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GD NEWS / JUNE 2018

IN THIS EDITION

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Accidental Damage, Proximate Cause & Exclusions – Clarity for Insurers

The cause of damage can be a critical issue when analysing whether a claim falls for cover under an insurance policy.

Some policies provide cover for accidental damage and "accident/accidental" is defined in the policy and to trigger the policy there needs to be a mishap or an accident.

Exclusions may limit the types of accidents that are covered and where that is the case problems can arise where damage occurs as a result of two or more causes.

Where there are 2 or more causes that have played a role in damaging property it is necessary to identify the proximate cause of a loss and if there are 2 causes that have operated interdependently and each had to occur for the damage to occur the loss does not fall for cover under the policy.

The decision of Allsop CJ in *Sheehan v Lloyds Names Munich Re Syndicate Ltd* provides guidance on how the Courts will approach the identification of the proximate cause of a loss and the impact of exclusions where an insurer and insured are in dispute over what was the proximate cause and each have identified a different cause with only one of those causes excluded.

Allsop CJ was called on to consider a claim for damage to the starboard engine of a motor yacht. Sheehan owned a Sunseeker Manhattan, a monohull pleasure craft with two diesel engines. The yacht was refuelled by Sheehan at the Hillarys Yacht Club in Western Australia and had travelled out of the marina when he increased his speed and within approximately five minutes an alarm activated and the speed of the engine slowed automatically. Sheehan sought to navigate his yacht back to the marina and part way back the starboard engine shut down. He continued to operate the port engine for a while until he shut it down and then went to look in the engine bay room and observed the starboard side fuel tank was covered in oil. An oil cooler gasket was defective. The operating

manual required the engines to be switched off when an alarm sounded and Sheehan did not do that.

The damage to the engine resulted from overheating and seizure of the engine due to the loss of lube oil pressure and was a result of faulty design of the sealing arrangement between the lube oil cooler and the engine block. The gasket failed. The failure was not due to mechanical breakdown, the mechanical breakdown was due to the lack of lube oil.

Running the engine on after the alarm sounded compounded issues.

Sheehan had a policy of insurance that provided cover for *"accidental loss or damage to your boat and contents"*. The term "accident/accidental" was defined to mean *"an event that you did not expect or intend to happen".* It also included a series of accidents arising out of the one event.

There were exclusions in the policy and in particular, Sheehan was not covered for:

- inherent defects, structural faults, faulty workmanship or faulty design;
- any illegal or deliberate action by you, or someone acting with your express or implied consent;
- mechanical, structural, electrical or electronic breakdown unless directly caused by one of the insured events listed earlier in the PDS;
- a motor caused by or resulting from seizure and/or overheating unless caused by an accident which is otherwise an accepted claim under the policy.

The insurer contended the damage was not accidental damage and that one or more general exclusions applied. This called into focus the proximate cause of the loss.

When it came to determining whether or not there was accidental damage in insurance policies, Allsop CJ observed:

> *"An accident has been variously described as an "unlooked for mishap or an untoward event which is not expected or described" or "any unintended and unexpected occurrence which produces hurt or loss"."*

Allsop CJ went on to observe that accidental involves something *"fortuitous and unexpected"*.

Allsop CJ noted when it comes to looking at accidental damage there is an objective test which incorporates the specific knowledge and experience of the person involved. The question in this case was whether a reasonable operator of the vessel with the knowledge of Sheehan would have expected the damage to the starboard engine to have occurred in the circumstances.

The insurer argued that deliberately courting a risk could not amount to accidental damage. It was said the insured who had courted the risk and was aware of the risk of loss or damage but decided to take it should not be covered under the policy.

Allsop CJ noted Sheehan's actions demonstrated poor seamanship. Sheehan was not aware the alarm related to oil pressure and he believed he could limp home with the engine running. Allsop CJ concluded that from the perspective of a reasonable person with the knowledge of Sheehan, the rapid damage to the engine was unexpected and as such a reasonable person would have believed no damage would have occurred if the engine was operated in limp mode. Unfortunately that was not a correct assumption.

Allsop CJ concluded that a high standard must be reached for it to be found that an insured has courted the risk and where Sheehan had no knowledge the alarm related to lube oil pressure, it was not appropriate for there to be a conclusion he courted the risk.

As Allsop CJ observed from the principles in *Mount Albert City Council v New Zealand Municipalities Cooperative Insurance Co Ltd*:

> *"There is a category of cases falling short of a deliberate causing of the damage by the insured where his conduct is nevertheless so hazardous and culpable that the event cannot fairly be called an accident. It can only be a question of fact whether a case falls within this category. The insured's knowledge of the risk must be important, in that unless the evidence justifies the inference that he deliberately incurred the risk one would be very slow to find that the event was other than an accident. On the other hand it seems to me not decisive that the risk may have been deliberately run or calculated. For instance if the risk was reasonably seen by the insured as not a high one the occurrence might not be found to be an accident."*

With the first hurdle jumped Allsop CJ turned to a consideration of the cause of the damage.

Allsop CJ observed that causal enquiry is directed to the proximate cause of the loss. Allsop CJ noted that:

> *"This means proximate in efficiency, not the last in time. ... Proximate cause is determined based upon a judgment as to the "real", "effective", or "dominant" or "most efficient" cause. What is a proximate cause is to be decided as a matter of judgment reached by applying the common sense knowledge of a business person or seafarer. There does not need to be a single dominant, proximate or effective cause of loss or damage."*

Allsop CJ concluded that where there are a number of contributing causes it is not necessary to strain to isolate one if it seems that two or more causes operated with approximately equal effect.

In this case there was the loss of lube oil pressure due to the faulty design of the gasket and the damage

would have been avoided if Sheehan had turned off the engine immediately.

Sheehan argued there was only one proximate cause which was his failure to turn off the starboard engine once the alarm activated.

The insurer argued that the defective gasket was the effective cause and that cause was excluded and in the alternative both the defective gasket and the failure to turn off the starboard engine were effective causes and as one cause was excluded the claim was not covered.

Where there is more than one cause that contributes to damage it is necessary to attempt to identify the most proximate cause.

Where there are two or more causes of equal effect it is necessary to determine whether or not those causes have acted interdependently such that both are necessary for the damage to occur. Both causes may be necessary for the damage to occur or alternatively, the damage may have eventuated if either occurred.

In insurance law there is a long standing principle known as the Wayne Tank principle which is to the effect that:

"Where there are multiple proximate causes and one is an excluded event under the policy then the insured will not be able to recover."

A more accurate statement of the principle that where there are two proximate causes which are concurrent and interdependent, in the sense that if neither would have caused the loss without the other and one of those causes is excluded, then the policy is not liable to respond.

The more difficult question arises where the policy excludes one cause and not another and the two causes operating concurrently caused the damage however each would have caused the loss without the other. In this situation it is essential to pay close attention to the terms of each policy.

Allsop CJ concluded that:

> *"Once one concludes that, as a matter of construction of the contract, the insurer and the insured have agreed that the cover does not extend to any loss caused by a particular cause, and that the loss was caused by that cause, the policy's lack of response can be seen as evident. It is only if one concludes that the parties have agreed that the policy will not respond if the excluded cause must be the sole cause, for the existence of a concurrent and not excluded cause to be relevant."*

The application of the Wayne Tank principle will always turn on a question of construction of the policy however exclusions are not generally drafted to provide that the exclusion only applies where the excluded circumstances are the sole cause of a loss.

However in this case the Wayne Tank principle did not ultimately arise. Allsop CJ concluded there was a single proximate cause, the defective gasket.

Allsop CJ noted the Court is obliged to first identify a single proximate cause of loss and if a conclusion is reached that there are instead multiple proximate causes it is necessary to turn to consider whether they are concurrent and interdependent.

The faulty design of the gasket led to the drop in pressure. That led to the damage to the engine. The "real", "effective", or "dominant" or "most efficient" cause was the defective gasket.

The proximate cause was the failure of the gasket due to its faulty design. This enlivened the defective design exclusion.

The Wayne Tank principle did not need to be considered where there was only one proximate cause.

At the end of the day the policy did not respond.

Sheehan lost his engine and whilst the damage was accidental the policy did not respond as the damage was caused by defects.

Sheehan was ordered to pay the insurer's costs of $50,000 and he must now look to those responsible for the defective design to compensate him for his loss.

Discerning the proximate cause of damage is often a difficult task particularly where there are multiple causes that have contributed to the damage. Whether the damage results from the causes operating interdependently is an important consideration where one of the causes is excluded.

However equally important are the terms of the policy and whether or not the exclusions operate in a way that the excluded cause must be the sole cause of the loss for the existence of a concurrent and not excluded cause to be relevant.

For the Wayne Tank principle it is simple. Where there are two proximate causes which are concurrent and interdependent and one is excluded, an insured will not be able to recover its loss if the causes are inseparable and one is excluded by the policy.

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Ouch – A Liability Policy Doesn't Cover Damage Resulting From Alleged Defective Works

In a claim for property damage under a liability insurance policy it is not always easy to identify an occurrence which is the trigger for a claim or determine whether a claim is excluded where the property that is damaged is the product that has been supplied by a business.

Liability insurance covers damage caused by fortuitous events where the damage is neither expected nor intended from the viewpoint of the insured and there are generally exclusions that stipulate that damage to the product that an insured supplied is not covered where the damage results from a defect in the product. Some liability policies exclude damage to that part of the product that is defective whilst others exclude the damage to the product as a whole. The terms of the product defect exclusion can have significant consequences where a product supplied is damaged as a consequence of a defect in one of its components.

A further complication often arises where the product is supplied as part of a professional service and there is a professional services exclusion in the policy.

The recent decision of the NSW Court of Appeal in *Weir Services Australia Pty Ltd v AXA Corporate Solutions Assurance [2018] NSWCA 100* has shined some light on the way the Courts will approach the analysis of a claim for property damage arising from defective installation and commissioning works.

Weir was engaged by Phil Gold Processing and Refining Corp ("Phil Gold") in connection with the refurbishment of a semi-autogenerous grinding mill (SAG Mill) to be used in a mineral processing facility. Two years after completion of the refurbishment work, a circumferential weld disintegrated and one of the end plates became detached from the mill which was extensively damaged and unserviceable for some time. Phil Gold alleged that the disintegration of the weld resulted from one or both of two factors: inadequacy of welding undertaken during the refurbishment and failure to detect in the course of the refurbishment that pre-existing welding was in need of renewal. Phil Gold claimed compensation from Weir in respect of damage to the SAG Mill and loss of earning suffered which was determined at $2 million at an arbitration. Before the arbitration proceeded it was agreed that any recovery would be limited to US$10.725 million (cap) and that Weir would pay Phil Gold a fixed amount of US$2 million (collar) regardless of the outcome of the arbitration proceedings.

There was no real dispute regarding the circumstances of the claim made by Phil Gold. A part of the SAG Mill was damaged. A weld fractured and a steel flange and bolt, drum and end plate were thereby damaged in such a way that the SAG Mill as a whole could not operate and substantial remedial work was necessary. Weir was responsible for new welding work in the relevant area; also that part of its task was to assess pre-existing welding as a prelude to deciding where and to what extent new welding needed to be done. The shortcomings alleged against it concerned both these aspects of its work.

Weir had a broadform liability policy with AXA Corporate Solutions. The policy covered Weir's "liability to pay compensation for property damage" that was triggered by an occurrence. The insuring clause provided cover for:

"property damage which happens during the period of insurance and is caused by an occurrence and happens in connection with your business".

The policy had a product defect and a professional services exclusion. Relevantly they excluded:

"Professional Services

Liability caused by or arising from the rendering of or failure to render professional advice or service by You or any error or omission connected therewith."

This exclusion shall not apply to:

…..

(b) claims in respect of Personal Injury or Property Damage where such professional advice or service is given without fee or charge."

"Product Defects

Property Damage to Your Products if such Property Damage is attributable to any defect in Your Product."

There were 3 key definitions in the Policy

'*Occurrence' means an event, including continuous or repeated exposure to substantially the same general conditions, which results in Personal Injury or Property Damage neither expected nor intended by You.*

'Product' means anything (after it has ceased to be in Your possession or in Your legal control) which has been manufactured, grown, extracted, produced, processed, constructed, erected, installed, assembled, altered, repaired, serviced, treated, sold, supplied or distributed by You in the course of Your business, including any packaging or containers (other than a Vehicle) used to package or contain Your Product(s).

'Property Damage' means physical loss, damage or destruction of tangible property including the resultant loss of use, or loss of use of tangible property which has not been physically damaged or destroyed, provided such loss of use is caused by an Occurrence."

Weir claimed on its broadfrom liability policy contending the monies payable for the arbitration determination which essentially arose as a consequence of the cap and collar agreement was liability in respect of property damage and there had been an occurrence. AXA rejected the claim contending there was no occurrence and the professional services and Product defects exclusions applied. The battle lines were drawn. Proceedings were commenced by Weir in the NSW Supreme Court.

Hammerschlag J heard the proceedings and determined the policy was not satisfied because Weir

had not established that an "occurrence" had resulted in "Property Damage"; the "professional services" exclusion would have operated to defeat any entitlement on Weir's part; and although an insured can, as against its insurer, rely on a reasonable settlement or compromise with a third party as establishing the existence and quantum of liability to that third party the cap and collar agreement entered into by Weir with Phil Gold was not a settlement or compromise of that type.

Not satisfied with that determination Weir appealed. In the appeal Weir challenged these 3 findings of Hammerschlag J and AXA contended that the trial judge should have determined the Product Defects exclusion had application. The end result was a drubbing for Weir.

AXA accepted that a liability to which the insuring clause responds is capable of being determined by a judgment, arbitral award or reasonable settlement however, the cap and collar agreement was not a settlement which had that effect, not because it was unreasonable, but because it contemplated the determination of Weir's liability (if any) to Phil Gold as the outcome of the arbitration process. There was a liability without the necessity of damage.

The Court of Appeal determined the sum payable by Weir was not an amount which, in a strict sense, Weir was legally liable to pay as compensation for legal injury. The collar that Weir was required to pay was not an amount which Weir was legally liable to pay by way of compensation for physical damage to property. Weir had limited its liability for the claim made by Phil Gold by the cap and collar agreement, won the arbitration and only had to pay the collar of $2 million but was not insured for that payment. Whilst that was the view with the majority of the Court, White JA did not agree on this issue. White JA observed "Weir, acting in good faith to AXA, was required to achieve the best settlement it could. AXA did not contend that in entering into the Cap and Collar Agreement Weir did otherwise than what its obligation of good faith required and in those circumstances the policy should respond."

But that was not the only reason why the policy may not respond. The next issue was whether there was an occurrence that caused property damage. This was a key issue as the "occurrence" itself cannot be the damage. On this issue the determination was not as clear cut either with the judges arriving at different conclusions.

Weir contended that the relevant "occurrence" was the defective nature of the original and repair welds (including the circumferential weld), or the repeated "cyclic" loading of the joints and welds due to the constant rotation of the drum in its normal operation, or both.

Meagher JA concluded the occurrence was the exposure of the drum to the cyclic loading forces was the relevant "occurrence" with the failure of the circumferential weld the damage which was sufficiently connected with Weir's business by the fact that it had undertaken, allegedly in a defective manner, the task of rebuilding and refurbishing the mill in its ordinary business activities.

Barrett AJA approached the determination of the occurrence and whether there was damage in a different way. He concluded the failure of the weld could not be an occurrence as it was also the damage noting:

> *"The failure of the circumferential weld can be said to be an "occurrence" – that is, in essence, an event that caused property damage. It is, in one sense, not difficult to categorise the failure of the weld or the opening of the separation between the drum and the end plate as an "event". They were readily observable changes in physical circumstances. But they were, in their own right, damage; and the strict dichotomy between "occurrence" (in the sense of an "event" or state of affairs causative of damage) and damage itself precluded recognition of those readily observable changes in physical circumstances as an "occurrence".*

On this analysis the policy would not respond however Barrett AJA determined there was an analysis that amounted to an occurrence concluding the state of affairs created by the defective weld was the "occurrence". Barrett AJA concluded;

> *"The SAG Mill (which contained Weir's allegedly deficient welding work) was put back into operation after completion of the refurbishment and then operated normally until it failed prematurely because of the disintegration of the circumferential weld. Throughout that period, there existed in relation to the mill the continuing state of affairs consisting of the presence and influence of the defective welding work. That state of affairs culminated in the disintegration that was the first step in the rapid spread of damage within the mill. Because the disintegration was itself damage, it was the existence of the state of affairs that must be regarded as having caused the disintegration and all the other damage that flowed from it."*

Barrett AJA was satisfied the elements of the "occurrence" definition were satisfied so as to make the state of affairs created by Weir's performance of the refurbishment work an "occurrence". Barrett AJA concluded the primary judge erred when he found that performance by Weir of the repair work was not an "occurrence" because it lacked the essential quality of being unexpected. Under the definition of "occurrence", the unexpected criterion applies to the damage, not the event. To attach a notion of fortuity to the event rather than the damage is to misconstrue the definition.

White JA agreed with Meagher JA that cyclic loading being the repeated exposure to a general condition that resulted in damage to tangible property that was

neither expected nor intended was the occurrence. The forces imposed by the cyclic loading on the defective welds caused the welds to fail and that caused damage to property when the mill as a whole was the tangible property rather than focusing on the weld alone. White JA preferred not to express a view on whether faulty workmanship can be classified as an occurrence.

The "occurrence" point came down in favour of Weir and it was on to the exclusions.

On the professional services exclusion it was determined the liability incurred by Weir arose from its provision of, or failure to adequately provide, professional engineering services. Welding was part of those services. The exclusion applied.

Barrett AJA with whom the rest of the Court agreed concluded that an overall view of the services required was called for when determining whether the professional services exclusion was engaged. Barrett AJA noted:

"*The nature and scope of Weir's contracted services cannot be determined by the kind of line-by-line dissection of the budget spreadsheet for which Weir contends. The services involved more than the aggregate of the line items. The core task, according to the documents, was "to conduct the mechanical refurbishment" of the SAG Mill. Weir had an overarching responsibility to "direct the correct installation, alignment and commissioning of the mechanical aspects" of the mill and to "ensure" refurbishment, installation and commissioning to Phil Gold's satisfaction in accordance with "sound engineering practice". All aspects of supervision were committed to Weir. The reference to quality assurance ("QA") and quality control ("QC") responsibilities made it clear that specialised skill and judgment were essential components of the task. The assignment as a whole was an engineering assignment and the services Weir was contracted to provide were engineering services and therefore professional services*."

The end result was the professional services exclusion applied.

Finally the product defects exclusion was considered and again there was no luck for Weir.

Barrett AJA in the leading judgement on this issue concluded:

> *"It is necessary to look closely at the definition of "Product". Only a "thing" ("anything") is capable of being a "Product". One attribute that makes a particular "thing" a "Product" is that it was once, but is no longer, in Weir's possession or under its legal control. Another such attribute is that the "thing" was dealt with by Weir in one of several specified ways, including "repaired" and "treated". There can be no doubt that Weir "repaired" and "treated" something – perhaps several things – at the premises in Canada. It received at those premises the disassembled parts of a SAG Mill. It delivered from the premises refurbished but not yet fully reassembled parts of a SAG mill. It is also clear that no "thing" of relevance remained in Weir's possession or under its control after it had completed its contracted assignment. The question is whether the "thing" that Weir "repaired" or "treated" sustained "Property Damage" after it had left Weir's possession and control, being damage "attributable to" a "defect" in the "Product".*
>
> *…*
>
> *Weir's contracted task was "to conduct the mechanical refurbishment" of the SAG Mill, with responsibility extending "from refurbishment activities through to assembly and commissioning" of the mill. At the time the contract was made, the SAG Mill was in pieces. Weir received a collection of component parts. It refurbished those parts with a view to their assembly into a functioning mill after their removal to the Philippines. Some further parts (such as bolts) had to be added at the destination to achieve that result. The sensible view is that it was the collection of mill parts refurbished by Weir (including the drum), whether in assembled or disassembled state, that was Weir's "Product".*
>
> *That "Product" contained a "defect" because welding work (including investigation and assessment) had been performed in an unworkmanlike way with the result that the welded component and therefore the mill as a whole failed in circumstances in which there should have been no failure. Under clause 3.7, therefore, Weir was not covered for damage to the welded component and the mill as a whole attributable to the defective welding."*

Whilst the product defect did not extend to the whole of the damage asserted by Phil Gold and it could not be a complete answer to Weir's claim it was not necessary to determine the precise operation of the exclusion which depended on an assessment of the part of the overall damage suffered by Phil Gold that was in truth damage "to" the mill itself as the other determinations on the nature of the loss and the professional services exclusion meant the policy did not respond at all.

The end result was that an engineering business was not entitled to cover under its liability policy for the services delivered that were claimed to have involved defective welding works that caused damage to the property of its client.

The case serves as reminder of the potential for professional services exclusions in liability policies to have a very wide application when the services of a professional include work that may not at first blush appear to be of a professional nature.

In this case, a harsh result for Weir but an interesting outcome for the insurance industry.

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Obvious Risks & The Duty to Warn

Since the enactment of civil liability legislation throughout Australia a defendant's liability for an alleged failure to warn an injured plaintiff of an obvious risk of harm has been restricted.

In New South Wales, Queensland, Western Australia, South Australia and Tasmania a defendant has no proactive duty to warn an injured plaintiff of obvious risks. In those States the law treats injured plaintiffs to have known of the existence of an obvious risk with no requirement upon defendants to issue a warning.

The position in Victoria is slightly different whereby plaintiffs must prove they were unaware of the obvious risk if a defendant raises a defence of *Volenti*.

The Northern Territory and the Australia Capital Territory do not have similar legislative provisions in relation to obvious risks.

In a recent decision of the ACT Court of Appeal the Court considered whether the owner of a supermarket owed a duty to warn an injured plaintiff of the risk of harm associated with a faulty automatic gate at the entrance to the store.

In *Korda v Aldi Foods Pty Limited*, Jenny Korda sustained injury to her left leg after striking a trolley she was pushing. The trolley had collided with an automatic gate at the entrance to the Aldi store in the Canberra Centre when it failed to open automatically.

Entry for customers into the Aldi store involved passing through two metal gates which were designed to open automatically when a customer approached them from outside the store.

Korda brought proceedings at the ACT Magistrates Court against Aldi alleging Aldi was negligent by reason of a failure to leave the second gate open at all times in circumstances where it was not operating correctly.

Korda also pleaded a failure by Aldi to install a warning sign in close proximity to the gates warning customers including Korda the second gate was not operating correctly.

The learned Magistrate found in favour of Korda and entered judgment of approximately $56,000 in her favour after deducting 50% for contributory negligence. The Magistrate found Korda had failed to keep a proper look out when she looked to her right to observe a biscuit display before proceeding through the second gate which failed to open.

Korda appealed to the ACT Supreme Court against the finding of 50% contributory negligence. Aldi cross appealed in relation to the finding that it was negligent.

In the Supreme Court, Associate Justice Robinson allowed the cross appeal by Aldi and thereby set aside the judgment below and entered a judgment for Aldi. Robinson AJ held that Korda had failed to establish causation.

Had the judgment not been set aside, Robinson AJ would have allowed the appeal and reduced the finding of contributory negligence from 50% to 20%.

Korda appealed to the ACT Court of Appeal and argued that Aldi was negligent as per the primary judgment of the learned Magistrate.

Further, Korda contended there should be no reduction for contributory negligence.

Aldi filed a Notice of Contention in the ACT Court of Appeal. Aldi submitted that whilst Robinson AJ was correct to find that causation had not been established, Aldi went further to argue there was no breach of any relevant duty of care and the learned Magistrate had erred in finding Aldi's knowledge of the operation of the second gate required Aldi to install a warning sign.

The ACT Court of Appeal considered the evidence with respect to the design and functioning of the gates at the entrance to the Aldi store. A customer entering the store would pass through the first gate and then through the second gate. There was a distance of about one metre between the two gates and the width of the entry allowed a customer to push a trolley through them with no difficulty.

There was also an interrelationship between the operation of the two gates as the opening of the first gate would trigger the radar sensor on the second gate, thereby causing it to open.

It was common ground that on the day of the accident the gate assembly mechanism was not working correctly as the first gate had been left permanently open due to it swinging wildly.

The plaintiff's injury occurred when having pushed a trolley through the open first gate, Korda then looked to her right, away from the gate towards a store display of biscuits, expecting the second gate to open automatically. When it failed to do so the trolley hit the gate and as a consequence struck Korda on the lower left shin.

The principal case run by Korda at trial was that the appropriate precaution would have been for Aldi to leave the second gate permanently open as it did with the first gate. However, no evidence was led by Korda about that precaution and the possibility was not put to defence witnesses. Accordingly, the Magistrate held it was impossible to quantify that precaution without further evidence. In any event, had the gate been left open, a warning sign would not have been required.

Despite this, the Magistrate found on the balance of probabilities that a reasonable person in Aldi's position would have displayed a warning sign proximate to the

gates and that it was unreasonable for Aldi not to have done so.

This was held by the Magistrate to constitute a breach of duty of care without any evidence regarding what the warning sign ought to have said and in the absence of any evidence from Korda as to what, if any, effect it would have had upon her behaviour had the warning sign been present.

These inadequacies in the Magistrate's reasoning were picked up by Robinson AJ in the appeal to the Supreme Court.

The ACT Court of Appeal also considered evidence from Aldi employees regarding their observations of the operation of the gates before Korda's accident. At its highest that evidence involved knowledge on the part of Aldi that the sensor-operated gates only opened when the sensor was triggered and the triggering of that sensor may not be 100% reliable.

In those circumstances the Court of Appeal held no warning sign was required. In a unanimous judgment Byrnes, Mossop and Bromwich JJ made the following observations:

> *"Gates, like doors, are obvious obstacles. The gate was a clear barrier to the entry of persons into the store. It would be apparent to entrants to the store that they could only do so if the gate opened or was open. ... there was no evidence to suggest that signs were displayed on equivalent automatic gates or doors. When the question is viewed prospectively, as it must be, [Aldi] acting reasonably was not required to warn entrants of the need to wait until the gate was open before proceeding through it."*

Aldi's Notice of Contention succeeded and the Court of Appeal upheld the decision of Robinson AJ to enter a judgment in Aldi's favour.

The Court of Appeal also dealt with Korda's appeal on causation which focused on a failure to warn.

The Court, quoting from an earlier decision of the Western Australian Court of Appeal in *Shire of Gingin v Coomb*, stated:

> *"In the case of a breach of duty to erect a warning sign, it follows that the claimant carries the burden of proving that if an appropriate sign had been erected, he or she would have seen it, read it, and thereafter modified his or her behaviour in a way which would have avoided, or reduced the extent of the injuries suffered."*

The ACT Court of Appeal held that, in the absence of any evidence about the nature of a sign, what it would say or where it might be placed, it was not possible to reach a conclusion that it would have been effective. The Court stated:

> *"That is because the form of warning proposed on appeal would go no further than pointing out the obvious possibility in relation to any automated opening to any premises that it might not operate properly (as opposed to it actually not working properly, which was not something that was established beyond the isolated incident involving [Korda])."*

Accordingly the appeal by Korda in relation to causation was dismissed. The result was that Aldi succeeded.

If this case had proceeded under the civil liability legislation in the other States of Australia (except Victoria), it would have been open to Aldi to defend the case on the basis that Aldi had no proactive duty to warn Korda of the obvious risk of harm associated with the second entrance gate.

That defence would succeed if it was established that the risk of harm was obvious.

However, the decision of the ACT Court of Appeal demonstrates that, even where the above defence is not available, the Court will consider whether a risk is obvious to establish whether or not there was a duty to warn.

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Court Considers Extent of Pollution Cover under Public Liability Policy

Public liability insurance policies usually exclude cover for liability in respect of injury or damage as a result of an occurrence during the period of insurance arising directly or indirectly from pollution.

However, some liability policies will contain a policy extension or endorsement where the pollution exclusion does not apply and cover is provided.

The NSW Court of Appeal recently considered such a policy in *Marketform Managing Agency Limited v Amashaw Pty Limited*.

Amashaw, which operated a petrol service station in Loftus, entered into a contract of insurance with Marketform which provided liability cover for the period 5 December 2011 to 15 June 2012. The policy was then renewed for a further 12 months.

The relevant insuring clause was in the following terms:

> *"The Insured is indemnified by this Coverage Section in accordance with the Operative Clause against the Insured's liability to pay damages, including payments, costs, fees and expenses, in accordance with the law of any country for and/or arising out of Injury and or Damage occurring in its entirety during the Period of Insurance and arising out of Pollution, but only to the extent that the Insured can demonstrate that:*

10.1 such pollution was the direct result of a sudden, specific and identifiable event occurring during the Period of Insurance;

10.2 the Insured had taken all reasonable precautions to prevent loss by pollution."

"Pollution" was defined to mean any pollution or contamination of the atmosphere or of any water, land or other tangible property.

"Damage" was defined to mean:

"26.4.1 loss or destruction of or damage to physical property;

26.4.2 loss of use of physical property not lost, destroyed or damaged arising out of an occurrence;

26.4.3 conversion, trespass, nuisance or wrongful interference with the enjoyment of rights over physical property or interference with servitude or right of access across the property of another ..."

To comply with its obligations under the environmental protection legislation, Amashaw engaged several experts to:

- conduct monitoring of the ground water in and around the service station site and record any levels of contamination by hydrocarbons; and
- conduct monitoring of the underground petroleum storage systems for leaks.

Such monitoring was conducted both before and during the period of insurance.

Reports issued to Amashaw by the experts showed an increase in levels of hydrocarbons which exceeded allowable limits and which occurred gradually over time.

By April 2013, one of the experts' analysis indicated the unleaded petrol tanks or its associated pipes were leaking substantial volumes of petrol.

About the same time, Sydney Water advised Amashaw petroleum hydrocarbon odours had been detected in its sewer immediately downstream from the service station's connection point to that sewer. Amashaw retained JBS Environmental Pty Limited ("JBS") to investigate the matter.

JBS reported to Amashaw on 5 June 2013 that significant levels of petroleum were migrating towards the monitoring well and discharging through soil and ground water at the north east portion of the site. Further, high levels of hydrocarbon vapours were present throughout the Telstra access points, indicative of potentially widespread hydrocarbon contamination in the soils and ground water on the site and potentially extending off site to the east.

However, two days before the JBS report was published, an explosion occurred in the sewer system to the west of the site.

Amashaw incurred approximately $1.2 million to rectify the damage caused by the explosion and to prevent the further possibility of pollution and resulting damage. These were described by Amashaw as "short term measures" and "later measures".

Amashaw claimed indemnity from Marketform in respect of the short term measures and the later measures. Marketform declined indemnity. Amashaw then filed court proceedings at the NSW Supreme Court and the claim proceeded to hearing before McDougall J.

The evidence before the primary judge was that Amashaw incurred the costs associated with:

- pumping out the Sydney Water sewer, damming it and flushing it out (the short term measures); and
- installing a trench beyond the northern and eastern boundaries of the site to intercept and thus prevent the spread of petroleum hydrocarbons (the later measures).

Amashaw contended the leak of unleaded petrol in March, April and May 2013 was a sudden, specific and identifiable event during the policy period and the direct result of that event was "pollution" by petrol contaminated ground water entering the neighbouring sub-soil, sewer and stormwater drains.

Amashaw also contended the relevant "damage" constituted loss actionable in nuisance which occurred entirely during the second period of insurance and arose out of that pollution such that Amashaw became liable to pay damages to Sydney Water, Sutherland Shire Council, City Rail and owners of neighbouring residential properties.

Marketform argued Amashaw's statutory obligation to make good the damage to Sydney Water's sewer main precluded any liability for damages in nuisance to Sydney Water. Marketform also argued the damage did not occur in its entirety during the second period of insurance but progressively over time as and when hydrocarbons from Amashaw's service station travelled through the ground water and entered the sewer main.

McDougall J rejected both arguments by Marketform. His Honour found the 2013 release of unleaded petrol was the result of the spontaneous failure of a check valve, underground and adjacent to an unleaded petrol pump and that such release was the source of the hydrocarbons which entered the sewer and ignited on 3 June 2013.

The primary judge held the release was an "event" separate from the pollution which was its direct result. His Honour stated:

"In short:

1. the relevant Pollution giving rise to Damage is the contamination of Sydney Water's sewer main by petrol; and

2. *the event causing that pollution was the earlier discharge (in and after March 2013) of petrol from the failed check valve."*

However, McDougall J also held that Amashaw was only entitled to indemnity in respect of the short term measures, not the long term measures. Judgment was entered in favour of Amashaw for approximately $274,000.

As the amount was less than $500,000, the primary judge made no order as to costs thereby refusing to make an order for Amashaw's costs to be paid by Marketform.

Marketform appealed to the NSW Court of Appeal in relation to the primary judge's findings that the policy responded to Amashaw's claim for indemnity in respect of the short term measures.

Amashaw cross appealed in relation to McDougall J's findings that the policy did not respond to the claim for indemnity in respect of the later measures and also in relation to the costs orders.

It should be noted that Marketform also ran a non-disclosure case which was rejected by the primary judge and by the NSW Court of Appeal. For the purpose of this article, we have focused on the findings of both courts regarding policy coverage and the costs arguments.

In summary, the Court of Appeal unanimously dismissed Marketform's appeal and the cross appeal by Amashaw.

In the leading judgment delivered by Meagher JA (with whom Leeming JA & Emmett AJA agreed) his Honour focused on the principles under the law of nuisance and noted:

> *"…any material interference with Sydney Water's rights over land occurred when it became aware of the risk associated with the presence of [hydrocarbons]. It is not suggested that this took place before mid May 2013. It follows that the relevant Damage occurred in its entirety during the second period of insurance."*

Further, the Court of Appeal held the short term measures undertaken by Amashaw in late May and early June 2013 were directed to removing the risk of fire or explosion that existed by reason of the petrol contaminated ground water then present in the sewer, not any risk existing at an earlier point in time.

Those short term measures therefore discharged Amashaw's liability to Sydney Water for the reasonable cost of putting the sewer in the state it would have been in had such ground water not entered.

Accordingly, the Court of Appeal upheld Amashaw's claim for indemnity in respect of the costs of the short term measures.

In respect of the claim for later measures, both the primary judge and the Court of Appeal rejected Amashaw's claim.

At first instance, McDougall J concluded such works were not undertaken to make good the damage caused but rather to prevent further potential damage.

The Court of Appeal agreed. In a separate judgment concurring with the leading judgment of Meagher JA, His Honour Acting Justice Emmett observed:

> *"In effect, Amashaw was seeking insurance cover in respect of the cost of satisfying the condition of cover that it had taken all reasonable precautions to prevent loss by Pollution. The preventative work was in effect a precaution to prevent loss in the future by Pollution."*

In other words, Emmett AJA considered the claim for later measures was a cost of Amashaw complying with its obligation under the insurance policy to take reasonable precautions to prevent pollution.

This interesting decision illustrates the approach taken by an appeal court when interpreting a liability policy which provides cover for damage arising out of pollution.

The Court emphasised the importance of ascertaining the relevant damage, the event causing the pollution out of which such damage arose and whether this occurred during the period of insurance.

Also relevant is whether the costs claimed by an insured under the policy are in relation to rectifying existing pollution or preventing future pollution, the latter of which was excluded from cover. As the majority of those costs were excluded, Amashaw was left having to pay its own legal costs.

We speculate that a provision in the policy that provided cover for mitigation costs incurred to prevent further damage may well have resulted in a different outcome.

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Two Companies in an Integrated Business Operation Held Liable for Personal Injury

A common feature of personal injury claims involves a "labour hire" scenario where a worker, employed by Company A, is lent on hire to Company B and is injured while carrying out work at Company B's premises.

The injured worker will invariably claim damages from both Company A (the employer) and Company B (the host employer).

What if Company A and Company B are related companies in an integrated business operation

Company B is ultimately in control of the operations of Company A?

The NSW Court of Appeal recently considered these issues in *Strategic Formwork Pty Limited v Daniel Hitchen*.

Hitchen was severely injured while unloading timber beams from a shipping container on the premises of his employer, RTS Holdings Pty Limited ("RTS") at Corrimal. Hitchen sued RTS and another company, Strategic Formwork Pty Limited ("Strategic") which allegedly exercised control over RTS.

While RTS admitted liability for the incident, Strategic did not. Indeed, Strategic denied it owed Hitchen a duty of care. Alternatively, if Strategic owed such a duty, the duty was not breached.

The matter proceeded to hearing at the NSW Supreme Court before her Honour Associate Justice Harrison who found in favour of Hitchen against RTS and Strategic and apportioned liability at 60% against Strategic and 40% against RTS.

After applying Section 151Z of the *Workers Compensation Act 1987* (NSW) the judgment in favour of Hitchen against Strategic was entered at $1.3 million.

Strategic appealed to the Court of Appeal in relation to the finding that Strategic owed Hitchen a duty of care. Both Strategic and Hitchen challenged the apportionment of liability entered by Harrison AsJ.

The Court of Appeal (per Basten & Simpson JJA and Sackville AJA) unanimously dismissed Strategic's appeal in respect of the existence of a duty of care.

On apportionment, Basten JA and Sackville AJA held the primary judge's assessment was correct whereas Simpson JA would have increased Strategic's apportionment of liability to 75%.

The central issue in the appeal was whether Strategic owed Hitchen a duty of care. This required a consideration of the integrated business operation involving both RTS and Strategic to determine whether or not Strategic exercised the requisite control over the system of work under which Hitchen was employed and which gave rise to his injuries.

The evidence at trial was that Hitchen was a backpacker undertaking casual work at the RTS premises at Corrimal which involved moving 3.6m timber beams from a stack within a shipping container a short distance where they were restacked. During the course of manoeuvring one of those timber beams the stack inside the container collapsed on him causing severe injuries and resulting in partial paraplegia.

There was no question Hitchen was employed by RTS, who admitted liability.

The question was whether Strategic also owed Hitchen a duty of care in the circumstances.

On this issue the evidence presented at trial before Associate Justice Harrison confirmed the following:

- there was no doubt RTS and Strategic had a close commercial relationship;
- Strategic was incorporated in 2002. Its sole director and secretary was Graham Van Der Merwe, a civil engineer, who was also the majority shareholder;
- RTS was incorporated in 2007 with its business operations commencing in 2009;
- upon its incorporation, Van Der Merwe's wife was the sole director and secretary of RTS and its sole shareholder but Mr Van Der Merwe was employed as its general manager between May 2009 and January 2011, ceasing in that role some four months before the accident;
- Mr Van Der Merwe was the managing director of Strategic;
- Strategic entered into contracts to provide formwork for service cores in high rise buildings;
- Strategic employed draftsmen to design plans for the formwork;
- the plans were transmitted by Strategic to RTS at Corrimal for preparation of the necessary components;
- yard labourers at Corrimal undertook construction of the components in accordance with the designs and obtained the necessary materials and equipment for use on the building site;
- RTS arranged for the materials and equipment to be transported to the building site;
- employees from Strategic and RTS were involved in the onsite construction of the formwork;
- the whole of the operation was directed by the general manager of Strategic, Mr Day who reported to Mr Van Der Merwe;
- Mr Day would give instructions to a Mr Gales, an onsite manager employed by RTS at Corrimal, including working arrangements and safety matters;
- Gales had authority to spend no more than $300 to $500 beyond which he required authorisation from the director of RTS, Mrs Van Der Merwe;
- at the time of the accident Mr Van Der Merwe remained the person ultimately responsible for the operation at Corrimal as the managing director of Strategic;
- Strategic prepared payroll statements for all employees (Strategic and RTS);
- Strategic paid all invoices issued to Strategic and RTS;
- Mr Van Der Merwe was the person who implemented the safety system for the work carried out at Corrimal;
- signs and instructions were present at Corrimal in the name of Strategic Formwork. Workers used

hi-vis shirts branded with Strategic Formwork and the commonly used description of the yard was "Strategic yard".

Basten JA, who wrote the leading judgment, observed the business operations were closely integrated between RTS and Strategic however His Honour went on to say:

"Neither the formal employment relationships, nor the separation of corporate structures, precludes the possibility that one entity may exercise a degree of control over activities carried on by another, such as to give rise to a duty of care to affected employees."

Justice Basten held the trial judge was correct in finding Strategic exercised control over the operations of RTS. Further, the exercise of control by Strategic extended to the supervision of occupational health and safety matters. It followed that both Strategic and RTS owed a duty of care to employees of either company, including Hitchen, who worked at the Corrimal yard and elsewhere.

Basten JA made the following observation:

> *"Whether or not Strategic owed a duty of care to the plaintiff depended entirely upon its relationship with RTS ... only two [salient] features were directly material, namely a finding that Strategic had day to day control of the system of work at the yard and that Strategic assumed responsibility for the system of work."*

Simpson JA and Sackville AJA agreed with Basten JA. Strategic's appeal was dismissed.

Basten JA did not disturb the primary judge's finding of 60% liability being apportioned to Strategic. Sackville AJA agreed with Justice Basten.

However, her Honour Justice Simpson held that she would have increased Strategic's apportionment to 75%.

Simpson JA observed with approval the primary judge's description of the relative culpabilities of Strategic and RTS as:

> *"... overwhelmingly against Strategic ... because it designed the system, it controlled the operatives in the system and it inspected the yard where the system was deployed but failed to detect or act upon the risk of harm to which the plaintiff was exposed."*

Justice Simpson held that the apportionment of 60% to Strategic did not reflect the primary judge's finding of Strategic's relative culpability being "overwhelming".

This case illustrates that two related companies in an integrated business operation can each be held liable where one is the employer of the injured worker and the other exercises control over the employer's activities.

Here, the evidence demonstrated that whilst Strategic did not employ Hitchen and other employees, it was Strategic who exercised ultimate control over the operations at the RTS premises in Corrimal including occupational health and safety matters and the system of work which governed the manner in which Hitchen's work activities were to be performed.

The control exercised by Strategic over the RTS operations at Corrimal was sufficient to give rise to a duty of care which resulted in Strategic bearing the lion's share of responsibility.

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The Cost of Labour Hire Continues

In our previous issues of GD News we have discussed a number of decisions of the Courts involving the use of labour hire. In more recent times, the Courts have been consistent in apportioning a far greater part (if not all) of the liability to the host employer.

The NSW Court of Appeal has recently continued this trend.

In *Rail Corporation NSW v Donald; Staff Innovations Pty Limited t/as Bamford Family Trust*, Alan Donald commenced proceedings against the host employer, Rail Corporation NSW and his employer, Staff Innovations Pty Limited, for injuries sustained during the course of his employment with Staff Innovations whilst he was lent on hire to RailCorp. In his work with RailCorp Donald primarily worked as a jackhammer operator. Donald contended he sustained injury to his back as a consequence of the nature and conditions of his employment. Donald came to surgery and on 20 April 2010 underwent a lumbar decompression and spinal fusion.

In a previous issue of GD News we discussed the judgment of His Honour Justice Campbell in the Supreme Court who found RailCorp liable and awarded damages in the sum of $1,236,913. The employer was found to be 10% liable.

RailCorp appealed from that judgment and the labour hire employer also cross appealed in relation to the finding of liability against that employer.

The issue of whether or not RailCorp had breached their duty of care was in essence related to the issue of whether Donald had to work continuously without rest breaks where his partner Gonzales, who was employed by RailCorp directly, did not undertake any jackhammering where in other teams the jackhammering tasks were shared between two workers.

There was also an issue whether Donald's injury was caused by his employment.

At the time of Donald's injury RailCorp was maintaining the City Circle Line. The workers would generally work for about four hours each day from around 12.30 am. Donald's work would involve removing old timber sleepers and replacing them with polymer sleepers. To remove the old timber sleepers jackhammering would be involved. The jackhammering for each sleeper would take between 10 to 25 minutes, depending on the skill of the person undertaking the jackhammering.

RailCorp's argument was that the workers could take breaks whenever they wanted and there was also a system of work rotation in place. However, the trial judge determined there was no formalised system for rotating the tasks. Further, Donald would generally be teamed up with Gonzales, a direct employee of RailCorp, who was not required to undertake any jackhammering. In addition, once the sleeper was removed by jackhammering it would then be lifted out. Donald's evidence was that he would do the lifting without assistance apart from a small centre section.

RailCorp argued on appeal that the trial judge ought to have found Donald did have adequate rest breaks in circumstances where Gonzales would clear away the rubble.

RailCorp's Safe Work Method Statement provided that jackhammer operators should have a break every 20 minutes however the Court found that was not enforced.

Beazley ACJ stated:

"In my opinion, the evidence demonstrated that RailCorp was negligent in failing to take precautions against the risk of harm that Mr Donald would sustain injury in undertaking work where he was the sole person in his team of two required to undertake jackhammering, and where he also did additional heavy lifting without assistance. It was not sufficient for RailCorp to leave it to Mr Donald to decide when and for how long he stopped for rest breaks.

Once RailCorp determined or permitted Mr Donald to work differently from the way in which the reasonably safe de-factor work system operated, it was its responsibility to take reasonable care to ensure that Mr Donald was given adequate instruction in relation to the manner in which he needed to perform his work so as to do so in a safe manner. It was also obliged to take adequate steps to ensure that he was performing his work in a safe manner. It did neither. As I have explained, RailCorp's evidence was that not only did it not follow its own safety procedures, to the extent that its evidence related to the instructions it gave to employees, that evidence only related to the general system of work.

RailCorp was thus negligent in failing to provide Mr Donald with a system of work that guarded against the risk of personal injury, and failed to take adequate steps to ensure that he took reasonable rest breaks from jackhammering and from undertaking additional heavy work that was recognised to be work generally undertaken by two workers, including removing the sleepers and lifting them onto the truck and moving the bags of rubble to where they were to be collected and also lifting them onto the truck."

The fact that there were 4,000 work reported injuries and this was the only incident associated with jackhammering was not sufficient for RailCorp to escape liability. The fact there was an absence of reports of injury due to jackhammering did not mean the risk of harm was "not insignificant".

Further, the Court of Appeal accepted that causation of injury was established.

The argument in relation to contributory negligence was unsuccessful.

In relation to employer liability, Beazley ACJ stated:

> *"The fact that Staff Innovations was, apparently, unaware of Mr Donald's particular work circumstances meant either or both of the following: first, Mr Bamford did not undertake adequate inspection; and secondly, he did not speak to Mr Donald. Alternatively, to the extent that Mr Bamford discussed the manner in which the work was performed with RailCorp personnel, I consider Staff Innovations to be liable, just as I consider RailCorp is liable, for permitting Mr Donald to work in circumstances where even the de-facto system of work did not apply to him."*

The finding of 10% liability on the part of the employer therefore remained.

The trend that arguably started with *Shoalhaven City Council v Humphries* has therefore continued. Courts have continued to approach labour hire type cases on the basis the majority of liability will rest with the host employer.

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CONSTRUCTION ROUNDUP

Security Of Payment Claims - Requirements For Supporting Statements

Prior to the amendment in 2013 to the Building and Construction Industry Security of Payment Act 1999 (NSW), it had been common practice for principals to require that their contractors include with their progress claims a statutory declaration that all their subcontractors and suppliers had been duly paid. Such a provision was intended to reduce the risk to the principal that a claim would be made by a

subcontractor or supplier direct to it for an amount received by the head contractor but not paid down the contractual chain.

However, this was merely a contractual obligation – if the contract did not include such a provision then the principal did not have the comfort of knowing whether the subcontractors and suppliers on the project were being paid by the head contractor.

Furthermore, and despite the penalty for swearing a false statutory declaration for material benefit being up to seven years' imprisonment, many contractors were simply not telling the truth on their statutory declarations, knowing that it was highly unlikely that they would ever be caught by the police and prosecuted.

The 2013 amendments were effected in line with the recommendations of Mr Bruce Collins QC as the chair of the Independent Inquiry into Construction Industry Insolvency in NSW. One of those recommendations was to make the requirement for a supporting statutory declaration to have legislative (rather than contractual) effect; another was to give power to the NSW Department of Finance and Services to prosecute those who commit offences against the Act.

As a consequence, section 13 of the Act now includes two additional subsections. Subsection (7) provides that a head contractor must not serve a payment claim on the principal unless that payment claim is accompanied by a related supporting statement, and a maximum penalty of $22,000 applies to a contravention of this provision. Subsection (8) provides that a head contract must not serve a payment claim on the principal accompanied by a supporting statement knowing that the statement is false or misleading in a material particular in the particular circumstances. The maximum penalty for a contravention of subsection (8) is $22,000 or three months' imprisonment (or both).

The form of the supporting statement is prescribed by the regulations.

The question arises, however, as to whether a statement that does not strictly comply with the requirements of the Act for a supporting statement suffices for the purposes of the Act. And if the supporting statement does not qualify as a "supporting statement" within the meaning of the Act, does that have the consequence that the relevant payment claim was not validly served (and therefore the payment and adjudication process in the Act has not been triggered)?

The issues were recently examined by Justice Ball in *Central Projects Pty Limited v. Davidson* [2018] NSWSC 523.

Mr Davidson was the owner of a property in Curlewis Street, Bondi. He engaged Central Projects to construct a mixed commercial and residential development on his property.

On 5 January 2018, Central Projects served "Progress Claim 24", purportedly under section 13 of the Act. At the time that this progress claim was served, the work under the contract had been suspended by Mr Davidson and the preceding "Progress Claim 23" had still not been paid.

Mr Davidson did not serve any payment schedule in response to Progress Claim 24 and therefore City Projects commenced debt recovery proceedings in Court under section 15 of the Act. In response, Mr Davidson claimed that Central Projects' payment claim had not been accompanied by a supporting statement as required by the Act, therefore not entitling Central Projects to the debt recovery rights under the Act.

Central Projects had included with Progress Claim 24 an "Attachment 8" that had been titled "Supporting Statement by Head Contractor". It was apparent that this document had been downloaded from the website of NSW Fair Trading and was substantially in the form prescribed by the regulations subordinate to the Act.

Central Projects submitted that its Attachment 8 met the two requirements of the Act, namely: (a) it was in the prescribed form; and (b) it contained a declaration of the type set out in the Act (that all subcontractors had been paid).

While the "Supporting Statement" included some obvious errors in identifying the parties and it was apparent that the person who had completed the form had misunderstood the information to be set out in the formal parts of the document, the parties had not taken the point that those errors had had any effect on the validity of the supporting statement or of the payment claim itself.

On the other hand, Mr Davidson had complained that the information set out in the form about payments made to Central Projects' subcontractors and suppliers was neither accurate nor complete. For example, the person who had completed the form had not understood that it was intended that all suppliers be also identified – not just those who had also installed their products on site.

Ball J accepted Central Projects' submission that the Act did not require that the supporting statement list be entirely accurate and complete in order to be a valid statement. His Honour agreed that if the opposite were to be correct, then subsection 8 would have no work to do – that is, if a document was not a supporting statement for the purposes of subsection (7) because it was not entirely accurate, then it would be difficult to see how an offence could ever be committed under subsection (8).

His Honour stated that consistently with McDougall J's approach in *Kitchen Xchange v. Formacon Building Services* [2014] NSWSC 1602, in determining whether a document meets the requirements of a prescribed form, it ought to be possible to compare the document

with the prescribed form and ask whether it contains the prescribed information and is substantially in the form prescribed. If it does and is, that is sufficient. It is not necessary to investigate whether each fact stated in the form is accurate.

Forms are prescribed for a wide range of purposes and it would be unreasonable to expect those who rely on or receive forms to check the accuracy of the information they contain before being entitled to proceed on the basis that the form was duly completed.

His Honour noted that it was apparent that the declaration made on the form that all subcontractors had been paid referred to all subcontractors – not just those that had been specifically identified on the statement.

Consequently, a supporting statement would be false or misleading in a material particular if it omitted one or more subcontractors from the list of subcontractors and that omission was material. It would also be false or misleading in a material particular if, contrary to the declaration, not all subcontractors had been paid (apart from those in respect of whom a dispute existed) and the amount owed to an unpaid subcontractor was material. In either case, if a head contractor knew that the supporting statement was false or misleading, then the head contractor would have committed an offence by serving the statement.

Ball J noted that in the present case each of the subcontractors who had been omitted from the supporting statement had been identified in a PC Allowance Register that had been included with the claim. Therefore, Mr Davidson had not been prevented from investigating the accuracy of the information that had been provided by Central Projects.

It followed that Attachment 8 was a supporting statement for the purposes of the Act, notwithstanding that it did not list all subcontractors in respect of whom the payment claim was made. Accordingly, the payment claim had been validly served.

As a side note, Ball J commented that if the issue had been one for decision by the court in this case, he would not have agreed with the conclusions of McDougall J in *Kitchen Xchange* that the failure to serve a supporting statement rendered a payment claim as invalid.

McDougall J had considered the wording of subsection (7) to be clear and that the term "must not" was plainly mandatory. His Honour had explained that to hold that subsection (7) did not intend to invalidate service of a payment claim unaccompanied by the requisite statement would set at nought the prohibition. It would permit a claimant to engage the operation of the Act without troubling to comply with a specific and mandatory requirement for doing so.

McDougall J had also held that if service of a payment claim was ineffective because it was not authorised by subsection (7), an adjudicator appointed to adjudicate the payment claim would not have the requisite jurisdiction to deliver a determination on the claim.

By comparison, Ball J stated that while he accepted that the language of subsection (7) was mandatory, the subsection contained its own remedy for a breach of the prohibition by creating an offence with a maximum penalty of a fine of $22,000. The question, therefore, was not whether the prohibition would be set at nought, but whether the legislature implicitly intended a breach of the prohibition to have other consequences as well as a potential fine. In Ball J's opinion, there were several reasons for thinking that it did not.

These reasons included: (1) the language of section 13 did not readily accommodate an additional consequence; (2) the different manner in which the Act precluded the service of more than one payment claim per reference date (with the consequence that any subsequent payment claim with reference to that date is not a valid payment claim under the Act); (3) the fact that (despite the main intention of Parliament when amending the Act was to address the issues identified in the Collins inquiry) no mention was made in the Inquiry's Final Report or in the Second Reading Speech to a contravention of the Act (by not providing a complying supporting statement) having such consequences.

Therefore, in Ball J's view, a failure to provide a supporting statement in compliance with the Act did not automatically mean that a payment claim had not been validly served.

While Ball J's comments in *Central Projects* about the consequence of non-compliance with subsection (7) were merely obiter dicta in this case, it is likely that this issue will continue to be explored in the future and it is not clear which way the court would be likely to decide.

Contractors would be well-advised to ensure that due care is taken to ensure that supporting statements are accurate and complete and are sworn by a person within the contractor's organisation who has the appropriate level of knowledge about the status of the payments due to be made to subcontractors and suppliers for the project.

Bearing in mind the serious consequences of swearing a statutory declaration in a supporting statement that may be held to be false or misleading, where there is potential for the veracity of the statutory declaration to be challenged, it would be prudent to first obtain legal advice on the best approach to the issue.

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EMPLOYMENT ROUNDUP

Delay In Positive Action By Employer Resulted In A Valid Summary Dismissal Being Found To Be Unfair

The Fair Work Commission recently determined in a matter of *Wong v Taitung Australia Pty Limited* that an employer who did have a valid reason for summary dismissal of an employee it considered had been engaged in a joint illegal enterprise by stealing produce from the employer, was unfairly summarily dismissed as the employer permitted the employee to continue to perform work for three months in full knowledge of the joint illegal enterprise before the dismissal took place.

Wong had worked for the employer for just over nine years. From 2012 he commenced driving a small delivery truck from the employer's food storage warehouse. He had daily deliveries of food supplies.

Wong had no blemishes on his employment record. He had a history of complaints regarding his employment including workplace health and safety issues as well as the payment of incorrect wages and other employment related entitlements.

Another employee was found to have stolen eight cartons of prawns in February 2016. That employee informed the employer he was involved in an arrangement whereby he and other employees would steal stock by adding additional produce items which were not identified in the particular picking slip for orders for delivery. The additional produce items would then be sold and some of the proceeds of the sale would be distributed to other participants in the arrangement.

The general manager of the employer undertook an investigation into confessions by other employees regarding the arrangement the employees to steal and sell produce. The general manager made a statement to Police in February 2016. One of the employees who had been involved in the stealing arrangement also made a statement to the Police.

The general manager gave evidence the Police suggested the employer defer any disciplinary action against any of the employees so further evidence of the conduct could be obtained.

Wong was nominated as a participant in the arrangement by the confessing employee.

A transcript of a *WhatsApp* conversation was tendered before the Commission which contained references of the arrangement and the participants.

On 12 May 2016 Wong made a complaint regarding the truck he was driving being faulty and un-roadworthy. The warehouse manager took the view Wong was being unnecessarily difficult and stood him down for 24 hours. Wong made complaints to the Fair Work Ombudsman, WorkSafe and NSW Roads & Maritime Service.

The following day Wong was telephoned by the warehouse manager. Wong did not speak to the warehouse manager but a message was left by the warehouse manager that Wong was required to come to work to deal with another issue.

On 16 or 17 May (there is a dispute in the evidence) Wong attended the employer's premises and was handed a letter which invited him to attend a disciplinary meeting the following day to answer allegations he had been engaged in a joint illegal enterprise which had been discovered by confessions from another employee in February 2016. He was invited to bring a lawyer or support person to the meeting.

Wong attended the employer's premises the next day without a support person as he was able to engage a lawyer at short notice. The allegations were put to Wong, who denied being involved.

After the meeting Wong was advised by telephone and later confirmed in a letter that he had been summarily dismissed on the basis of serious misconduct in respect of the joint criminal enterprise.

Commissioner Cambridge, in considering whether there was a valid reason for dismissal noted confirmation of *"the employer's belief the applicant was participating in the joint criminal enterprise would provide proper, sound, defensible, valid reason for dismissal."*

The Commissioner was satisfied there was sufficient evidentiary material which represented a sound basis for the employer's belief Wong was a participant in the joint illegal enterprise. The Commissioner noted whilst Wong's complaints regarding safety of his truck may have represented the reason for the timing of the dismissal, such complaints were "insignificant issues" when compared with the serious misconduct of Wong as a participant in the joint criminal enterprise.

However, when considering whether the dismissal was harsh, unjust or unreasonable, the Commissioner examined whether there were any other relevant matters within the meaning of Section 387(h) of the *Fair Work Act 2009*.

The Commissioner concluded the procedure adopted by the employer included one unfortunate and important error. The Commissioner noted the employer consciously permitted Wong to continue to perform work up until the dismissal in full knowledge of the nature and extent of the misconduct for which it subsequently invoked a summary dismissal. Although the delay appeared to have been as a result of the suggestion of the Police, the continuation of employment removed the capacity for the employer to subsequently summarily dismiss the employee.

The Commissioner applied a level of severity to the misconduct which was inconsistent with permitting Wong to continue work for the potential of obtaining further evidence. The Commissioner found the continuation of Wong's employment meant the employer could not subsequently summarily dismiss on the basis of the misconduct when it permitted Wong to continue work.

In such circumstances and notwithstanding the severity of Wong's misconduct, the failure to suspend the worker from duties meant the employer was required to implement any dismissal with notice rather than summarily.

As such, the Commissioner determined the dismissal of Wong was unjust.

Although Wong did not seek reinstatement as a remedy for his unfair dismissal, the Commissioner noted reinstatement would be inappropriate in the circumstances which involved such misconduct.

The Commissioner concluded Wong's employment would have been terminated within a very short period had he not been summarily dismissed. Having regard to the severity and the nature of the misconduct, the Commissioner determined the compensation Wong would otherwise have been provided in an amount equivalent to his notice period should be reduced to zero. The Commissioner made no order for compensation.

Employers should carefully manage investigations into serious misconduct by standing down employees that are the subject of the misconduct until the investigation is complete. Allowing an employee, who the employer has determined has engaged in misconduct, to continue working may remove the right of an employer to dismiss the employee for misconduct.

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Redundancy basics

We have examined in past editions of GD News some of the fundamental issues relating to the commencement of an employment relationship.

Let's now look at some relationship ending situations.

The concept of "redundancy" is central to many issues which arise for employers and employees in the industrial context.

What is redundancy?

It is critical to keep in mind that redundancy is a concept which relates to positions or roles within an organisation. People are not redundant; positions are.

Essentially, the best working definition of a redundancy situation is that it occurs where the employer no longer requires anyone to perform a role or position.

That does not mean that the functions and duties of a role have all necessarily disappeared. It just means that the employer no longer wants or needs the particular group of functions to be performed by the one role.

That means, for example, that where the duties of a former position are allocated to others within an organisation, there can still be a situation of redundancy.

Redundancy does not occur because of the performance or conduct of the employee.

Termination

Often, although not always, the fact that a role has been made redundant means that the person filling that role will have their employment terminated.

Termination will not occur if another role within the organisation is found for the employee in question. This is redeployment.

If termination does take place, it is described properly as a termination arising by reason of redundancy.

Entitlements on redundancy

Generally, an employee whose employment is terminated by reason of redundancy will be entitled to (a) notice of termination or payment in lieu; and (b) a redundancy payment.

For most people, these will be in accordance with the minimums prescribed by the Fair Work Act 2009.

For some, however, there will be contractual arrangements which govern what amounts are to be paid. These are sometimes complex, but it should be remembered that contractual provisions cannot displace the statutory minimums.

Procedure for redundancy termination

The Fair Work Ombudsman publishes a useful guide for best practice in this area which includes:

Step 1: Communicate changes to the employees affected

Regular communication with employees is important. Most awards and registered agreements require employers to consult with employees regarding changes, including changes to production, organisation, structure or technology.

This should inform employees about changes and give them the opportunity to ask questions.

Step 2: Ascertain notice periods and redundancy entitlements

Determine what the minimum notice of termination and redundancy pay entitlements are for affected

employees. Awards and enterprise agreements may include redundancy entitlements which are additional to the National Employment Standards.

The employee can work the notice period or the employer can pay the employee in lieu of that notice.

Step 3: Inform Centrelink

If you decide to terminate the employment of 15 or more employees **and** it is for reasons of an economic, technological, structural or similar nature (or if the reasons include any of these things) you must provide Centrelink with written notice of the dismissals.

Step 4: Prepare a letter of termination of employment

The letter of termination should specify:

- the reason for the termination of the employee's employment
- the notice period and whether the employee will be paid in lieu of notice
- the date of the employee's last day of work
- details of the employee's redundancy pay entitlements
- any other entitlements to be paid (like annual leave and long service leave), and
- that redundancy pay will usually result in waiting periods for any applicable Centrelink payments.

Step 5: Meet with the employee to provide notice of termination

Meet with the employee to give them the letter, explain the reasons the position has been made redundant and provide them with the opportunity to ask questions. Carefully explain the information in the letter and ensure the employee understands.

The written notice can also be delivered or posted to the employee's last known address.

You should keep a copy of the letter for your records.

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WORKERS COMPENSATION ROUNDUP

WPI Claims and Deductions for Previous Injuries

Where workers have suffered from a combination of injuries over time it can be difficult to determine the whole person impairment caused by a particular injury. That issue can become even more problematic when the first injury ceases to produce symptoms and the second injury occurs. Apportioning responsibilities for symptoms in those circumstances creates challenges for Medical Assessors.

Section 323 of the *Workers Compensation Act 1998* (the "Act") provides a mechanism for the determination of the deduction to be made for a prior injury. The section provides:

> *"(1) In assessing the degree of permanent impairment resulting from an injury, there is to be a deduction for any proportion of the impairment that is due to any previous injury (whether or not it is an injury for which compensation has been paid or is payable under Division 4 of Part 3 of the 1987 Act) or that is due to any pre-existing condition or abnormality.*
>
> *(2) If the extent of a deduction under this section (or a part of it) will be difficult or costly to determine (because, for example, of the absence of medical evidence), it is to be assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence."*

Cogent evidence of the extent of the previous injury can lead to a deduction greater than 10% which may result in the reduction of the assessment of whole person impairment below 15%, 20% or 30% which are key levels in the determination of workers compensation benefits.

This can lead to disputes where there is a Section 323 calculation involved in a medical assessment.

There can be a protracted dispute as a consequence of the appeal mechanisms for Medical Assessments, as was seen in recent decision of the Supreme Court in *Vannini v Worldwide Demolitions Pty Limited.*

The injured worker was employed by Effective Demolitions in heavy labouring work in 2008. During the course of this employment he developed a gradual onset of back pain. He told various medical practitioners during the course of the current claim he had a long history of lower back discomfort and over the years experienced pain with heavy manual work. His condition deteriorated until he could not maintain his normal duties with Effective Demolitions. He subsequently underwent surgery on 4 August 2008 in the form of a L5/S1 laminotomy, microlumbar discectomy and foraminotomy. No workers compensation claim was made in respect of the 2008 injury and operation.

The injured worker subsequently resumed work with Effective Demolitions and when they would not make allowances for his condition he ceased working with them. In early 2009 he commenced employment with Worldwide Demolitions Pty Limited. On 6 March 2009, whilst lifting a sheet of roofing iron, he felt sudden severe pain in his lower back and leg. He subsequently lodged a claim in relation to this injury.

The injured worker pursued a claim under section 66 of the Act for his 2009 injury.

The worker sought expert opinions from Dr Bodel who initially assessed the worker on 5 July 2010 and the Doctor considered, at that stage, apportionment of whole person impairment was two thirds to the original injury in 2008 and one third to the injury of 6 March 2009. The doctor considered the pathology was all the same pathology although aggravated in the 2009 injury. In a subsequent report Dr Bodel changed his opinion and concluded the injured worker was asymptomatic at the time of the injury of 6 March 2009 and therefore a new injury occurred at that time and assessed 22% whole person impairment with no deduction for contribution from the accident in 2008.There was no apparent reason for the change of opinion.

The injured worker lodged proceedings for lump sum compensation.

The dispute was referred under Section 321 of the *Workers Compensation Act 1998* (the "Act") to an approved medical specialist, Dr Rosenthal.

On 11 April 2017 Dr Rosenthal issued a Medical Assessment Certificate assessing 22% whole person impairment but finding that no part of the impairment was due to a previous injury, pre-existing condition or abnormality pursuant to Section 323 of the Act.

The employer lodged an appeal against the Medical Assessment Certificate on the basis the certificate contained a demonstrable error and was based on incorrect criteria. It was asserted that Dr Rosenthal had not applied any deduction for a pre-existing condition and an Appeal Panel determined that Dr Rosenthal had erred in finding the injured worker's whole person impairment was not due in any proportion to any previous injury or pre-existing condition or abnormality and assessed whole person impairment at 24%, concluding 50% was due to a previous injury to a lumbar spine in 2008, giving rise to a nett impairment of 12% as a result of the injury of 6 March 2009.

The Appeal Panel had followed the settled legal position that it is "an error to proceed on the basis that once a person has had surgery to the lumbar spine, irrespective of the outcome, that person has a residual level of impairment" and that what is required is "a conclusion, based on all the evidence, that the pre-existing injury, condition or abnormality caused or contributed to that impairment".

The Appeal Panel concluded there was ample evidence that the injury in March 2009, only some seven months after the earlier injury and surgery, and at the same level, contributed to the current impairment. The consensus of medical opinion suggested that the 2009 injury represented a "recurrence" of the earlier injury, although with some additional impairment from the 2009 injury.

With that turnaround the injured worker applied to the Supreme Court for Judicial Review of the Appeal Panel's decision. The injured worker alleged jurisdictional error on the part of the Appeal Panel, error of law on the face of the record, unreasonableness of the decision, a failure to accord procedural fairness and failure to give adequate reasons. However that challenge failed as the Appeal Panel had not made any error.

His Honour Justice Fagan determined the Judicial Review and upheld the Appeal Panel findings by dismissing the appeal with costs.

In the course of his decision His Honour observed that the Appeal Panel relied on the fact there was no explanation from Dr Bodel for his departing from his original opinion when 50% deduction.

Determinations of Section 323 deductions can lead to appeals by both workers and insurers. A whole person impairment of 15% is the threshold for a work injury damages claim and a Section 323 deduction reduces the whole person assessment percentage.

In order to establish a pre-existing condition for the purpose of a deduction under Section 323 of the Act there must be, at the relevant date, an actual condition although it may be asymptomatic. The degree of pre-existing impairment will be a contentious issue particularly where prior injuries are asymptomatic when a further injury occurs. However evidence the condition existed prior to the injury or where the injury is a disease due to the nature and conditions of employment will lead to a deduction and it is assumed (for the purpose of avoiding disputation) that the deduction (or the relevant part of it) is 10% of the impairment, unless this assumption is at odds with the available evidence.

It is critical to review the medical evidence to determine whether the 10% deduction is not justified or whether the deduction should be more that the minimum 10% that will be assumed to avoid disputes.

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Must Be Made Is Not Mandatory When It Comes to Merit Reviews

The 2012 amendments introduced the notion of "work capacity decisions" which were identified in Section 43 of the *Workers Compensation Act 1987*. These decisions made by insurers are final and binding on the parties and are only subject to review as provided for in Section 44BB by a process of internal review by the insurer, then "merit review" by SIRA and then review by the Independent Review Officer. Section 43(1) also provide for judicial review by the Supreme Court, but not otherwise.

Section 44BB(3) provides that an application for review, whether by SIRA or the Independent Review Officer, must be made within 30 days after the worker receives notice of the decision sought to be reviewed.

The meaning of the word "must" in this context has recently been the subject of consideration by the Court of Appeal in *Bhusal v Catholic Health Care Limited* [2018] NSWCA 56.

The worker sustained injury in the course of her employment and made a claim for compensation benefits which was accepted by the employer's licensed insurer.

On 25 February 2016 the insurer advised the worker that following review of her claim her work capacity was such that she was disentitled to further weekly payments. The worker sought an internal review of the decision by a letter dated 24 March 2016. The internal review took place and the insurer advised on 29 April 2016 the original decision was confirmed. The notification was provided by a letter addressed to the solicitors who had assisted the claimant in preparing the application for internal review.

On 3 May 2016 the solicitors forwarded the notification to the worker together with an Application for Merit Review by SIRA. That Application specified the date on which the worker received the insurer's internal review decision as 2 May 2016.

The solicitors filed the Application for Merit Review by SIRA on 9 June 2016. The insurer provided its response to the Application on 14 June 2016 basically stating the Application for Merit Review did not include any new information from the information supplied at the internal review.

On 30 June 2016 SIRA advised the worker it had determined it did not have jurisdiction to proceed with the review because the Application for Merit Review made on 9 June 2016 was not made within 30 days after the worker received notice of the insurer's internal review decision on 2 May 2016 as stated in the Application for Merit Review.

On 29 June 2016 the worker lodged an application for "procedural review" with the Independent Review Officer complaining she had not been given the opportunity to provide SIRA submissions on the question of jurisdiction. That application was accompanied by a statement from the worker explaining she had only received the actual notice of the insurer's review decision on 2 June 2016 after she returned to Australia from Nepal.

The Independent Review Officer dismissed the application because the worker had not complied with Section 44BB(3)(a) and was therefore in breach of the review process as SIRA had declined to undertake a merit review because it declined jurisdiction.

On 4 November 2016 the worker sought a judicial review of the decision by both SIRA and the Independent Review Officer. The hearing before his Honour Justice Button proceeded on the undisputed basis that the worker did not receive the notification of the internal review decision until her return to Australia on 3 June 2016. He rejected the argument there was a denial of procedural fairness by SIRA in extinguishing the worker's right of review without having heard from the parties or checked that the disentitling statement as to notice was factually correct.

Justice Button accepted that the word "must" in Section 44BB(3)(a) is "mandatory in the true sense" and therefore rejected the worker's submission that SIRA should have given her an opportunity of explaining why she did not lodge her application within 30 days from 2 May 2016. He rejected the proposition the date on which the worker received notice of the internal review decision is a jurisdictional fact.

The matter then proceeded to the Court of Appeal. As a preliminary matter it was common ground the expression "receives notice … of the insurer's [internal review] decision" in Section 44BB(3)(a) meant personal receipt of the notice by the worker not receipt by a lawyer or other person assisting the worker. It was accepted the worker did not personally receive the notice informing her of the insurer's internal review decision before 2 June 2016 when she returned from Nepal and thus the Application for Merit Review was lodged within the 30 day period prescribed by Section 44BB(3)(a).

Further, it was accepted by the insurer that SIRA when reviewing the insurer's work capacity decision was bound to afford procedural fairness to the worker. The dispute before the Court of Appeal was essentially whether the procedure adopted by the Delegate caused the worker to suffer practical injustice.

The Court held that procedural fairness is concerned with a fair hearing not a fair outcome. In order to establish she had been denied procedural fairness, the worker needed to show that she did not receive a fair hearing by SIRA.

The Court determined that SIRA was required to review the insurer's decision in the context of the dispute between the insurer and the worker. The nature of the dispute will determine the issues that must be addressed by SIRA and SIRA was obliged to provide each party with a fair opportunity to be heard on the issues arising in the review. This clearly included the fundamental question of whether SIRA was entitled to exercise the jurisdiction invoked by the worker in reviewing the insurer's internal review decision.

The Court indicated the authorities make it clear the touchstone for determining whether a person has been denied procedural fairness is whether the procedures adopted have caused "practical injustice" to the party. This included the need to bring to a person's attention any critical issue or factor on which the administrative decision was likely to turn so that the person may have

an opportunity of dealing with it. This includes issues not previously thought to be in dispute which might be the subject of adverse findings.

It was observed that the standard form of the Merit Review Application completed by the worker did not explain that if it was lodged outside the 30 day period, not only would the worker contravene Section 44BB(3)(a) but SIRA would lack jurisdiction to entertain the Application. No guidance was given as to the meaning of the word "receives" in Section 44BB(3)(a). The absence of this information would have been of real consequence if the worker's attention had been drawn to it and she had been given the opportunity to make submissions prior to the Delegate deciding SIRA lacked jurisdiction to undertake the Merit Review.

It was also noted SIRA had considered the question of jurisdiction significant enough to draw it to the attention of the insurer. The insurer's response made no reference to this issue. Thus the worker had been left "entirely in the dark" about the existence of jurisdictional issues.

Therefore it was concluded the worker suffered practical injustice because she had been denied the opportunity to make submissions on the issue that proved crucial to the outcome of her Merit Review Application. The fact the worker had received assistance from solicitors did not detract from the need to afford procedural fairness.

The Court of Appeal observed however the denial of procedural fairness did not imply SIRA was obliged to check the accuracy of information provided by an applicant that appeared to be adverse to his or her case. In this instance there was a denial of procedural fairness because neither the Delegate nor the insurer directed the worker's attention to the critical issue on which SIRA's decision turned. She was therefore denied the opportunity to be heard on the issue.

The Court of Appeal set aside the orders made by Justice Button and SIRA's decision of 30 June 2016 and remitted the Application for Merit Review to SIRA for determination according to law.

As a consequence of the decision, the limitation period fixed by Section 44BB(3)(a) is not finite. Whilst SIRA has no obligation to check the accuracy of the information provided by an applicant, any critical issue on which its decision turns must be directed to the worker's attention otherwise there will be a denial of procedural fairness.

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