

# Building & Construction Law Case Note

3 September 2009

## *Leighton Contractors Pty Ltd –v– Fox & Ors; Calliden Insurance Limited –v– Fox [2009] HCA 35 (2 September 2009)*

### Appeal from the New South Wales Court of Appeal

by Linda Hamilton, Notary Public, Partner

Principal contractors and their contractors should be relieved by this decision of the High Court. It provides rigour to established principles to preserve and delineate the respective roles of the various entities and specialties on site. It recognises the practicalities of big site management and reinforces the need for independent contractors to understand and meet their OH&S obligations. Construction and engineering underwriters now have a clearer frame of reference within which to assess the risks of their potential insureds.

#### Issues covered:

- This case helps delineate the relative responsibilities on site of the OH&S regime.
- If relying on a breach of Regulation as a head of negligence, causation of damage must still be proven.
- Common law duties are not of strict liability and are tempered from such by the element of "reasonable care".
- The Principal contractor is not responsible for the safety of an independent contractor who is injured whilst acting within his or her expertise.
- There is no duty of the Principal contractor to train the independent contractor in the hazards of their expertise.
- There is no general duty of care to induct all entrants on site in the codes of practise peculiar to their expertise.
- Contractors have a duty to hire competent subcontractors.

#### The corporate structure on the building site

Leighton Contractors Pty Ltd ("Leighton") was the principal contractor carrying out works at the Hilton Hotel in Sydney. Leighton contracted with Downview Pty Ltd ("Downview") to carry out concreting work.

Downview, unbeknownst to Leighton, subcontracted with an entity they thought was Toro Constructions Pty Limited ("Toro") to pour concrete on 7 March. The concrete pour had originally been scheduled to take place on 8 March. The people who Downview thought were the employees and representatives of Toro were named Quentin Still ("Still") and Jason Cook ("Cook"). These 2 persons had previously, subcontracted further to a man named "Jamie" who had previously supplied a concrete pump truck together with his own labour and that of an offsider to the site. As a result of the re-scheduling of the job from 8 March to 7 March, Jamie was unable to perform those duties so Still or Cook telephoned and hired Shark Shire Pumping whose principal was a Mr John Martin, to

supply the concrete pump trucks. Mr Martin was also a principal of a company called Aggforce Concrete Pty Limited ("Aggforce") which supplied labour to those trucks.

The labour supplied to Aggforce was in the form of independent contractors being Mr Warren Stewart ("Stewart") whose employer was Warren Stewart Pty Ltd, and the plaintiff Mr Brian Alan Fox ("Fox").

So, Leighton employed Downview who thought it employed Toro but really employed Shark Shire Pumping and Aggforce which in turn employed the plaintiff and Warren Stewart Pty Limited who in turn employed Stewart as an independent contractor. Neither Leighton nor Downview for that matter, were aware of the sub subcontracting arrangements. Indeed, originally Toro had been joined as a 4th defendant and these proceedings were only discontinued when Still revealed he was not an employee.

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## Facts

On 7 March the driver of the concrete pump truck supplied by Shark Shire Pumping was Stewart and his offsider was Fox. It was arranged that both were to take instructions from Still. Neither Still nor the plaintiff, despite many years of experience, had experience working on a major multi storey construction site.

The 3 men took a number of pipes from the pump truck to level 12 of the construction where the concrete was to be poured. They linked up the pipes on level 12 to the static line which was a pipe attached to one of the columns which ran down to level 4. The 3 men returned to level 4 and connected the line from the truck to the static line. During this process Fox assisted Still on level 12. Stewart remained on level 4 with the truck. The pour was completed. The pump was turned off. Still and Fox went down to level 4 to assist Stewart to uncover the pipes. Stewart reversed the pump truck out of the way. A forklift driver moved a waste bin into position at Still's direction. The forklift backed away. The end pipe was moved by Stewart, Still and Fox into a position over the waste bin. It was not chained or otherwise secured to this bin. Previously, Jamie the other contractor, had always secured the pipe to the waste bin with chains which he himself, supplied. Still understood the proper practice required this occur, just in case during the cleaning of the pipes there was a build up of pressure and the sponge got stuck and blew. Still denied at trial that he had observed that the pipe was not attached to the bin. His evidence in this regard was not accepted.

The process of cleaning the lines was to blow a purpose built sponge through the pipes. A 4 inch sponge was blown through without difficulty. Still and Stewart however, considered that the sponge was an ineffective means of cleaning these pipes which included pipes with a 5 inch diameter. Therefore, Still substituted a hessian bag filled with dacron for the purpose built cleaning sponge. Still and Stewart were in telephone contact throughout the line cleaning. Still was on level 12.

Stewart was on level 4 with Fox. The dacron filled bag became blocked in the pipe. Stewart (of Warren Stewart Pty Limited) advised Still (not of Toro nor of Downview or of Leighton) of the blockage and it was agreed that Still would increase the air pressure in an effort to clear it. Stewart directed Fox to move away from the pipe. Fox moved to a position around 30 feet away from the pipe. The pressure increased and the dacron bag was expelled with force causing the pipe to whiplash away from the waste bin and strike Fox. During this, the forklift driver and labourer were present on level 4 and both were wearing Leighton safety wear. It was accepted that no person associated with Leighton or Downview gave any directions in connection with the operation.

There was an industry approved Code of Practice issued by the WorkCover Authority of New South Wales called "**Code of Practice: Pumping Concrete**" gazetted 3 December 1993 which was approved as an Industry Code of Practice under Section 44A of the *Occupational Health & Safety Act 1983* (NSW) and taken to be an approved Industry Code of Practice for the purpose of Part 4 of the 2000 Act. Stewart was not familiar with this Code of Practice. The Code of Practice covered the topic of line cleaning. It required that this process only be taken out by experienced and trained pumping personnel. It specifically warned that air pressure could cause anything inside the pipeline to act as a high velocity projectile. It prescribed specific safety precautions which included that a positive catchment device had to be attached to the discharge end of the pipeline to safely catch the cleaning device. It also provided that all workers be kept away from the discharge end while the concrete was under pressure.

At trial, it was held that there were 2 causes of accident being the use of the dacron filled bag and the failure to tie the end of the pipe to the waste bin. It was the latter omission which was determined as the relevant cause.

## The Court of Appeal

The Court of Appeal found that Leighton and Downview were in breach of their duties to Fox.

Leighton argued that this finding meant that it had had imposed upon it a duty as ample as that as employer and employee. Primarily this was because the Court of Appeal found that Leighton, despite being the principal contractor only, was required to undertake the training of independent contractors in matters of safety peculiar to their speciality.

Once this was found (which it was), the Court of Appeal then found that this training (induction) had been provided by Leighton to Fox that his accident would not have occurred. The basis of this finding on causation was acknowledged as sparse. It consisted of the evidence that Stewart had directed Fox to stand clear. The Court of Appeal said that:

*"There is no reason to suppose that he [Stewart] would not have taken an additional and relatively simple step of tying down the pipe had he been advised [inducted] that this was necessary for safety reasons."*

The High Court considered the Court of Appeal erred in drawing this inference.

**It should be remembered that Leighton had no contract with Aggforce or Shark and in fact did not know that Downview had subcontracted the works at all. It had no knowledge that persons were on the site who had not been inducted. In holding this inference to be an error by the Court of Appeal there is a recognition by the High Court of the practical difficulties faced by head contractors on large sites in policing these sites.**

The High Court also held that the Court of Appeal erred in its understanding of the OH&S induction training that was to be undertaken on site as opposed to elsewhere. The Court of Appeal held that Regulation 217(a) of the Code of Practice referred to the Code for pumping concrete. It did not. In fact, the reference to Clause 217(a) was a reference instead, to a document entitled “Code of Practice: Occupational Health & Safety Induction Training for Construction Work” (“the Code of Practice”) which commenced on 1 April 1999.<sup>1</sup> It covered health and safety in three areas being general training work, activity based training and site specific training. Of these 3, the only training that needed to take place on site was the site specific training. The other two being general training and work activity based training were to take place in a documented training course off site and only once. So, whilst it was correct for the Court of Appeal to understand the content of OH&S induction training for a person in a concrete pumping industry to include the Pumping Code it was incorrect that it be conducted on site.

The site-specific training required of Leighton was on hazards orientation including the location of safe access amenities and first aid, site specific safety rules or accident emergency and evacuation procedures and of the equipment that is available on site. The relevant obligation therefore of Leighton and which was reinforced in the contract it had with Downview, was that it only need be satisfied that the person i.e. Fox had done OH&S induction training in the general health and safety topics and work activity based health and safety topics within the 2 years immediately preceding 1 April 1999. All then that was required of Leighton was a completion of the site specific OH&S induction training.

Other statutory duties which carried criminal sanctions were also alleged. These were subject to the defences set out in Section 28 of the *OH&S Act*.

The Regulations that carried criminal sanctions were those that ensured all systems were safe without risk to health and that people other than employees were not exposed to risks to their health or safety arising from the conduct of the employer’s undertaking while such persons were at the site.

The High Court said that Leighton was required by the Regulations to ensure that each subcontractor under Clause 227(2) provided Leighton with a written safe work method statement in respect of the work to be carried out, and that Downview be directed to comply with the safe work method statement, and the requirements of the *OH&S Act* and Regulation and to ensure that Downview’s activities were monitored to the extent necessary to determine whether it was complying. The contract between Leighton and Downview required Downview to establish its own health and safety plan. Also, to supply safe work method statements detailing processes, related recent hazards and describing how Downview intended to control them. Also the Court noted that Downview was required to submit to Leighton approval of any subcontract. The approval of the subcontract was to be at Leighton’s discretion. Any secondary contractor not approved would not be permitted to enter the site. For the “Toro” subcontract, Downview did not get this approval. Further, in the contract Leighton required Downview to require that all persons engaged on the site on work to attend a site induction prior to commencing the work. Leighton’s compliance and stringency in this regard was underlined by the fact that the first work method statement provided by Downview was rejected as inadequate. Leighton required Downview to amend it to take into account marked up comments. These directed Downview’s attention to the applicable legislation, Regulations and Code of Practice including the Pumping Code. The revised work method statement

identified the activity of concrete pumping and listed the potential areas of hazard. These included being struck by concrete or a piece of pipe from a weak joint or burst in the pipe or a blockage in the line. Control measures were listed as by having the provision of training by the owner of the pump, toolbox meetings, site inductions and having a competent person in charge of the pump.

Importantly, the High Court observed that there was no allegation against Downview or against Leighton of breach of statutory duty. The High Court said that the NSW *OH&S Act* prevented the duties imposed by it giving rise to private rights. In saying this, the High Court specifically included Section 32(1) of the *Occupational Health & Safety Act 2000* (New South Wales).

It is important to note therefore that although breach of the *OH&S Act* regulations can form particulars of breach in a pleading of negligence, that this breach does not form a separate cause of action.

### The duty of the principal contractor – Leighton

The Court of Appeal said the principal contractor had overall responsibility for the safety of the site which was reflective in the OH&S Regulation and in the general law.

The High Court referred to those categories of cases at general law in which it was recognised that a principal contractor may incur such liability. These categories were for the tortious acts of independent contractors that it has directly authorised, for failure to coordinate the activities of independent contractors and for breaches of its

<sup>1</sup> This Code was prepared in association with the introduction of Part 15 into the Construction Safety Regulations 1950 (NSW), Construction Safety Amendment (Amenities & Training) Regulation 1998 (NSW), Schedule 1, Item 2. Part 15 made provision for OH&S induction training and imposed on principal contractors the obligation now found in Clause 213(1) of the Regulations (Construction Safety Regulations 1950 (NSW) Reg 162A(1)). By force of transitional provisions, the Code of Practice was an approved Industry Code of Practice under Section 44A of the *Occupational Health & Safety Act 1983* (New South Wales) under Part 4 of the *OH&S Act*.

specific duties as an occupier. The Court of Appeal however went too far in finding a duty of care to ensure a reasonable level of safety by induction training owed by the principal contractor to subcontractors and to others coming on to the construction site.

The High Court said that:

*“While it is true that obligations under statutory or other enactments have relevance to determining the existence and scope of a duty, it is necessary to exercise caution in translating the obligations imposed on employers, principal contractors and others under the OH&S Act and the Regulation into a duty at common law”.*

This was because at common law all duties of care are to be discharged by the exercise of reasonable care. There is not any strict liability as may arise pursuant to a statute.

The Court of Appeal was criticised for giving no consideration as to whether Leighton had implemented a reasonable system for ensuring induction.

The High Court accepted the argument of Leighton that were it to be found that Leighton owed a duty to Fox and Stewart to provide induction training to them in the safe method of line cleaning (i.e. within their own specialty) it would then owe a duty to provide training in the safe method of carrying on every trade and conducting every specialised activity carried out on the site to every worker on the site. To do this would be too onerous. Also it would ignore that Leighton and principal contractors like it would be unlikely to possess the detailed knowledge necessary.

Further, to require such a duty to provide training in the safe method of carrying out the contractor’s specialised task would be inconsistent with the maintenance of the distinction the common law draws between the obligations of employers to their employees and on the other hand, the principal to its independent contractors.

## The duty of the subcontractor – Downview

Downview was criticised by the Court of Appeal because it had abandoned its responsibilities to the persons conducting its contracting work to conduct such operations safely and to use competent and properly trained operators.

It was observed however, by the High Court that the Court of Appeal did not overturn the primary judge’s findings that Downview had subcontracted the task of concrete pumping to Still and Cook and that Still was an experienced and competent contractor. There was no evidence of unsafe work methods prior to this accident of which Leighton or Downview were aware.

The High Court held that had Downview failed to engage a competent contractor it may not have avoided liability for the negligent failure of Downview to take reasonable care to adopt a safe system of work. Provided that the contractor was competent and the activity of concrete pumping was placed in the contractor’s hands, Downview was not subject to an ongoing general law obligation with respect to the safety of the work methods employed by the contractor or those with whom the contractor subcontracted.

In relation to Downview’s contractual relationships the Court of Appeal said these were “extraordinarily haphazard”. The Court of Appeal’s criticisms might have been valid had Downview not engaged the services of a competent contractor. There was however no evidence that despite Downview being mistaken as to the identity of the subcontractor that the persons who were contracted were incompetent. Hence, there was no liability of Downview to Fox.

Finally, the plaintiff submitted there was a liability on the basis of **Stevens –v– Brodribb Sawmilling Co Pty Ltd**. That is, that if an entrepreneur engages independent contractors to do work that might as readily be done by employees in circumstances in which there is a risk to them of injury arising from the

nature of the work and when there is a need for direction and coordination of the various activities being undertaken, the entrepreneur will come under a duty to prescribe a safe system of work. The High Court held there was nothing unreasonable about subcontracting the work of concrete pumping. It was an activity that required specialised equipment which lent itself to being carried out by independent contractors.

## The finding

Accordingly, Justices French, Gummow, Hayne, Hayden and Bell unanimously allowed the appeals of Downview and Leighton against the injured independent contractor Fox. In so doing, the Court upheld the general law that says that an independent contractor is not owed a duty other than:

*“To use reasonable care to avoid unnecessary risks of injury and to minimise other risks of injury. It does not import a duty to retain control of working systems if it is reasonable to engage the services of independent contractors that were competent themselves to control their system of work without supervision by the entrepreneur. Once the activity has been organised and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur. If there is no failure to take reasonable care in the employment of independent contractors competent to carry out their own systems of work, or in not retaining a supervisory power or in leading undefined the contract of the respective areas of responsibility, the entrepreneur is not liable for damage caused merely by a negligent failure of an independent contractor to adopt or follow a safe system of work either within his area of responsibility or in an area of shared responsibility”.* (Brennan J in **Stevens –v– Brodribb Sawmilling Co Pty Ltd** (1986) 160 CLR 16 at 47 48).

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