HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

BRIGHTON UND REFERN PLASTER PTY LIMITED (UNDER EXTERNAL ADMINISTRATION AND/OR CONTROLLER APPOINTED) APPELLANT

AND

SCOTT RAYMOND BOARDMAN RESPONDENT

Brighton Und Refern Plaster Pty Limited v Boardman
[2006] HCA 33
15 June 2006
S479/2005

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

R S Toner SC with M J Jenkins for the appellant (instructed by Rankin Nathan Solicitors)

M I Bozic SC with D M Shoebridge for the respondent (instructed by Taylor & Scott Lawyers)

CATCHWORDS

Brighton und Refern Plaster Pty Limited v Boardman

Workers' Compensation − Plaintiff did not comply with s 151C of the *Workers Compensation Act* 1987 (NSW) − Defendant did not take any point as to non-compliance until after an order for judgment had been made under Pt 11 r 1(1) of the District Court Rules − Whether proceedings commenced by the plaintiff invalid or a nullity because of non-compliance with s 151C − Whether procedural steps taken by the parties under the District Court Rules invalid or nullities because of non-compliance with s 151C − Whether defendant entitled to an order setting aside the order for judgment − Whether the concept of waiver relevant.

Statutory construction − Where statute imposed a restriction upon the commencement of court proceedings but made no provision for consequences of non-compliance − Construction of s 151C of *Workers Compensation Act* 1987 (NSW).

Workers Compensation Act 1987 (NSW), Pt 5, s 151C.

1 GLEESON CJ, GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. This appeal from the New South Wales Court of Appeal (Giles and McColl JJA)[1] was heard concurrently with the appeal in *Berowra Holdings Pty Ltd v Gordon*[2] and the issues for determination were, to a great extent, common. It is unnecessary to repeat what is said in *Berowra Holdings* concerning the proper construction to be given to s 151C of the *Workers Compensation Act* 1987 (NSW) ("the 1987 Act") and the significance of the context of the relevant District Court Rules ("the Rules").

2 Like the worker in *Berowra Holdings*, the respondent in this case ("the worker") commenced proceedings in the District Court of New South Wales without complying with s 151C. The appellant ("the employer") did not take any point in relation to non-compliance until some considerable time had elapsed, and after various steps had been taken pursuant to the Rules. Submissions in the District Court and the Court of Appeal were cast in terms of "waiver", a concept which is of limited utility in this context[3]. The appeal to this Court was conducted on the basis that non-compliance with s 151C rendered the proceedings a "nullity", with the result that waiver could not occur.

3 Consistently with the reasons given in *Berowra Holdings*, the proceedings in this case cannot be characterised as a "nullity", and accordingly this appeal must fail.

Procedural history

4 This case presents a sorry tale of insufficiently explained delay and requires some consideration of the procedural complexities generated by that delay.

5 The worker was injured at work on 13 February 2001. He commenced proceedings by ordinary statement of claim filed in the District Court on 19 July 2001 and claimed common law damages in respect of his injuries. The date of filing proceedings was self-evidently less than six months from the date the injury was suffered, and hence there was a failure to comply with s 151C of the

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1 *Brighton und Refern Plaster Pty Ltd v Boardman* [2005] NSWCA 167.

2 [2006] HCA 32.

3 See *Berowra Holdings Ltd v Gordon* [2006] HCA 32 at [38]-[39].

1987 Act unless (and this was not suggested) one of the conditions specified in sub-s (2) of that section was satisfied. The employer did not plead to the statement of claim; there is no evidence that the employer participated in any way in the proceedings until 2 August 2002, although it was certainly informed of all steps taken in the proceedings.

6 The worker's proceedings were listed for review on 16 January 2002 and for a status conference on 13 March 2002. The employer made no appearance on either occasion. Presumably for this reason, the proceedings were listed for a "show cause" hearing on 17 April 2002. At that hearing there again was no appearance for the employer. There was no record before this Court of the precise terms of the order made by Bowden ADCJ on that occasion. However, the effect of the order within the scheme of the Rules was the entry of judgment pursuant to Pt 11 r 1(1) of the Rules[4]. By Pt 11 r 1(2)(a), the employer was deemed to have admitted liability and the matter was to proceed to trial for the assessment of damages pursuant to Pt 11 r 3 and Pt 27 r 1[5]. This order for judgment procedure pursuant to Pt 11 represents the equivalent for unliquidated claims of the procedure for default judgment in respect of liquidated claims[6]. The proceedings were listed on 9 May 2002, for the assessment of damages.

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4 Pt 11 r 1(1) provided:

> "(1) Where, in an action commenced by the lodging of an ordinary statement of claim:
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> (a) a defendant has not filed a notice of the grounds of his defence under Part 10 rule 1(1), or has filed such a notice which the Court has ordered to be struck out, and
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> (b) a period of 28 days after service of the statement of claim on that defendant has elapsed,
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> the plaintiff may, within 12 months after the expiration of that period, or at such later time as the Court may, on sufficient cause being shown, allow, and on filing a form of order for judgment and an affidavit of service of the statement of claim on that defendant, have an order for judgment made by the Court or registrar against that defendant."

5 Pt 11 r 1(2)(b).

6 Pt 13 r 1.

7 An order for judgment of the kind made by Bowden ADCJ might be set aside pursuant to Pt 11 r 2, either "by order of the Court" or automatically upon the filing of a notice of grounds of defence under Pt 10 r 1(1). The effect of an order for judgment being set aside was to remove any operation from Pt 11 r 1(2), the effect of which has already been described[7]. It is to be noted that no leave requirement originally pertained to the ability of a defendant to file a notice of defence pursuant to Pt 10 r 1(1); the defendant could file that defence "at any time before judgment". However, with effect from 17 April 2003, that rule was amended requiring a defence to be filed within two months after the service of the statement of claim. That amendment bound the employer in this case[8], a matter of significance.

8 Neither party appeared on the date on which the trial as to the assessment of damages had been listed. The worker's proceedings were dismissed by the Court on its own motion for want of prosecution[9]. Subsequently, the worker applied in accordance with the Rules to set aside that order and for the proceedings to be reinstated[10]. It may be inferred that the employer made no appearance at the hearing of the re-instatement application, since it first filed an appearance after that date, namely on 2 August 2002. The worker's application was granted on 12 July 2002.

9 It was on 2 August 2002 that the employer first took any point in relation to s 151C. It did so by filing a notice of motion for summary dismissal of the proceedings for non-compliance with s 151C. At that stage the employer had not filed a notice of grounds of defence, and hence the orders made by Bowen ADCJ on 17 April 2002 continued in operation. In response, the worker, by notice of motion filed on 25 September 2002, applied for orders granting leave either:

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7 Pt 11 r 2(2).

8 A defendant's right under s 56 of the *District Court Act* 1973 (NSW) was to defend the proceedings "as prescribed by the rules". "[T]he rules" in this context were the "civil procedure rules" (meaning "rules of Court made and in force under Part 3" of the *District Court Act*) (s 4(1)). Accordingly, the "right" of a defendant to file a defence under the old Pt 10 r 1(1) of the Rules does not come within the meaning of a right or privilege acquired or accrued under the Act or statutory rule so as to be protected by the *Interpretation Act* 1987 (NSW), s 30.

9 Pt 18 r 3.

10 Presumably pursuant to Pt 1 r 7A(5) of the Rules.

(1) to commence the proceedings within six months of the injury; or (2) to continue the proceedings. The basis for the worker's motion was "waiver", but the precise basis within the Rules for the relief sought is unclear[11].

10 It was not until almost one year later on 17 July 2003 that the employer purported to file a Notice of Grounds of Defence. However, as has been mentioned, the employer's ability to file a defence was constrained by the Rules. Leave was required because more than two months had elapsed after service of the worker's statement of claim[12]. The upshot was that it was impossible for the employer to avail itself of the operation of Pt 11 r 2(1)(b) of the Rules automatically to set aside the order for judgment made by Bowden ADCJ on 17 April 2002. It is to be noted that at no stage did the employer seek leave to set aside the order for judgment or to file its Notice of Grounds of Defence, as was now required were it to avail itself of Pt 11 r 2.

The litigation

11 The application by the employer for summary dismissal of the proceedings must be considered in the light of the situation that obtained when the two notices of motion were filed, that of the employer on 2 August 2002, and that of the worker on 25 September 2002. Since the employer required the leave of the Court to set aside the order for judgment made on 17 April 2002, the order continued in force and this was still so on 13 February 2004 when the employer's notice of motion came on for hearing before Balla DCJ. This was appreciated by the primary judge. The worker had in his favour an order for judgment made pursuant to the Rules, and the employer required the leave of the Court in order to displace that order. It is in that context that the decision of Balla DCJ must be considered.

12 As has previously been mentioned, Balla DCJ accepted the submission for the worker that the employer by its conduct had waived its right to rely on s 151C(1). Her Honour drew support from the circumstance that the order for judgment under Pt 11 r 1(1) and the employer's deemed admission of liability

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11 Pt 10 r 6 of the Rules did provide that where a defendant has failed to comply with orders of the Court or conduct its defence with due despatch, a plaintiff may apply to the Court to strike out the defence in whole or in part or "make such other order as the Court thinks fit".

12 Pt 10 r 1(5) (as amended from 17 April 2003).

under Pt 11 r 1(2) remained in effect. She also recorded a concession on the part of counsel for the employer that such a finding was open.

13 As indicated in *Berowra Holdings*[13], concepts of "waiver" are of limited utility in such a context. The employer sought summary dismissal of the proceedings pursuant to a discretionary power vested in the District Court, in exercise of which numerous factors were relevant[14]. Her Honour ordered that the employer's motion be dismissed and it was plainly open in the circumstances for her to do so.

The Court of Appeal

14 In the application by the employer for leave to appeal against that order, argument focused upon the concept of "nullity". The Court of Appeal rejected this argument and refused leave to appeal. The Court applied its earlier decision in *Gordon v Berowra Holdings Ltd*[15]. For the reasons given in *Berowra Holdings*[16], the Court of Appeal was right to do so. Once that is accepted, it is clear that there was no warrant for the Court of Appeal to hold that the primary judge ought not to have dismissed the employer's motion. Counsel for the employer submitted that, on a proper construction of s 151C, the Court had no option except to strike out the proceedings as "void ab initio". That submission cannot be accepted.

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13 [2006] HCA 32 at [38]-[39].

14 See *Ketteman v Hansel Properties* [1987] AC 189 at 220 per Lord Griffiths.

15 (2005) 62 NSWLR 427.

16 [2006] HCA 32.

Gleeson CJ
Gummow J
Hayne J
Heydon J
Crennan J

Orders

The appeal should be dismissed with costs.

16 KIRBY J. This appeal comes from an order of the New South Wales Court of Appeal[17]. By that order, the Court of Appeal refused Brighton Und Refern Plaster Pty Limited (Under External Administration and/or Controller Appointed) leave to appeal from orders of the District Court of New South Wales. By those orders, the primary judge dismissed proceedings brought by the appellant in that court. Those proceedings involved an application by the appellant for dismissal of proceedings brought against it by Mr Scott Boardman ("the respondent") or, alternatively, for leave to file an amended defence. The amended defence sought to raise, for the first time as between the parties, an argument based on s 151C(1) of the *Workers Compensation Act* 1987 (NSW) ("the Act").

17 These proceedings thus present questions in common with those raised in *Berowra Holdings Pty Ltd v Gordon*[18]. Those proceedings were heard by this Court concurrently with these and are being decided at the same time.

18 As in *Gordon*, the appeal raises issues concerning the meaning and purpose of s 151C(1) of the Act; the effect of non-compliance with its terms; and whether any public policy, evident on the face of the sub-section, required the primary judge to provide the relief belatedly sought by the appellant.

19 Neither the language nor the purpose of s 151C(1) demanded the provision of relief to the appellant on the ground that the proceedings were "invalid" or "null and void". They were not invalid, null or void. Nor did the circumstances otherwise require the provision of relief. The decision of the Court of Appeal refusing leave was open to it. The appeal to this Court should be dismissed.

The facts

20 There was no relevant dispute about the facts. They can be derived from the findings made by the primary judge[19].

21 The respondent claims that he was injured whilst working for the appellant on 13 February 2001[20]. He asserts that his injuries were caused by the negligence of the appellant. By a letter of 28 March 2001, the appellant's insurer

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17 In *Brighton Und Refern Plaster Pty Ltd v Boardman* [2005] NSWCA 167.

18 *Berowra Holdings Pty Ltd v Gordon* [2006] HCA 32 ("*Gordon*").

19 *Boardman v Brighton Und Refern Plaster Pty Ltd*, unreported, 13 February 2004 ("reasons of Balla DCJ") at 2-3.

20 Reasons of Balla DCJ at 2.

(described as "the GIO") referred to the respondent's claim for compensation under the Act. It asked the respondent to complete a notification form[21].

22 On 19 July 2001, the respondent caused his statement of claim for damages for personal injury to be filed in the District Court[22]. He named the appellant as the defendant in an action for damages in respect of his injury. On 23 July 2001, by registered mail, the statement of claim and a court timetable were served on the appellant. The timetable nominated a "review date" of 16 January 2002[23].

23 By letter of 28 September 2001, the appellant's insurer wrote to the respondent's solicitor acknowledging receipt of a claim brought under the Act. The letter stated[24]:

> "We wish to advise that this office is presently in the process of assessing your client's loss under sec 66 and compensation under sec 67 in an attempt to resolve this matter."

The insurer arranged a medical appointment and sought particulars.

24 When the review date was reached and the matter returned before the District Court on 16 January 2002, there was no appearance for the appellant. The Court ordered the appellant to file a defence within 28 days[25]. On 18 January 2002, the solicitor for the respondent wrote to the administrator of the appellant, since appointed, informing the administrator of the orders so made, including the order for the filing of a defence by 16 February 2002[26]. No such defence was filed.

25 In accordance with the court timetable, a "status conference" was listed in the District Court on 13 March 2002. Once again, there was no appearance for the appellant. The matter was then listed for a "show cause" hearing on 17 April 2002[27].

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21 Reasons of Balla DCJ at 2.

22 Reasons of Balla DCJ at 2.

23 Reasons of Balla DCJ at 2.

24 Reasons of Balla DCJ at 2.

25 Reasons of Balla DCJ at 3.

26 Reasons of Balla DCJ at 3.

27 Reasons of Balla DCJ at 3.

26 By letter of 28 March 2002 the appellant's administrator was informed that the respondent was considering the need to seek leave from the Supreme Court to continue the action on the basis that the proceedings had begun before the "liquidation" of the appellant. The administrator was also notified of the show cause hearing scheduled to take place on 17 April 2002.

27 On 11 April 2002, the administrator informed the respondent's solicitor that the appellant was not in liquidation but under administration and that "the matter was in the hands of the GIO"[28]. When on 17 April 2002 the proceedings were listed before Bowden DCJ, for the third time there was no appearance for the appellant. According to the primary judge, the court file noted[29]:

> "Note Pf advises Def NOT in Liq and no legal consent necessary. F/Hearing of Assessment of Damages 9/5/02 est 1 day."

28 When the proceedings, so described, were called in the District Court on 9 May 2002, the court file notes[30]:

> "No appearance 9.38 or 9.50 am. All proceedings dismissed in terms of Part 18 Rule 3."

29 This order of dismissal was made by Garling DCJ[31]. However, on 16 May 2002, the respondent's solicitor notified the appellant's administrator, and the GIO, of these developments; and that a notice of motion was being filed to reinstate the proceedings[32]. Pursuant to that motion, on 12 July 2002, the proceedings were reinstated[33]. On 2 August 2002, a notice of appearance was filed on behalf of the appellant[34]. Nearly a year passed before, on 17 July 2003, a defence was purportedly filed for the appellant denying liability to the respondent and pleading non-compliance with s 151C of the Act[35]. No leave had been sought to file that defence so long out of time. Leave was required because more

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28 Reasons of Balla DCJ at 3.

29 Reasons of Balla DCJ at 3.

30 Reasons of Balla DCJ at 3.

31 Reasons of Balla DCJ at 3.

32 Reasons of Balla DCJ at 3.

33 Reasons of Balla DCJ at 4.

34 Reasons of Balla DCJ at 4.

35 Reasons of Balla DCJ at 4.

than two months had elapsed from the initial service of the respondent's statement of claim[36].

30 The purported defence occasioned notices of motion for the appellant and the respondent respectively. Relevantly, the appellant sought orders dismissing the reinstated proceedings because of the non-compliance with s 151C(1) of the Act. It was this motion that was decided by the primary judge, against the appellant's submissions, on 13 February 2004[37].

The legislation

31 The legislative background to the provisions of s 151C of the Act is described in this Court's reasons in *Gordon*[38]. The provisions of s 151C, and of other relevant sections of the Act, are also set out in *Gordon*[39]. It is unnecessary to repeat this information. It is sufficient to recall the terms of s 151C(1). That sub-section states:

> "151C(1) A person to whom compensation is payable under this Act is not entitled to commence court proceedings for damages in respect of the injury concerned against the employer liable to pay that compensation until 6 months have elapsed since notice of the injury was given to the employer."

32 Because the respondent's proceedings were commenced before the time specified in s 151C(1), the appellant contended that the respondent's proceedings in both the District Court and in the Court of Appeal were invalid. By this, it meant null and void. Because the appellant contended that s 151C(1) of the Act had been enacted for reasons of public policy that transcended the individual interests of the parties to the proceedings, it argued that it was not open to the parties to disregard, or waive, non-compliance with the sub-section. Rather, it was the duty of the courts to uphold the law as expressed in the sub-section and to give effect to its purpose. The appellant complained that neither the primary judge in the District Court nor the judges in the Court of Appeal had done this.

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36 DCR, Pt 10 r 1, as amended from 17 April 2003.

37 Reasons of Balla DCJ at 6.

38 [2006] HCA 32 at [72]-[74].

39 [2006] HCA 32 at [75]-[80].

The decision of the primary judge

33 In the hearing of the motions in the District Court, concessions were made on behalf of each of the parties. The record (and the findings of the primary judge) did not disclose exactly when the appellant had been given notice of the respondent's injury, commencing the running of time for which s 151C(1) provides. However, it was clear that the commencement of the proceedings for damages, having occurred within six months from the date of the injury, had likewise occurred within six months of the notice. The respondent conceded that this was the case. He also conceded that neither the appellant nor its insurer had wholly or partly denied liability for his injuries, so as to engage s 151C(2) of the Act[40].

34 For its part, the appellant conceded that, in the light of the foregoing history, the respondent "was entitled to a finding that the failure to act by the [appellant] and its insurer amounted to waiver"[41]. No equivalent concession on the part of the employer was made in *Gordon*. Whilst making this concession, the appellant submitted that it was legally irrelevant. It would only be relevant if non-compliance with s 151C(1) was solely for the interests of the appellant. This was an interpretation that the appellant disputed.

35 The respondent submitted that non-compliance with s 151C could be, and had been, waived by the appellant. Alternatively, the respondent argued that the appellant, by the course of the proceedings, should be taken to have admitted liability. This was reflected in the order of Bowden DCJ, for default of appearance of the appellant, that the respondent's claim was for hearing as on an assessment of damages. That order, so it was said, precluded the appellant from "relying on a breach of any procedural requirement" in the Act, such as s 151C(1)[42].

36 The primary judge rejected the submissions for the appellant, contending that the language of s 151C of the Act was such as to forbid waiver by the employer. More relevantly, her Honour rejected the appellant's submission that the statement of claim was "a nullity"[43]. By reference to authority, including a decision of this Court concerning the proper approach to deriving the meaning of contested statutory language[44], the primary judge concluded that the proceedings

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40 Reasons of Balla DCJ at 4.

41 Reasons of Balla DCJ at 6.

42 Reasons of Balla DCJ at 6.

43 Reasons of Balla DCJ at 5.

44 *Project Blue Sky Inc v Australian Broadcasting Authority* (1997) 194 CLR 355.

were not invalid and that a party such as the appellant was entitled, as it chose, not to rely on a failure of the respondent to comply with s 151C(1).

37 By examination of the history of the proceedings, the date on which her Honour inferred that the appellant had first become aware of the common law claim (23 July 2001), and the repeated failures of the appellant to rely upon the respondent's non-compliance with the sub-section, the primary judge concluded that the appellant had waived such non-compliance. It had done so by the time when, on 17 April 2002, orders were made by Bowden DCJ equivalent to an Order for Judgment in favour of the respondent[45]. Although the proceedings had later been struck out and then restored, the primary judge accepted that the Order for Judgment in favour of the respondent remained in force. This meant that the appellant was "deemed to have admitted liability"[46]. The primary judge concluded that such deemed admission was further evidence of the appellant's waiver of its "right to rely on a breach of sec 151C"[47]. The appellant's belated purported filing of a defence, outside the times permitted by the District Court Rules ("the DCR") and contrary to the order made on 16 January 2002 (and notified soon after) meant that the purported defence "did not operate to set aside the Order for Judgment … and there was no application before me to set aside the Order for Judgment"[48].

38 In addition to her finding of waiver, the primary judge, in the alternative, accepted the respondent's submission that the appellant had admitted liability. She concluded that such admission "precludes the defendant from relying on a breach of any procedural requirement"[49]. It was on this basis, expressed in the alternative, that Balla DCJ dismissed the appellant's notice of motion; gave leave to the appellant to file an amended defence by 15 March 2004; and stood the proceedings over for further directions on that day.

39 In this context, the "amended defence" contemplated by the primary judge's orders must have been a defence consistent with her principal finding that the appellant had admitted liability to the respondent and suffered judgment against it on that basis. Reading the orders below, together with the primary judge's reasons for them, makes it clear that any "amended" defence to be filed

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45 Pursuant to Pt 11 r 1(1) DCR.

46 Pursuant to Pt 11 r 1(2) DCR.

47 Reasons of Balla DCJ at 6.

48 Reasons of Balla DCJ at 6.

49 Reasons of Balla DCJ at 6.

could not include a defence based on s 151C(1) of the Act. The subsequent proceedings have gone forward on that assumption.

The decision of the Court of Appeal

40 The appellant sought leave to appeal to the Court of Appeal against the orders of the primary judge. The reasons of the Court of Appeal refusing such leave were given by Giles JA (with whom McColl JA concurred). They are stated briefly, having regard to the then recent decision of the Court of Appeal in *Gordon*[50], and because the appellant's attempt to appeal required a grant of leave.

41 Unsurprisingly, having regard to the decision in *Gordon*, the Court of Appeal rejected the appellant's submission that non-compliance with s 151C of the Act rendered the proceedings a nullity, and could not be waived[51]. It dealt with identified submissions to reject an argument, perhaps formal, that leave should be granted to reconsider the correctness of *Gordon*. On this basis, Giles JA identified, as the only remaining question, "whether in the present case waiver was properly found by the judge"[52].

42 In view of the concession in the District Court, by counsel then appearing for the appellant, that the respondent was "entitled to a finding that the failure to act by the defendant and its insurer amounted to waiver"[53], the conclusion of waiver, in fact and in law, was treated in this case as scarcely open to contest. However, in any event, Giles JA observed that it had been available to the primary judge to have regard to the "many opportunities" open to the appellant and its insurer to raise the s 151C question as relevant to a finding that reliance on s 151C should not be allowed, "particularly given the concession"[54]. On this basis, the Court of Appeal concluded that the primary judge's orders disclosed no error. Leave to appeal was accordingly refused.

43 Special leave was granted by this Court because the correctness of the decision in the present case rested, in part at least, on the correctness of the reasons in *Gordon*. It was therefore just that the appellant's objection to the holding in that case should be protected whilst it was subject to this Court's examination.

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50 *Gordon v Berowra Holdings Pty Ltd* (2005) 62 NSWLR 427.

51 [2005] NSWCA 167 at [3].

52 [2005] NSWCA 167 at [7].

53 [2005] NSWCA 167 at [7].

54 [2005] NSWCA 167 at [7].

The issues

44 *Issues in the appeal*: The issues presented by this appeal are confined by this Court's decision in *Gordon*. They are:

(1) *The nullity issue*: Was the Court of Appeal correct in affirming the decision of the primary judge that non-compliance with s 151C(1) of the Act did not render such proceedings invalid, in the sense of null and void, having regard to the terms of the sub-section, its purpose and any public policy at stake, or illegality involved, in allowing the proceedings to continue to judgment?

(2) *The waiver issue*: Having regard to the conclusion on (1), was it open to, or necessary for, the primary judge to decide, in the circumstances, that the appellant had waived the respondent's non-compliance with s 151C(1) of the Act such that the District Court made no error in refusing to dismiss the respondent's proceedings and in refusing to allow the appellant to file a defence to the proceedings based on non-compliance with s 151C(1)?

45 *Other potential questions*: Potentially, there were other issues arising out of the conclusions of the primary judge, concerning the interpretation of the effect of the non-appearance of the appellant before the District Court on 17 April 2002; the effect of the orders made by Bowden DCJ on that day; whether those orders amounted to an Order for Judgment under the DCR[55]; and whether any such Order for Judgment survived the later striking out of the proceedings for the non-appearance of both parties before the Court on 9 May 2002, and the reinstatement of such proceedings on 12 July 2002.

46 Neither the notice of appeal in the Court of Appeal, nor the notice of appeal in this Court, raises any of the last-mentioned issues. Nor do they deal expressly with the alternative argument, accepted by the primary judge, that the appellant had admitted liability to the respondent in such a way as to preclude it from relying on a breach of s 151C(1) of the Act, following the imputed Order for Judgment or the inferred admission of liability.

47 *Defensive contention of preclusion*: In this Court, in addition to his arguments based on the law of waiver, the respondent advanced defensive submissions invoking a suggested preclusion of the appellant from relying on s 151C(1) of the Act at the time (17 July 2003) that the appellant first filed a purported defence in which the suggested non-compliance with s 151C(1) was first raised.

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55 Pt 11 r 1(1).

48 The respondent's submissions contended that a ground of preclusion (which might raise issues of estoppel or election, rather than waiver[56]) arose in his case by reason of a supervening change to the Act. That change, the respondent argued, occasioned actual prejudice to him, if the appellant were belatedly allowed to rely on s 151C(1), because of the failure of the appellant, despite repeated opportunities over more than two years, to plead, and rely on, s 151C(1). In that interval the Act was amended by the *Workers Compensation Legislation Further Amendment Act* 2001 (NSW).

49 By that amendment, which commenced on 27 November 2001, with retrospective effect upon all common law claims by injured workers that were not filed on or before that date[57], a new and higher threshold to the right of action for damages was introduced. It required proof of an injury resulting in 15% impairment of the whole person. Effectively, this amendment limited the access of workers, entitled to benefits under the Act, to court proceedings for damages in respect of an injury falling within the Act. The new threshold was inserted in terms of s 151H of the Act. The respondent thus contended that, if his proceedings were now dismissed for breach of s 151C(1) he would suffer actual prejudice because that section had not earlier been pleaded by the appellant. Whether dated from the first time that a pleaded defence was proffered or from the first time s 151C(1) of the Act was mentioned (both of which occurred in July 2003), the appellant's belated reliance on the sub-section would mean that any later proceedings, brought by the respondent, would be liable to possible defeat by reason of the intervening provisions of s 151H of the Act. On this basis too, the respondent sought to uphold the correctness of the primary judge's orders.

50 *Essential issue – nullity*: In the way in which the notices of appeal to the Court of Appeal and to this Court were drafted, the sole issues raised by the grant of special leave were the two issues stated earlier. The appeals, so expressed, do not present any of the further issues that might otherwise arise.

51 Basically, the appellant came to this Court to contest the conclusion in *Gordon* that, despite s 151C(1) of the Act, the proceedings were not invalid and might still result in a judgment for damages in favour of the respondent. In the way this appeal was argued, even the second issue, of waiver, is not presented by the grounds of appeal. Nonetheless, the appellant accepted that it was bound by the concession made by its counsel in the District Court, noted and relied upon in the Court of Appeal, that a relevant waiver by the appellant had occurred[58].

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56 *Verwayen v The Commonwealth* (1990) 170 CLR 394 at 463. See *Gordon* (2006) HCA 32 at [38]-[39], [125].

57 The Act, Sched 6, Pt 18C, par 9.

58 [2006] HCATrans 107 at 1465.

52 It is in this way that, in the end, this appeal is reduced to the applicability to this case of this Court's decision in *Gordon*[59].

The proceedings were not null and void

53 For the reasons given in *Gordon*[60], the proceedings maintained by the respondent in the District Court were not "invalid". They were not "null and void". Neither the language nor the purpose of s 151C(1) of the Act is such as to suggest nullity or voidness of proceedings commenced in contravention of s 151C(1)[61].

54 It was open to a party such as the appellant, notwithstanding that sub-section, to allow the proceedings to continue despite the breach of s 151C(1). By those provisions, no duty was cast on the District Court to give effect to them where a party had not chosen to raise them. The language of s 151C(1) was not apt to extinguish the respondent's cause of action at common law. The most that it did was to introduce a procedural bar to the prosecution of the cause of action which the appellant could choose not to enforce.

55 As such, it was necessary for the appellant, if it wished to invoke the requirements of s 151C(1), to plead it in its defence. If it found itself out of time for relying on that sub-section in its defence, it was obliged to secure the leave of the District Court to file a relevant defence out of time. Necessarily, that need, in the absence of nullity or invalidity, engaged the powers and discretions of the primary judge of the District Court who was asked to permit the belated ground of defence. Such powers and discretions had to be exercised according to law and with regard to the relevant considerations. But it was not obligatory for the primary judge to permit the defence to be raised belatedly. Whether that should be done would depend on all the circumstances of the case.

56 This was not a case where public policy or the protection of the interests of others (including protection of any interests of the state) suggested a conclusion contrary to the foregoing. Nor was this a case where the terms of s 151C(1) of the Act rendered the proceedings illegal, obliging an outcome that

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59 [2006] HCA 32.

60 [2006] HCA 32 at [82]-[96].

61 See also *Ruddy v Procurator Fiscal, Perth* [2006] UKPC D2.

would permit the appellant to plead the invalidity of the proceedings on that ground at any time[62].

57 The result is that, conformably with the decision in *Gordon*, the central plank of the appellant's submissions must be rejected. In effect, this requires dismissal of the appeal in the terms in which it was pleaded and argued.

Waiver and preclusion need not be decided

58 The foregoing conclusion, and the reasoning of this Court in *Gordon*, indicate why it is unnecessary in this appeal to explore the operation of the law of waiver and, to the extent that it was raised by the respondent's submissions, the issue of estoppel or election on the basis of preclusion.

59 The conclusion and orders of the primary judge were open to her given the history of the proceedings, the multiple non-appearances of the appellant and the opportunities which the appellant ignored, or overlooked, to plead s 151C(1) of the Act. This was so for reasons analogous to those explained by this Court in *Gordon*. In these circumstances it is also unnecessary to consider the defensive submission, advanced by the appellant, that an argument of preclusion could not be allowed for reasons of procedural fairness, because those arguments were not raised and explored in evidence below[63].

60 To the extent that the DCR were relied on by the primary judge to inform her understanding of her powers and their exercise, no error was shown in what she did or in her resulting orders. On the contrary, as *Gordon* shows, once the jurisdiction and powers of the District Court were invoked, it was obligatory to conform to those Rules. The appellant specifically disclaimed any argument that the applicable DCR were inconsistent with the provisions of s 151C(1) of the Act[64]. No such inconsistency is apparent.

61 It follows that, having regard to the Court's reasons in *Gordon*, it is unnecessary, and would be inappropriate, for this Court to explore the

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62 See *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 413; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 218-219, 226, 236.

63 cf *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Coulton v Holcombe* (1986) 162 CLR 1 at 6.

64 [2006] HCATrans 107 at 1541.

requirements of the law of waiver. That law is confusing and imprecise[65]. This appeal is not an occasion where clarification is necessary to reach the Court's orders.

62 Nor, for similar reasons, is it necessary, or would it be appropriate, to examine whether the law of estoppel is available to the respondent to sustain the orders made in the District Court. Nor is it necessary or appropriate to enter upon the correctness of the alternative way in which the primary judge based her conclusion on her acceptance that the appellant had admitted liability to the respondent by the course of its neglect of the proceedings in the District Court, having regard to the ordinary operation of the DCR. Upon all of these questions, I would venture no opinion. *Gordon* applies. That requires, in the circumstances, that the appeal against the primary judge's orders must fail.

Order

63 The appeal should be dismissed with costs.

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65 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 456; *Roebuck v Mungovin* [1994] 2 AC 224 at 235-236.