IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S201 of 2013

BETWEEN:

ADCO CONSTRUCTIONS PTY LTD
Appellant

and

RONALD GOUDAPPEL
First Respondent

WORKCOVER AUTHORITY OF NSW
Second Respondent

FIRST RESPONDENTS' SUBMISSIONS

Part I: Certification re: internet publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The first respondent says that the main issue for the Court's consideration is the construction, and operation, of the 2012 Regulation in the circumstances of the first respondent's accrued rights in respect of his claim for lump sum compensation.

3. The first respondent does not dispute that the New South Wales parliament has the plenary power to enact delegated legislation which is *prima facie* in the nature of a "Henry VIII" clause, and which is *prima facie* a transitional and savings provision. The core issue in the present case is, however, the construction, and operation, of the clause in question.

4. The first respondent notes that there is a difficulty with defining the issues by reference to the Court of Appeal's decision, because the appellant (and the second respondent) did not argue before the Court of Appeal the "Henry VIII" argument now advanced in this Court. As a result, where the issue is stated in terms of "validity" (AS [3] and AS [33](referring, in part, to CA [33]); also 2RS [2] and [8]), the Court of Appeal was not speaking in terms of "validity" as it concerned the plenary power to enact a "Henry VIII" type clause, but it was speaking in terms of the construction, and

---

Filed by: Leitch Hasson Dent
Lawyers
Level 3
130 Elizabeth Street
Sydney NSW 2000
DX 1163 SYDNEY
Tel: (02) 9264 6644
Fax: (02) 9264 6622
Ref: Andrew Dent

operation, of the clause in question as it impacted the first respondent's accrued rights (compare also 2RS [24]-[37]).

Part III: Judiciary Act 1903 (Cth), s 78B

5. The first respondent, on advice, considers that notice is not required pursuant to s 78B of the *Judiciary Act* 1903 (Cth).

Part IV: Material facts

6. The first respondent accepts the appellant's statement of relevant facts, and procedural history, set out in AS [6], subject to the following matters.

7. The statement in AS [6(e)(ii)] is a factual statement, implying the correctness of the construction currently contended by the appellant as part of its argument as to the operation and effect of the legislative provisions.

8. The facts stated in AS [6(i) and (j)] were the conclusions of the Workers Compensation Commission and the Court of Appeal, reached as a matter of the construction, and operation, of the legislative provisions without consideration of the "Henry VIII" arguments now presented in this appeal.

9. Accordingly in AS [6(j)] the Court of Appeal, within a setting where it was concluded that the first respondent had accrued rights in respect of his lump sum compensation entitlements, "ruled that it was beyond the power and invalid to the extent which it sought to prejudicially effect the first respondent's rights (CA [33])". This was a conclusion as to the construction, and operation, of the legislative provisions and not a finding directed to the issue of whether the regulation in question was within the plenary legislative power of the New South Wales parliament.

Part V: Appellant's statement of applicable Constitutional provisions, statutes and regulations

10. The first respondent accepts that the appellant has identified the relevant Constitutional provisions, statutes and regulations.

Part VI: Argument

11. The construction of "Henry VIII" clauses: As indicated, the first respondent does not dispute that the state parliament has plenary power to enact a transitional and savings provision in delegated legislation of a type and character described as a "Henry VIII" clause. In that regard, there is no dispute with that starting point, as discussed in AS [19] (also 2RS [10], [12] and [19]).

12. However, where the first respondent parts with the analysis of the appellant is that in respect of the clause in question in this appeal, even if it is a clause of a "Henry VIII" nature, the question to be determined is whether or not that clause, as interpreted, operates to have the effect contended for by the appellant.

13. Accepting that the antecedent starting point is that a state parliament has plenary power to enact a "Henry VIII" clause: *Public Service Association and Professional Officer's Association Amalgamated of New South Wales v Director of Public Employment* (2012) 87 ALJR 162, [18] (French CJ), the determinative question as to the operation and effect of the progeny of the enabling "Henry VIII" clause is what did the enabling Henry VIII clause authorised its progeny to do?[1]

14. That question involves an orthodox approach to the construction of the clause, having regard to its text and context. There is nothing in principle that permits (or requires) a "Henry VIII" clause to be interpreted by application of different principle.

15. In the *Public Service Association* decision, French CJ, [18], said:

> "A parliament may also authorise the making of regulations which have effect notwithstanding provisions of the Act under which they are made. Section 146C does that. Such powers are analogous to so-called "Henry VIII" clauses, authorising the making of regulations which amend the Act under which they are made. Those powers have been criticised for their effects upon the relationship between the parliament and the executive, but not held invalid on that account under either the Commonwealth Constitution or constitutions of the States."

---

[1] Different terminology to reflect particular situations under consideration has been used. Pearce and Argument, *Delegated Legislation in Australia*, 4th ed, 2012, discuss, for example, the principle to be applied in terms of: *(a)* "it must be clear that there is an intention to permit regulations to override an Act" (292); *(b)* "under a power to "modify" an Act by delegated legislation, the modifications may be so radical as to be an excess of power" (293); *(c)* in respect of inconsistent drafting, "every effort should be made to read the apparently competing provisions in such way as to give effect to both. However, where that is not possible, it is the delegated legislation which must give way" (293); *(d)* in respect of inconsistent effect, "the most common situation in which delegated legislation is found to be repugnant to the Act under which it has been made is where it deals with a matter subsidiary to, but associated with, the principal Act in such a way as to run counter to the effect of the Act. ... The Act had, in effect, covered the field on the particular issue, and to supplement it in the regulations was an attempt to interfere with the expressed wishes of the legislature" (292-294). In *Combined State Unions v State Service Co-ordinating Committee* [1982] 1 NZLR 742, 745, Woodhouse P stated:

> "It is an important constitutional principle that subordinate legislation cannot repeal or interfere with the operation of a statute except with the antecedent authority of Parliament itself. It is a constitutional principle because it gives effect to the primacy of Parliament in the whole field of legislation. And as a corollary a rule of construction springs from it that the Courts will not accept that Parliament has intended its own enactments to be subject to suspension, amendment or repeal by any kind of subordinate legislation at the hands of the Executive unless direct and unambigious authority has been expressly spelled out to that effect, or is to be found as a matter of necessary intendment, in the parent statute."

16. While the *Proclamation by the Crown Act* 1539 (UK) clearly authorised proclamations made by the Crown with advice of council to be treated as laws made by the parliament, what has been "authorised" by the "Henry VIII" clause remains a question of construction.

17. Legally, therefore, the mere existence of a provision in the nature of a "Henry VIII" clause does not authorise progeny more enabled and more capable than the enabling clause.[2] This reflects, at least in part, a legal consistency with an orthodox approach to the construction of the federal or state constitutions where the question is the validity of legislation passed by the parliament.

18. The importance of attention to the construction of a provision with the character of a "Henry VIII" clause is to determine the substantive question of what does the clause in fact authorise. This is illustrated by the reasons of Dixon J in *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73. The dispute in that case primarily concerned the question *simpliciter* of whether it was valid for the statutory provision in question to confer a legislative power to the executive (89). While the reasons are in that context, it is nonetheless clear that Dixon J's conclusion regarding the validity of the provision (104) rests on, in part, the construction of that provision (100). Further, Dixon J refers to the necessity that the product of such a provision does not exceed the authority that created it (95-96, 96-97 and 101).

19. Similarly, in the *Public Service Association* decision, the construction of the "Henry VIII" clause to determine what it does authorise was plainly determinative (French CJ: [17], [19]-[20], [37]-[45]; Hayne, Crennan, Kiefel and Bell JJ: [53]-[55], [58]; Heydon J: [64]-[70]).

20. <u>The construction of the 2012 Regulation:</u> The appellant's submissions identify (AS [20], also AS [25] and [32]) that for its purposes the key clause relied upon in the question of the construction is cl 5(2) of Part 19H of the 2012 Amending Act.

21. Before turning to consider that clause, it is relevant that the appellant's submissions also identify (AS [7]-[14]) that the collection of statutory provisions referred to in those paragraphs do not operate to extinguish the first respondent's entitlements: AS [14 (first sentence)].

22. The first respondent says that the core question relevant to the construction of the 2012 Regulation is whether that regulation (properly construed) operates (by retrospective effect) to extinguish the accrued rights which the first respondent had in respect of his claim for lump sum compensation: that is, does the 2012 Regulation as a matter of construction, and operation, authorise that outcome?

23. That question involves consideration of whether the text, and the context, of the regulation have that impact, and whether the terms of the 2012 Regulation are sufficiently express so as to be understood as being directed toward dealing with (in this case, retrospectively extinguishing) the accrued rights of the first respondent.

---

[2] See, for example, *Combined State Unions v State Service Co-ordinating Committee* [1982] 1 NZLR 742, 745 (extracted in footnote 1 above).

24. Against the group of legislative provisions also focused to transitional and savings matters which do not operate in a way which supports the construction contended for by the appellant (as identified in AS [7]-[14]), what is the work that cl 5(2) does which by its impact on cl 5(4) overcomes that situation?

25. In respect of this question of construction, the appellant says, as the first step, that by reason of cl 5(2) the regulations could prejudicially affect pre-existing rights (AS [20]) and, as the middle step, that the legislature has in cl 5(2) deliberately chosen the "broadest form of words imaginable" (AS [30]; also 2RS [17]-[18]).

26. The appellant says, as the last step, that the general principles of interpretation, "such as that amendments do not effect accrued rights, do not assist when the statutory rule by which the amendment is effected, and the provisions enabling it, provide that the amendment takes effect 'in the manner specified'" (AS [31]; also 2RS [17]-[18]).

27. The appellant's position is not correct. *First*, the use of broad words in the setting where the question concerns the retrospective extinguishment of accrued rights (to determine what has been, as a matter of construction, authorised by the "Henry VIII" clause) does not assist the appellant. To the contrary, as a matter of construction of a transitional and savings provision in a workers' compensation scheme (where changes to the entitlements conferred by that scheme vary according to how amendments to the scheme are implemented), transitional and savings provisions which will operate to retrospectively extinguish accrued rights require an express intention, or at least an intention which is sufficiently clear. Given, particularly, that amendments to a workers' compensation scheme will contain different transitional and savings provisions for different types of entitlements (as indeed was the case with the 2012 Amending Act), broad words do not speak in context to a relevant parliamentary intention to retrospectively extinguish accrued rights.

28. *Second*, cl 5(2), in directing its attention to Pt 20(1)(3), does not (by simply doing that) mandate (as if by implication, or necessary intendment) the consequence *de jure* that the parliament was speaking with an express or specific intention to extinguish accrued rights in a retrospective manner (particularly where the parliament is taken to be aware of the general law requirement in this regard, and the operation of s 30 of the *Interpretation Act* 1987 (NSW)). Instead, cl 5(2) did no more than remove the application of the other regulation, leaving the matter to be determined by the general law and other applying statutory provisions such as the *Interpretation Act* 1987 (NSW).

29. Accordingly, the essence of the appellant's submissions as to the construction of the 2012 Regulation is to, in substance, invert the usual approach to construing a transitional and savings provision that is said to adversely impact on accrued rights in a retrospective manner. Typically, in the construction of such a provision, there is a search for express text that displays that intention or, the consideration of whether the context of the provision in question displays that intention. Here, rather to the contrary, the blandness inherent in the broad wording of the provision is promoted as supplying the parliamentary intention.

30. While the second respondent addresses the issue of the plenary power to enact a "Henry VIII" clause (for example, 2RS [10], [12] and [19]) it does not address in terms why the 2012 Regulation is to be construed as authorising retrospective extinguishment of accrued rights other than (it appears) adopting the position that such an operation is within power (for example, 2RS [19]-[22], [29]-[32] and [35]) and that, as such, the "obvious intent was to authorise the making of regulations which did have a prejudicial affect on accrued rights" (2RS [28]). This in substance treats erroneously the question of construction as being answered by the question of power.

31. Beneficial construction: The 2012 Regulation forms part of a remedial workers' compensation scheme. It remains the case that in construing such a remedial legislative scheme, an interpretation which favours the entitlements of a worker is to be preferred. That principle has proper application in the present case, and leads consistently to the same outcome as the arguments concerning construction set out above.

32. In *Bird v Commonwealth of Australia* (1988) 165 CLR 1 the Court identified the workers' compensation scheme as being of a remedial character. In such cases, it was held that the provision is to be construed beneficially and, where two interpretations are possible, that which favours the worker is to be preferred (Deane and Gaudron JJ: 9, Mason CJ, Brennan and Toohey JJ: 6, citing *Wilson v Wilson's Tile Works Pty Ltd* (1960) 104 CLR 328, 335).

33. Claims affected: A minor matter (and not one directly relevant to the resolution of the appeal) is the description of the class of persons affected by the 2012 Regulation. The appellant inadvertently describes that class as being persons who had made a claim for weekly compensation, and then made a claim for lump sum compensation (AS [13]). The class of persons impacted by the construction and interpretation of the regulation is any worker who has made a claim for compensation which comes within s 261 of the 1998 Act. By operation of s 261(3), a claim for compensation within s 261 can be of any variety (weekly wage benefits, medical expenses or other entitlements provided by the scheme).

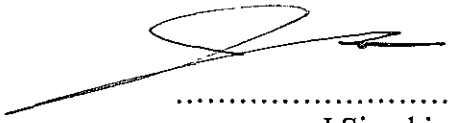
Part VII: A statement of the respondent's argument on notice of contention or notice of cross-appeal

34. Not applicable.

Part VIII: Estimate

35. The first respondent's estimate is that 1 to 1½ hours will be required for presentation of its oral argument.

Dated: 9 December 2013



.....
J Simpkins
Telephone (02) 8224 3037
Facsimile (02) 9232 8975
Email simpkins@sevenwentworth.com.au

.....
E G Romaniuk
Telephone (02) 9233 7711
Facsimile (02) 9232 8975
Email romaniuk@jackshand.com.au

.....
L Morgan
Telephone (02) 9264 5444
Facsimile (02) 9264 6667
Email morganluke@bigpond.com.au
Counsel for the First Respondent