCJ observed the leading authority on the effect of s151A(5) was the High Court decision in *State of New South Wales v Taylor* [2001] HCA 15; (2001) 204 CLR 461 and majority judgment in that case summarised the test to be applied as follows:

> *"Section 151A(5)(c) requires the court to determine whether it would be unreasonable for a person to believe that the evidence before the court, concerning the applicant's condition at the time of election, demonstrated that the further deterioration would occur. The reasonable cause for belief is determined by reference to the evidence before the court concerning the applicant's condition at that time and expert opinion as to what the medical prognosis for that condition was at that time. What the applicant knew or ought to have known is irrelevant. If the court determines that it would not be unreasonable for a person to believe that the further deterioration would occur, the application for revocation fails."*

The injured worker's application turned on the likelihood that the worker had cause to believe his condition would not deteriorate. However the application failed as the Court concluded the worker did not prove that a reasonable person in his position would have had no cause to believe that further deterioration of his medical condition would probably occur.

The Court determined at the time of the election the injured worker:

- was permanently unfit for work involving heavy or

moderately lifting;

- was doing work involving heavy lifting even though he was under medical advice not to.
- had begun to experience a recurrence of symptoms in June 2001; and
- had lumbar pain and restriction of movement with some symptoms down the back of the left leg and was taking medication for left leg cramps.

The Court also concluded the expert medical evidence as to prognosis at the time of the election established:

- There was potential for increase in the level of permanent impairment in the back and each leg;
- The prognosis was guarded;
- No doctor suggested the injured worker would improve;
- All doctors said the injured worker was permanently unfit for work involving heavy lifting and that she should not do such work.

These facts did not establish that there was "no reasonable cause to believe further deterioration would occur.

Russell SC DCJ observed "It would not be unreasonable to believe that the further deterioration that occurred would occur."

No doctor concluded there would be no further deterioration. All the medical evidence supported the opposite view, that the injured worker's condition would ultimately deteriorate.

As a result the Court determined a reasonable person in the injured worker's position would have had reasonable cause to believe further deterioration would probably occur.

This decision is significant for claims by workers that suffered injury between 30 June 1987 and 27 November 2001 who were obliged to elect between lump sum compensation and common law damages.

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Section 48 Breaches & a Worker's Reasonable Efforts

Chapter 3 of the *Workplace Injury Management and Workers Compensation Act 1998 ("WIM")* introduced objectives to establish a system that sought to achieve optimal results in terms of the timely, safe and durable return to work for workers following workplace injuries. As part of the objective it required an insurer to establish and maintain injury management programs and imposed on both employers and injured workers an obligation to participate and cooperate in the establishment of injury management plans. Both parties must comply with the obligations imposed by or under an injury management plan.

Section 48(1) mandates that workers with current work capacity make reasonable efforts to return to work in suitable employment or pre-injury employment at the worker's place of employment or another place of employment. Under Section 48A failure to comply with this obligation provides the insurer with capacity to suspend or terminate the payment of weekly compensation or to cease and determine the worker's entitlements to compensation by following the process set out within the section.

The issue as to whether an injured worker had failed to make reasonable efforts to return to work in suitable employment was the subject of a recent appeal determination by Deputy President Snell in *Cross v Secretary, Department of Education* [2019] NSWWCCPD 20.

The worker sustained injury to her left shoulder in August 2014 and February 2015 when undertaking her duties as an administrator officer at Orange High School. After undergoing surgery to her left shoulder on 30 July 2015, the worker moved to live in Melbourne with her fiancée on 16 August 2015, and she married on 21 November 2015.

Around 10 November 2015 the worker's claims manager advised her she should commence suitable duties at Orange High School from 16 November 2015. The worker advised she could not as she had no accommodation.

The requirement to undertake suitable duties at Orange High School was specified in a subsequent return to work plan issued on 22 February 2016. On 3 March 2016 the insurer advised the worker she had failed to comply with the obligations set out in her injury management plan. If she wished to continue to receive weekly benefits she needed to supply evidence she had returned on suitable duties as specified in the return to work plan.

On 27 April 2016 the insurer gave the worker notice her weekly payments were terminated as a consequence of her failure to return to suitable duties in accordance with her return to work plan.

The worker sought re-instatement of her weekly benefits in the Workers Compensation Commission. Before the arbitrator at first instance it was determined the worker had not made reasonable efforts to return to work in suitable employment at Orange High School or any other place of employment and he concluded the insurer was entitled to rely on Section 48 in defence of the worker's claim for weekly benefits. Accordingly there was an award entered in favour of the employer in respect of the worker's claim for weekly compensation.

On appeal the Deputy President commented the focus of Section 48 was whether a worker had made reasonable efforts to return to work. This required

consideration of the reasonableness (or lack of it) of a worker's action. He referred to a number of earlier decisions which indicated a general proposition of consideration of the state of knowledge and circumstances of the particular worker in determining the issue of whether the worker had acted reasonably or unreasonably.

The worker submitted the arbitrator had only considered one factor in determining reasonableness, being the failure to comply with the injury management plan.

The Deputy President held the arbitrator was in error in adopting this approach as he failed to "consider the reasonableness of her actions", apart from his finding that her move to Melbourne should be ignored when considering the worker's fitness for suitable employment.

Based upon the arbitrator's failure to consider the following factors associated with her move to Melbourne, the Deputy President found the arbitrator had failed to give adequate reasoning on the issue of reasonableness:

- the worker's evidence that it was common knowledge at Orange High School she intended moving to Melbourne;
- reassurance by five claims officers of the insurer there would be "no problems" transferring her case to Melbourne;
- when she advised of her intended move to Melbourne, advice from a case worker her case would be transferred to a rehabilitation provider for rehabilitation and job seeking based in Geelong;
- advice from the worker she had been diagnosed with frozen shoulder and there was a potential requirement for further surgery and medications made her drowsy and prevented her from driving.

The Deputy President commented:

> *"The appellant's decision to sell her house in Orange and move to Melbourne, in circumstances where she was moving to be with the man who was to become her husband, and where she accepted assurances from multiple claims officers that such a move would not cause any complications to her workers compensation claim, could not be regarded as other than reasonable. It is appropriate to consider the reasonableness of her actions in the context of the information given to her by the claims officers, which she accepted."*

For the claimant to comply with the requirements of the Return to Work Plan dated February 2016 it would have been necessary to leave her husband and her new home in Melbourne and travel to Orange to set up a new home. The Deputy President considered the level of disruption involved would have militated against a durable return to work.

He found the arbitrator's focus on whether the worker acted unreasonably mis-stated the issue, which was whether the worker had failed to make reasonable attempts to return to work in suitable employment.

The Deputy President concluded the facts indicated the employer could not establish failure on the worker's behalf to comply with her obligation to make reasonable efforts to return to work. Consequently the employer was found to have no defence to the worker's claim for reinstatement of weekly benefits.

The decision highlights the need for insurers to give consideration to the circumstances of each particular worker when preparing return to work plans and also when considering to suspend and determine a worker's entitlement to ongoing weekly benefits based upon a failure to make reasonable efforts to return to work in suitable employment.

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