hba *legal.*

Not my employee!
Consideration of an employers' liability exclusion clause

Marketform Managing Agency Ltd for and on behalf of the Underwriting Members of Syndicate 2468 for the 2009 Year of Account v Ashcroft Supa IGA Orange Pty Ltd [2020] NSWCA 36 (10 March 2020)

Key Points

- An appeal and cross-appeal were filed on the basis that the primary judge erred in his interpretation of an employers' liability exclusion clause and findings in relation to contributory negligence, employers' contribution pursuant to Section 151Z of the *Workers' Compensation Act*, and assessment of damages.
- The Court of Appeal dismissed the appeal, but otherwise allowed the cross-appeal in relation to damages.

Background

Mr Paul brought proceedings in the District Court ("DC") for personal injury against Ashcroft Supa IGA Orange Pty Ltd ("IGA") as the occupier of the workplace. Mr Paul did not bring work injury damages ("WID") proceedings against his employer, Skillset Limited ("Skillset").

IGA filed a cross-claim against Marketform Managing Agency Ltd for and on behalf of the Underwriting Members of Syndicate 2468 for the 2009 Year of Account ("the insurer") seeking it indemnify IGA pursuant to a policy of insurance.

The insurer denied indemnity on the basis that the following exclusion clause applied:

> "This Policy does not cover...
>
> 16.5 Employers' Liability
>
> liability for injury to any person under a contract of employment, service or apprenticeship with or for the provision of labour only services to the Insured where such injury arises out of the execution of such contract."

The primary judge found that IGA breached its duty of care and awarded damages to Mr Paul. His Honour found Mr Paul to be guilty of contributory negligence in the order of 10%. The primary judge apportioned 10% liability to Mr Paul's employer, Skillset, under Section 151z of the *Workers Compensation Act* due to the nature of the non-delegable duty owed to Mr Paul.

In relation to the cross claim, the primary judge held that the employers' liability exclusion clause **did not apply** and ordered that the insurer indemnify IGA pursuant to the policy.

The insurer appealed this finding, as well as the assessment of damages, apportionment of liability to Skillset and findings of contributory negligence.

The Law

Their Honours were asked to consider the application of the interpretation principles in *Zhang v ROC Services (NSW) Pty Ltd* [2016] NSWCA 370.

Their Honours also dealt with the application of section 151Z of the *Workers Compensation Act 1987* and the assessment of damages in accordance with the principles in *J Blackwood & Son v Skilled Engineering* [2008] NSWCA 142.

Conclusion

Issue 1: the construction of the insurance policy, specifically, whether the employers' liability exclusion clause applied.

The Court of Appeal disagreed with the primary judge's interpretation of the exclusion clause, but nevertheless agreed that the exclusion clause did not apply for different reasons, and dismissed the appeal.

The Court of Appeal interpreted the clause to apply to only employees of the insured, or one who is providing services of a similar kind to the insured.

The Court of Appeal determined that the contract between Skillset and IGA was not limited to "labour only services" but also provided for other services. Had the contract been for "labour only services", then the exclusion clause would have applied.

Issue 2: the primary judge's assessment of contributory negligence.

The Court of Appeal dismissed the appeal as there was no challenge to findings of facts, and the assessment of contributory negligence was open to the primary judge to determine.

Issue 3: the primary judge's assessment of the notional contribution of Skillset under s 151Z of the *Workers Compensation Act*.

The Court of Appeal dismissed the appeal as there was no basis to challenge the findings. There was little that Skillset could have done in the circumstances.

Issue 4: whether, if the appeal was dismissed, the damages calculation made by the primary judge was incorrect.

The Court of Appeal noted there was a slight calculation error and assessed damages as $613,864.24.

The Court of Appeal dismissed the appeal but allowed the cross appeal (on damages).

Lessons Learnt

1. Careful construction and interpretation of exclusion clauses within an insurance policy is paramount. The party seeking to rely on the exclusion clause bears the onus of proof.
2. Employers' liability exclusion clauses in particular may require careful scrutiny in labour hire/occupier cases.

3. In line with the trend of cases involving occupiers that exercise a significant degree of control over a labour hire employee, the occupier is likely to bear the majority of the liability (in this case, 90% apportioned to IGA).

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