Erect Safe Scaffolding (Australia) Pty Limited v Sutton
(6 June 2008)

Introduction:

Claims for accidents on building sites usually involve multiple parties. There are often contracts between the parties that contain clauses that deal with risk allocation and protection against risk. The contracts contain indemnity and insurance clauses that seek to impose certain obligations.

Sub-contractors are often under pressure to accept the standard wording contained in contracts produced by head contractors. An indemnity clause in a contract can seek to shift all responsibility for the head contractors' damages to the sub-contractor. This can create problems if the public liability insurance policy taken out by the sub-contractor contains an exclusion for contractual liability and the contract in question has not been noted in the Schedule attached to the policy. This means that in the event of the sub-contractor being liable to indemnify the head contractor under the contract, the sub-contractor will be uninsured for liability assumed under the agreement.

The decision highlights the importance of the wording in indemnity and insurance clauses in contracts being carefully drafted.

The facts in Sutton:

Ian Sutton was injured at work on 21 October 2002. Sutton was employed as a leading hand by Dalma Formwork Pty Limited. He was working on the construction of a large multi-storey residential and commercial building.

Australand Constructions Pty Limited was the head contractor. Dalma is a formwork company that was sub-contracted to Australand. Dalma was not a party to the proceedings. Erect Safe Scaffolding (Australia) Pty Limited provided scaffolding services to Australand pursuant to a contract. Erect safe was responsible for erecting and maintaining scaffolding on site.

Mr Sutton was injured when he was constructing formwork to enable concrete to be poured for the external wall of Level 9 of the building. The plaintiff obtained access to the area outside of the building by means of scaffolding.

Mr Sutton walked along the planking flooring on a scaffold until he reached a corner. About 1 metre around the corner crossbar ties supporting the scaffolding extended across the walkway about head height. Mr Sutton did not see the crossbar and struck his head on it. The crossbar had been erected by Erect Safe. Australand formed a Safety Committee prior to the accident that observed the protruding crossbar. The problem was not recorded by the Safety Committee however and there was no indication that any direction had been given to Erect Safe to rectify the problem. The Court held that Erect Safe created the hazard and failed to remove it. Australand was also liable to the plaintiff for a breach of duty of care.

The sub-contract between Erect Safe and Australand contained the following indemnity and insurance clauses:

11. *"The Sub-Contractor must indemnify Australand against all damages … or liability of any nature suffered or incurred by Australand arising out of the performance of the Sub-Contract Works and its other obligations under the Sub-Contract."*

12. *… The Sub-Contractor must effect and maintain during the currency of the Sub-Contract Public Liability Insurance in the joint names of Australand and the Sub-Contractor to cover them for their respective rights and interests against liability to third parties for loss of or damage to property and the death of or injury to any person."*

The Trial Judge found that the indemnity clause was engaged with the consequence that Erect Safe was required to indemnify Australand. Furthermore, Australand was entitled to damages for a breach by Erect Safe of its obligations to maintain a policy of public liability insurance.

Interpreting the Indemnity Clause:

The issue that arose for the Court of Appeal was whether clause 11 confined the liability of Erect Safe to indemnify Australand for liabilities arising from Erect Safe's performance of the Sub-Contract's Works or whether it extended to a liability of Australand which arose in relation to those Works. The Court held that the indemnity was confined.

Giles JA summarised the issue as follows:

> *"Australand incurred liability because it owed to Mr Sutton a duty to take reasonable care to see that the site was safe, and breached that duty by failing to take reasonable care to see that the danger presented by the protruding ties – of which it was aware through the work safe committee walk around – was minuted and attended to. Erect Safe created the problem and failed to rectify it in its performance of the Sub-Contract Work. Did Australand's liability arise out of the performance by Erect Safe of the Sub-Contract Works?"*

The Court answered that question in the negative. It held similarly:

> *"The incurring of liability by Australand directs attention to why the liability was incurred and particularly to whether an act or omission of Australand itself brought the liability upon it. Here it did."*

The same issue was considered by the NSW Supreme Court in *QBE Insurance v SLE Worldwide* (29 July 2005). In that case, Ms Henderson was injured on 30 September 2001 when she slipped on some steps at Stadium Australia whilst attending a Rugby League Grand Final organised and promoted by the NRL. She sued the operator of the Stadium, Stadium Australia Management ("SAM") and its agent, Ogden International.

QBE insured SAM and Ogden. SLE insured the NRL. QBE made a claim for dual insurance against SLE. The SLE policy provided insurance for "liability arising from and in relation to the activities of the NRL at Stadium Australia".

Although the Stadium was made available to the NRL for its game, SAM and Ogden had responsibility for the catering and condition of the steps. The plaintiff slipped on the metal steps because of spilt drink. Therefore Ms Henderson's accident was not due to anything done or omitted to be done by the NRL except that had the NRL not organised and promoted the game, Ms Henderson would not have been at the Stadium and exposed to the risk of the slippery steps. The question to be answered by the Court was whether SAM and Ogden's liability to Ms Henderson arose from and was in relation to the NRL's activities. The Court said that the expression "arising from" or "arising out of" involves the notion of at least some causal or consequential relationship, although that may be indirect rather than proximate.

The Court held that the words "arising from" denote the need for at least an indirect causal relationship which was not satisfied merely by the fact that, but for the NRL's staging of the game, the liability of SAM and Ogden would not have arisen.

The Court adopted the reasoning of the Court of Appeal of Victoria in *Australian Paper Plantations Pty Limited v Venturoni* (5 May 2000). In that case, Australian Paper Plantations ("APP") owned a forest. APP engaged Venturoni to cut down timber. Venturoni engaged Mr Mikulich to fell the trees. Mr Mikulich was injured by a falling tree. APP settled the action brought by Mr Mikulich and then sought indemnity from Venturoni in reliance on an indemnity clause contained in a contract between the parties. The indemnity was in favour of APP against all costs, damages etc arising out of or in respect of "the carrying out of the agreement".

Mr Mikulich did not allege who or what caused the tree to fall. APP conceded that the indemnity clause would not apply if the connection between a liability and the carrying out of the contract was merely temporal. It was not sufficient that a person to whom liability was owed was present and exposed to injury because he was performing work required by the contract between the parties. APP accepted that the words "*arising out of and in respect of"* required a discernable and rational link between the liability or claim and the carrying out of the contract.

In *Leighton Contractors Pty Limited v Smith* (2000) *NSWCA 55* the plaintiff was employed by Leighton, but on the day he was injured, he was working for the sub-contractor B&B. The plaintiff was securing roof trusses. One of the trusses collapsed and the plaintiff was injured. Although Leighton owed a duty to the plaintiff as his employer the "cause" of the plaintiff's injuries was the faulty erection of the roof truss by B&B.

A contract between Leighton and B&B included the following term: *"The Sub-Contractor (B&B) shall indemnify and keep indemnified the company (Leighton) against all loss or damage … resulting from … personal injury arising out of or resulting from any act, error or omission or neglect of the Sub-Contractor."*

The Court held that the proper construction of the clause meant that B&B was obliged to indemnify Leighton in full for the verdict against it. The Court pointed out that the indemnity clause was not concerned with the cause of Leighton's loss or damage, being the cause of its liability to Smith, but rather with the cause of Smith's personal injury. The Court concluded that it was irrelevant to the operation of the clause whether the B&B's "act or omission or neglect" was the cause of Leighton's liability. It was a cause of Smith's personal injury.

McClellan CJ who gave the lead judgment believed that the liability of Australand did not "arise" out of the performance by Erect Safe of any of its contractual obligations. Even though His Honour acknowledged that the occasion for the liability of Australand was the erection by Erect Safe of the faulty scaffold, he believed the liability of Australand arose from its own independent act of negligence in failing to maintain an appropriate safety regime for the site. The Judge believed that there was no direct or indirect causal connection between Erect Safe's performance of the Sub-Contract Works and the liability of Australand which arose in relation to those Works. The Judge was guided by the Decision of the High Court in *Andar Transport Limited v Brambles Limited* (2004) and said that any ambiguity in an indemnity clause should be construed in favour of the surety. The Judge cast doubt on the standing of *Darlington Futures Limited v Delco Australia Pty Limited* (1986) in which the Court favoured the approach of adopting the "ordinary and natural meaning of the words".

Insurance:

Erect Safe failed to take out insurance in the joint names of Australand and the Sub-Contractor as required in clause 12.1 of the Contract. McClellan CJ noted that the obligation imposed on Erect Safe by clause 12.1 was to obtain insurance to cover both Australand and Erect Safe *"for their respective rights and interests against liability to third parties for loss of or damage to property and the death of or injury to any person."*

The Judge noted that clause 12 followed clause 11 and His Honour had already concluded that the liability of Erect Safe under clause 11 was confined. He expressed the view that it would be surprising that if notwithstanding that limitation, the parties intended Erect Safe to obtain insurance for any liability of Australand, even that arising from its own negligence. Justice McClellan said that in the absence of express words, the obligation under an insurance clause in a contract which is provided to support an indemnity clause will not require the Sub-Contractor to maintain insurance against loss occasioned by the head contractor's negligence.

The Judge believed it was appropriate to adopt the same approach to the construction of clause 12.1. The Judge said that Australand's "rights and interests" referred to are those provided by the indemnity provided in clause 11. As Australand had no right to recover from Erect Safe in respect of damages occasioned by its own negligence, Erect Safe had no obligation to obtain insurance to support Australand's direct liability to the plaintiff caused by the negligent act of Australand.

Comments:

The factual interpretation by the Court was a surprising result. Erect Safe erected the scaffolding. Erect Safe created the risk by constructing the protruding crossbar. The risk came home because the plaintiff struck his head on the crossbar. It is therefore hard to see how the injury could not be said to have arisen out of the performance of the Sub-Contract Works. The Decision is unhelpful as the Court does not say exactly what is required to make the liability arise out of the performance of the Sub-Contract Works. It is an odd factual decision.

The Court's decision on the indemnity clause is not that surprising as it adopts the reasoning of the Court of Appeal of Victoria in *Australian Paper Plantations Pty Limited v Venturoni* as well as the Supreme Court of NSW in *QBE Insurance V SLE Worldwide*.

Indemnities are generally phrased with the words "we will indemnify you for any loss arising out of" the performance of the Contract Works. It can be a direct or indirect causal connection. Usually it is not difficult to establish that a loss arises out of the performance of the Contract Works.

The High Court says that in order to interpret the wording of indemnity and insurance provisions, you have to apply the words of the relevant clause to the facts, construed as part of the contract as a whole. Reference to other decisions of the Court based on different contracts are likely to be of limited assistance.

It is important to take care in drafting an indemnity clause. In *Leighton Contractors v Smith* the Sub-Contractor was obliged to indemnify Leighton in full for the verdict against it. This is because the clause was not directed to the cause of Leighton's loss or damage, ie its liability to Smith, but to the cause of Smith's personal injury.

The indemnity clause in Erect Safe was different to the wording in Leighton Contractors because in Smith, it was irrelevant that the act or omission of the Sub-Contractor was not the cause of the head contractor's liability. In Erect Safe, the wording of the indemnity clause required the Court to consider why the liability of Australand was incurred and particularly whether an act or omission of Australand itself brought the liability upon it.

If a head contractor wishes to be entitled to complete indemnity from a Sub-Contractor, even where the head contractor is also at fault, the wording used in the indemnity clause must be very clear and without ambiguity. The Court is otherwise likely to confine the indemnity so that it applies only where Sub-Contractor has been negligent.

Furthermore, if the principal wishes to have the benefit of insurance cover arranged by the Sub-Contractor, the wording of the insurance clause in the contract should state clearly that the insurance cover must extend to the head contractor's own negligence.

Section 151Z(2) of the Workers Compensation Act 1987:

Section 151Z(2) of the WCA operates so that an injured worker who successfully sues a third party, but who could also have recovered against their employer, will generally receive a reduced award of damages compared with the award they would be entitled to at common law. The employer's contribution is confined to the amount provided by Part 5 of the Act rather than the amount for which it would have been liable at common law and the total damages are reduced accordingly.

Section 151G(1) of the WCA provides that damages under the Act are confined to damages for past and future economic loss and past and future loss of superannuation benefits.

The calculation done by McClellan CJ under Section 151Z(2) of the WCA provides guidance as to how damages are to be assessed.

Examples:

<u>Employer not a party</u>

In *Erect Safe* Dalma, the employer, was not a party to the proceedings. To simplify matters, assume the following:

- CLA damages = $400,000
- WCA damages = $300,000

The Court apportioned liability as follows:

Erect Safe: 60%
Australand: 25%
Dalma: 15%

The calculation required by Section 151Z(2) of the WCA is as follows:

1 $400,000 - $300,000 = $100,000
2 $100,000 x 15% = $15,000
3 $400,000 - $15,000 = $385,000

The plaintiff's recovery as against Erect Safe and Australand is $385,000. The Court's apportionment of 60% to Erect Safe and 25% to Australand needs to be "rounded up" to 100% to determine the respective shares of the total damages payable to the plaintiff. This works out approximately as follows:

Erect Safe: 70%
Australand: 30%

Therefore Erect Safe pays $385,000 x 70% = $269,500.

Australand pays $385,000 x 30% = $115,500.

Employer is a party

Assume the following:

CLA damages - $400,000

WCA damages - $300,000

Employer's liability – 15%

The plaintiff obtains a verdict against Erect Safe and Australand of $400,000.
Applying Section 151Z:

1 $400,000 - $300,000 = $100,000
2 $100,000 x 15% = $15,000
3 $400,000 - $15,000 = $385,000

Accordingly the plaintiff's verdict is reduced from $400,000 to $385,000 because of Section 151Z.

The employer (Dalma) pays 15% of the WCA damages of $300,000 = $45,000.

The Common Law Defendants pay the balance = $340,000.

The Court apportioned responsibility as follows:

Erect Safe: 60%
Australand: 25%

If these percentages are "rounded up" it results in the following contributions:

Erect Safe: 70%
Australand: 30%

The balance of the plaintiff's verdict of $340,000 payable by the Common Law Defendants is as follows:

$340,000 x 70% = $238,000
$340,000 x 30% = $102,000

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