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Bulletin of the Workers Compensation Independent Review Office (WIRO)

CASE REVIEWS

Recent Cases

These case reviews are not intended to substitute for the headnotes or ratios of the cases. You are strongly encouraged to read the full decisions. Some decisions are linked to AustLii, where available.

Supreme Court of New South Wales

S 105 WIMA does not exclude the jurisdiction of the Local Court of NSW in a claim for recovery of monies paid as workers compensation from a worker

Labourpower Recruitment Services Pty Limited v Nolland [2019] NSWSC 512 – Adamson J – 6 May 2019

The plaintiff is a labour hire company that employed the defendant from August 2015 until 11 April 2018. On 19 November 2018, it appealed against a decision of Keogh LCM to dismiss proceedings that it commenced in the Local Court of NSW to recover an alleged overpayment of compensation to the defendant. The defendant filed a notice of motion to strike out the proceedings on the basis that the Local Court did not have jurisdiction in relation to the claim. The Magistrate accepted the defendant's arguments and dismissed the proceedings.

Justice Adamson noted that the Magistrate's reasons were delivered ex tempore, but were not recorded, and she paraphrased the reasons from a solicitor's notes, as follows:

> *The defendant seeks dismissal of the statement of claim. The statement of claim seeks re-payment of $25,000. The payments were made pursuant to s 33 of the Workers Compensation Act 1987 (NSW) in consequence of an alleged work-related injury, which the plaintiff alleges were not so sustained and were sustained while the defendant was playing sport. The statement of claim indicates that it is a money claim.*
>
> *The defendant submitted that the plaintiff's claim can only be dealt with by the Workers Compensation Commission.*
>
> *Section 105 of the Workplace Injury Management and Workers Compensation Act 1998 (NSW) provides: [read out]*
>
> > *Section 105 (1) is pertinent and provides that the Commission has exclusive jurisdiction to examine, hear and determine all matters under this Act and the 1987 Act. The defendant submitted that this Court would need to examine, hear*

and determine a matter under the Act in these proceedings. The plaintiff submitted that this Court would not be determining an entitlement under the Workers Compensation Act but rather a fact: whether the defendant was at work or not when he suffered the injury. But, as the defendant submitted, the Commission has exclusive jurisdiction to determine whether the injury was suffered in the workplace.

Although the monies were paid by the plaintiff and not by the workers compensation insurer, that does not give the Local Court jurisdiction. The plaintiff accepted that the payments were made under a Return to Work plan. A Return to Work plan is required by the Workers Compensation Act.

A factual determination would be required as to whether compensation was payable under the Workers Compensation Act.

In effect, I am asked to determine whether there has been an overpayment under s 235D of the Workplace Injury Management and Workers Compensation Act. I note that s 235D (2) provides that the Authority may order a person to repay money. It is not for me to trawl through the Act to find out how the Authority does that. If the Authority makes an order, then this creates a civil debt which would entitle the plaintiff to come to this Court to enforce the debt. In my view, the Commission has jurisdiction over this matter and this Court has no jurisdiction.

Accordingly, I uphold the notice of motion. The matter can be determined in the Workers Compensation Commission.

The appeal was lodged under s 39 of the *Local Court Act 1970* (NSW), which permits an appeal to the Supreme Court only on a question of law, and the parties agreed that the summons raised a question of law and that leave to appeal was not required.

The plaintiff appealed on two grounds, namely: (1) The Court below erred in holding that it had no jurisdiction to hear the proceedings; and (2) The Magistrate gave no, or insufficient, reasons for her Honour's conclusion.

When the hearing commenced, counsel for the plaintiff indicated that the Statement of Claim did not accurately reflect its claim, which was really for restitution of monies it had paid to the defendant as wages for the periods during which he had come to work after the 2 alleged work-related injuries (from 10 to 21 August 2017 and from mid-January 2018 to 11 April 2018). He sought leave to amend the Statement of Claim, but her Honour held that the Court did not have power to do this under s 39 of the *Local Court Act* and she considered the appeal based on the claim as pleaded.

The plaintiff argued that s 105 *WIMA* does not exclude the jurisdiction of the Local Court to determine a money claim by an employer against a worker for overpayment of income, whether the monies amounted to compensation or income for a worker who had suffered an injury and was not fit for full duties. It relied upon *Melesco Manufacturing Pty Ltd v Thompson* (1966) 40 NSWLR 525 (*Melesco*) as support for the argument that s 105 was insufficient to divest the Local Court of the jurisdiction which it would otherwise have in respect of money claims such as this. Further, although s 235D *WIMA* provided it with an avenue of recovery, other rights were expressly preserved by s 235D (5) and it could sue for the monies claimed in the Local Court.

The defendant argued that *Malesco* could be distinguished from this matter as it concerned the variation of an award by the Compensation Court that had the effect of decreasing the amount of weekly compensation payable to the worker. However, this matter turned on an allegation that the defendant was not entitled to workers compensation for a period because of his own misleading or fraudulent conduct. He argued that it would be necessary

for the tribunal that determined the claim to determine the question of his entitlement to workers compensation and this was a matter squarely within the jurisdiction of the Commission and s 105 *WIMA* therefore excluded the jurisdiction of any other court or tribunal. The plaintiff had a right under s 235D *WIMA* to apply to the Authority for an order that the defendant refund the amount of any overpayment to the plaintiff and if it did not obtain that order, it could seek review of the Authority's decision by the Commission.

Her Honour rejected the defendant's argument this matter was distinguishable from *Melesco*. She held that it is plain from the wording of s 235D (5) that the section does not intend to exclude other rights of recovery and, indeed, contemplates that there may be other rights of recovery. Section 235D (5) would have no work to do if there were no other rights of recovery which inured to an employer such as the plaintiff. Section 235B (2) (b) applied to this matter because it confers a right to recover on a person who has paid an amount to the claimant in connection with the claim if it is established that, for the purposes of obtaining a financial advantage, the claimant made a statement concerning an injury with knowledge that the statement was false or misleading within the meaning of s 235B (1).

Her Honour stated:

> 34. Neither party contended that the Commission had jurisdiction under s 235B (2) (b) to order a worker such as the defendant to repay to the employer the amount of a financial advantage. As the Commission is a body created under statute, it has no general powers other than those specifically conferred. Section 105 (1) confers exclusive jurisdiction to hear and determine all matters arising under the *Workplace Injury Management and Workers Compensation Act* and the *Workers Compensation Act*. It operates to limit the jurisdiction of other courts and tribunals. The jurisdiction it confers on the Commission is limited by the wording of s 105 (1), as the Court of Appeal held in *Melesco*. The Commission has no inherent jurisdiction but only has such powers as are necessary and incidental to the exercise of its statutory jurisdiction.
>
> 35. It would appear that a claim for recovery referable to s 235B could be the subject for an application for an order under s 235D. Had the legislature intended that the recovery claim under s 235B be brought directly to the Commission, it would have expressed its intention in clearer words. That the Commission's role under s 235D is only supervisory, the principal decision being one for the Authority, is further evidence that the legislature did not intend that s 235B would give rise to a claim that could be brought directly by an employer in the Commission.
>
> 36. It follows that the legislature, by enacting ss 235B and 235D, has not excluded the plaintiff's right to recover payments alleged to be overpayments of workers compensation, which is a common law right to recover monies had and received. The removal of a common law right to sue to recover an overpayment requires express words or necessary intention: *Coco v The Queen* (1994) 179 CLR 427; [1994] HCA 15; cited in *Carricks Ltd v Pizzaro* (1995) 38 NSWLR 274 at 280 (Cole JA) and *Melesco* at 532 (Sheller JA) and 541 (Powell JA). Nor is s 105 (1) sufficient to remove the jurisdiction of the Local Court to determine money claims within its jurisdictional limit: *Melesco*. The claim which the plaintiff brought in the Local Court was for monies recoverable at common law and was not a matter arising under the *Workers Compensation Act* or the *Workplace Injury Management and Workers Compensation Act*.

Her Honour held that the Magistrate erred in dismissing the claim, but noted that neither party had given the Magistrate the benefit of *Melesco*, which determines the question in the plaintiff's favour. She set aside the Magistrate's order, reserved costs and concluded:

> 41. I confirm for completeness that my reasons are not to be understood as expressing any view as to the merits of the plaintiff's claim. The only issue which arises in the proceedings before this Court is the Local Court's jurisdiction to hear the plaintiff's claim.

I note that her Honour did not address s 235 (1) *WIMA*, which provides, *Compensation under this Act (including the 1987 Act and the former 1926 Act): (a) is not capable of being assigned, charged or attached, and (b) does not pass to any other person by operation of law, nor can any claim be set off against that compensation.*

Further, s 235D (4) *WIMA* provides to the effect that if the Authority is satisfied that a person has received an overpayment as a result or partly as a result of an act that contravenes s 235A (fraud on workers compensation scheme) or s 235 C (false claims), it may order the person to refund the amount of overpayment to the person who made the payment. However, s 235D (5) provides that any such refund may be deducted from future payments of compensation, but not if it is payable under an award of the Commission. It is possible that the full implications of s 235 were not drawn to her Honour's attention.

Extension of time to commence WID proceedings under s 151D WCA granted based upon a concept of "representative error"

Humphries v McDermott Drilling Pty Ltd [2019] NSWSC 508 – Schmidt J – 7 May 2019

The plaintiff sought leave under s 151D WCA to extend the time to bring proceedings for WID's for injuries that he suffered in September 2009, while working in or about a coal mine. He was working with Mr Botica at that time.

The plaintiff commenced similar proceedings in 2012, which were discontinued in 2015 and argued that this was due to "representative error". The defendant opposed the granting of leave and sought orders under r 14.28 of the UCPR Rules 2005 (NSW), striking out the statement of claim and, in the alternative, orders permanently staying the proceedings under s 67 of the Civil Procedure Act 2005 (NSW).

Schmidt J stated that the only issue for determination was whether the leave sought by the plaintiff should be granted *"nunc pro tunc"* (retroactively to correct an earlier ruling). She noted that in *Salidio v Nominal Defendant* (1993) 32 NSWLR 524, Gleeson CJ stated in relation to s 54 (4) of the *Motor Accidents Act 1988,* which is a similar provision to s 151D *WCA,* that the immediate purpose of the Court's discretion is to "protect respondents against the injustice of stale claims and to promote forensic diligence". Consideration must also be given to the diligence, or lack of diligence, of the plaintiff's solicitors in asserting his rights; the extent of the delay; the reason for it; and the resulting forensic disadvantage for the defendant and its ability to defend the claims. She stated:

> 11. In *Salidio* reference was made to what the High Court said in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, at 547, 550 and 555, which may be summarised as: that it is for the respondent to adduce evidence that leads the court to conclude that actual prejudice would result and for the applicant to show that this does not amount to material prejudice; that the real question is whether the delay has made the chances of a fair trial unlikely, so that if it has not, there is no reason why the discretion should not be exercised; but that if actual prejudice of a significant kind is shown, the extension discretion should not trump the limitation period.

Her Honour stated that the proper question in determining an application under s 151D *WCA* is whether it would be fair and just to grant leave: *Itex Graphix Pty Limited v Elliott* [2002] NSWCA 104 (*Itex*). She noted that in *Itex*, a fully informed decision not to proceed within the 3-year limitation period and a further significant delay before the plaintiff changed her mind weighed heavily against the granting of the leave, particularly as there was no explanation for that course of action. However, in this matter it was relevant that the plaintiff not only notified his claims within the limitation period and commenced the 2012 proceedings within time, he also explained not only how they came to be discontinued and how the delay in bringing these proceedings occurred. Therefore, the issue is the adequacy of that explanation.

Her Honour noted that before the commencement of the 2012 proceedings, the plaintiff's solicitors (P K Simpson & Co) engaged investigators to locate Mr Botica and in April 2012, he provided information about the accident to the investigators and agreed to provide a statement. However, he failed to provide a statement and he did not respond to any further attempts to contact him. The 2012 statement of claim was served on both the defendant and Mr Botica. No defences were filed, but a notice of appearance was filed for both parties before the proceedings were discontinued in 2015 (after transfer to the District Court).

Her Honour also noted that TurksLegal filed a notice of appearance for both defendants, and stated:

> 26. On the evidence of Mr Vorbach of TurksLegal, it appears that no statement has been taken from Mr Botica by GIO, the solicitors who acted in the 2012 proceedings, or TurksLegal. It also appears that Mr Botica has never himself given TurksLegal instructions, either to enter an appearance for him in these proceedings, or to file a defence…no contact has ever been made with him, despite the efforts of an investigator engaged by TurksLegal after these proceedings were commenced… to locate him. Its instructions have only ever come from GIO.
>
> 27. That evidence raised obvious questions about TurksLegal's retainer to act for Mr Botica, given the contractual nature of the relationship between a solicitor and client, which ordinarily requires agreement: *Beach Petroleum NL v Abbott Tout Russell Kennedy* [1999] NSWCA 408; (1999) 48 NSWLR 1.
>
> 28. There may be circumstances in which such an agreement may be implied from conduct, courts generally accepting the existence of a retainer when a solicitor has performed work on behalf of a person with his or her knowledge and assent, in circumstances which are consistent with that person being the solicitor's client: *Shaw v Yarranova Pty Ltd* [2011] VSCA 55 at [19]…
>
> 38. Under the relevant conduct rules, Mr Humphries' solicitors are ordinarily not entitled to deal directly with Mr Botica, without TurksLegal's consent: *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*. That well explains why efforts to obtain a statement from Mr Botica were not pursued by Mr Humphries' solicitors, after the 2012 proceedings were commenced.

39. Given Mr Vorbach's evidence that since the 2018 proceedings were commenced, he has not been located, it may of course be that TurksLegal is not truly retained by Mr Botica. He was recalled to give evidence about the underlying facts. Then he said:

- his instructions had come from … GIO, the workers compensation insurer;
- an appearance was filed for Mr Botica, because it was conceded that he was an employee of McDermott for whom it was vicariously liable;
- he had not had direct contact with either McDermott or Mr Botica;
- he was disappointed to find that in the 2012 proceedings, the solicitors engaged by GIO, had focussed entirely on the status of McDermott as an employer in the mining industry, rather than the injury itself; and
- GIO's file had been subpoenaed and produced, apart from privileged documents.

40. The circumstances in which a legal practitioner's retainer may be challenged arose for consideration in *Doulaveras v Daher* (2009) ALR 627; [2009] NSWCA 58. There it was concluded, after an extensive review of the authorities, that a challenge to a retainer cannot be properly raised by a defence, although it can become an issue in the proceedings, if raised by a party, even informally: at [76] to [153].

41. There it was also observed at [150] that it is a "clear" abuse of the process of the Court to bring litigation supposedly in the name of a person, when that person has not authorised the litigation and that the Court will deal with such an abuse, once it is established that a supposed plaintiff has not given authority for the litigation to be brought. It is difficult to see that the position is any different, if it is an unauthorised appearance and defence which has been filed in the proceedings.

42. On Mr Vorbach's evidence it is McDermott's insurer, GIO, who has instructed TurksLegal, as the result of which an appearance has been entered not only for the insured, McDermott, but also one of its employees, Mr Botica.

43. The basis upon which a contact of insurance between an employer and an insurer could entitle the insurer to enter an appearance for such an employee, is not immediately obvious, despite what was submitted for McDermott, as to its vicarious liability for the negligent acts or omissions of Mr Botica. But the employee could certainly consent to the insurer acting for him or her, as was the case in *Le v Williams* [2004] NSWSC 645; [2005] NSW ConvR 56-109.

44. But it was not Mr Vorbach's evidence that there had been such authorisation given by Mr Botica. To the contrary, his evidence was that no contact had been able to be made with Mr Botica, since these proceedings were commenced.

45. It clearly does not follow in these circumstances, that at trial it would be expected that Mr Humphries would call evidence from Mr Botica. After all, he is a defendant in the proceedings legally represented by the same solicitors as act for McDermott. In the result, how *Jones v Dunkel* inferences could be drawn against Mr Humphries, if he did not call Mr Botica at trial, is not readily apparent.

46. That principle was explained in *RHG Mortgage Limited v Rosario Ianni* [2015] NSWCA 56 at [75] - [96]. The three relevant considerations are: first, that the missing witness would be expected to be called by one party, rather than the other; secondly, that this evidence would elucidate a particular matter and thirdly, that the absence is unexplained.

47. If those conditions are satisfied, then the inference may be drawn that the witness' evidence would not have helped the party's case. That inference may then be used in two ways. Firstly, in deciding whether to accept any particular evidence

given, either for or against that party, which relates to a matter about which the person not called as a witness could have spoken. Secondly, in deciding whether or not to draw inferences of fact, which are open in relation to matters about which that person could have spoken.": at [79].

49. Mr Botica being an active party to the proceedings, if he did not give evidence at trial, the inference available to be drawn would be that his evidence would not have assisted the case which he advanced by his defence.

Her Honour held that the evidence establishes that the discontinuation of the 2012 proceedings was the result of "representative error" on the part of one of the solicitors who acted on Mr Humphries' matter regarding counsel's advice, and not because he desired to abandon his common law claims. She stated:

64. The delay in the initiation of these proceedings after 2015 appears to be the attention given to the question of the law applicable to coal miners and whether it applied to Mr Humphries, about which the parties are now agreed. It was submitted for McDermott and Mr Botica, that had involved further representative error, but from the correspondence it is apparent that it was not only Mr Humphries' solicitors who were districted by this issue, before it was finally agreed.

65. It is also relevant that from what is in evidence and the submissions advanced, it is apparent that had defences been filed in the 2012 proceedings as they ought to have been, before those proceedings were discontinued, given the applicable Rules, what has now been agreed about Mr Humphries being a coalminer is likely then to have emerged. The error made in the discontinuation of those proceedings, is likely, thereby to have been avoided.

Her Honour considered the circumstances in this matter to be far removed from those in *Itex,* and she held that it has not been established that actual prejudice, let alone substantial prejudice, would result for the defendants if leave was granted or that the delay made the chances of a fair trial unlikely. Therefore, she granted leave under s 151D.

Her Honour ordered the plaintiff's solicitors to pay all parties' costs of the motions, as it appeared that inadequate supervision of the many solicitors who worked on the matter resulted in the erroneous discontinuance of the 2012 proceedings.

The concept of "representative error" appears to be a novel basis for the granting of leave under s 151D *WCA* and the decision appears to fly in the face of the legal concept that a lawyer is the agent of their client and that the client is bound by their agent's actions.