HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND BELL JJ

Matter No S528/2008

LEIGHTON CONTRACTORS PTY LTD APPELLANT

AND

BRIAN ALLAN FOX AND ORS RESPONDENTS

Matter No S534/2008

CALLIDEN INSURANCE LIMITED (ACN 004 125 268) APPELLANT

AND

BRIAN ALLAN FOX AND ORS RESPONDENTS

Leighton Contractors Pty Ltd v Fox
Calliden Insurance Limited v Fox
[2009] HCA 35
2 September 2009
S528/2008 & S534/2008

ORDER

In each matter, order:

1. *Appeal allowed.*

2. *Set aside orders 1 and 5 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 7 March 2008, and in lieu thereof order that the appeals to that Court be dismissed.*

3. *Appellant to pay the costs of the first respondent of the appeal to this Court.*

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with W S Reynolds for the appellant in S528/2008 and the second respondent in S534/2008 (instructed by Moray & Agnew Solicitors)

J E Maconachie QC with R G Gambi for the appellant in S534/2008 and the second respondent in S528/2008 (instructed by Wotton & Kearney)

M J Cranitch SC with R C Tonner for the first respondent in both matters (instructed by Walkom Lawyers)

No appearance for the third respondent in both matters

CATCHWORDS

Leighton Contractors Pty Ltd v Fox
Calliden Insurance Limited v Fox

Torts – Negligence – Duty of care – Independent subcontractor suffered injury resulting from negligent conduct of co-subcontractor – Whether induction training in industry approved code of practice would have avoided cause of injury – Whether principal contractor for construction work owes duty to provide, or be satisfied of the prior provision of, training in safe work methods to independent contractors working on construction site – Whether contractor retained to carry out concreting owes duty to provide training in safe work methods to independent subcontractor engaged by it to carry out concrete pumping – Whether obligations imposed on principal contractor and contractor under the *Occupational Health and Safety Act* 2000 (NSW) and the Occupational Health and Safety Regulation 2001 (NSW) give rise to a common law duty requiring for its discharge the provision of occupational health and safety induction training in respect of safe work methods of carrying out specialised tasks.

Occupational Health and Safety Act 2000 (NSW).
Occupational Health and Safety Regulation 2001 (NSW), Pt 8.2.
Code of Practice: Pumping Code (NSW).
Code of Practice: Occupational Health and Safety Induction Training for Construction Work (NSW).

FRENCH CJ, GUMMOW, HAYNE, HEYDON AND BELL JJ.

Introduction

1 *Background facts*. On 7 March 2003 Brian Allan Fox, the first respondent in each of these appeals, suffered severe injury in the course of working at the construction site of the Hilton hotel in Sydney. Leighton Contractors Pty Ltd ("Leighton"), the appellant in the first appeal, was the principal contractor for the project. By the "Works Contract", Leighton had contracted with Downview Pty Ltd ("Downview") to carry out the concreting, including the provision of reinforcing and formwork, for certain works. Downview had subcontracted the concrete pumping to Quentin Still and Jason Cook. Mr Fox and Warren Stewart were engaged by Mr Still and Mr Cook in connection with the concrete pumping for a pour that was scheduled to take place on 7 March.

2 After the concrete pour was completed Mr Still, Mr Stewart and Mr Fox commenced to clean the concrete delivery pipes. This involved blowing an object through the pipes with compressed air. In the negligent manner in which this was done the end pipe swung around and struck Mr Fox on the head.

3 *The trial*. Mr Fox brought proceedings in the New South Wales District Court in negligence against Leighton, Warren Stewart Pty Ltd, which employed Warren Stewart, and Downview. The trial judge (Gibb DCJ) found that the accident was caused by the negligent conduct of Mr Still and Mr Stewart. She dismissed the claims against Leighton and Downview, holding that there was no relevant breach of duty by either of them. She gave judgment for Mr Fox in the amount of $472,561.95 against Warren Stewart Pty Ltd. Warren Stewart Pty Ltd did not appeal against the judgment. Unfortunately for Mr Fox, it has since been de-registered.

4 *The appeal to the Court of Appeal*. Mr Fox appealed against the dismissal of his claims against Leighton and Downview. The Court of Appeal allowed the appeal, holding that Leighton and Downview were each subject to a common law duty of care for the benefit of Mr Fox and that each was in breach of that duty. The primary judge's orders were set aside and judgment was given against Leighton and Downview in the sum of $472,562. The Court of Appeal upheld a cross-appeal brought by Leighton against the dismissal of its cross-claim and ordered that Downview pay 80% of the judgment debt owed by Leighton to Mr Fox.

5 *The appeal to this Court*. Leighton and Downview appealed by special leave from the orders of the Court of Appeal. They contended that the

imposition on each of them of a common law duty of care owed to Mr Fox, an independent contractor, involves an unwarranted extension of the liability of principals for the negligent acts of other independent contractors engaged by them[1]. Each appeal should be allowed for the reasons that follow.

6 On 16 April 2009, after the institution of the appeals, Downview was de-registered. On the hearing of the appeals leave was given to substitute Calliden Insurance Limited as the second respondent in the first appeal, and as the appellant in the second appeal, pursuant to s 6(4) of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW). Calliden gave an undertaking as to costs in the terms of the undertaking previously given by Downview as a condition of the grant of special leave in the second appeal. This was an undertaking that Downview would pay Mr Fox's costs of the appeal and that it would not seek to disturb any costs order in his favour made in the Court of Appeal. Leighton gave an undertaking in the same terms as a condition of the grant of special leave in the first appeal.

7 It is convenient to continue to refer to the second respondent in the first appeal, and the appellant in the second appeal, as "Downview".

The factual background

8 *The relationships and experience of those present on 7 March.* Downview had dealings with Quentin Still, Jason Cook and Chris Gelle in connection with the subcontract for the concrete pumping. Each represented to Downview that he was employed by Toro Constructions Pty Ltd ("Toro"). Downview understood that its contract was with that entity. Toro was joined to the proceedings as fourth defendant. The proceedings were discontinued against Toro after Mr Still revealed that he was not in its employ.

9 Despite the confusion occasioned by the misrepresentation concerning Toro, Mr Still and Mr Cook secured the subcontract for the concrete pumping from Downview. They supplied the pipes and other equipment required for the work. Neither were joined to the proceedings.

10 Mr Still had attended the site on several occasions before the date of the accident. On these occasions he had engaged a man named Jamie who supplied a

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1 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 31 per Mason J, 47-48 per Brennan J; [1986] HCA 1.

concrete pump truck together with his own labour and that of an offsider. The concrete pour on 7 March had originally been scheduled to take place on the following day. One consequence of the re-scheduling was that Jamie was not available to supply his pump truck or to work on that day. Mr Still was informed of the re-scheduling on 7 March and either he or Mr Cook telephoned a man named John Martin to arrange for another concrete pump truck and labour.

11 Mr Martin was one of the principals of a business, Shark Shire Pumping, which supplied concrete pump trucks. He was also a principal of Aggforce Concrete Pty Ltd, which supplied labour to the concrete pumping industry. On 7 March Mr Stewart and Mr Fox attended the site in a pump truck supplied by Shark Shire Pumping in response to the request made to Mr Martin. Mr Stewart was the driver and Mr Fox was the offsider. Mr Fox was a labourer who had worked in the industry on and off for nearly a decade. Even though he worked "virtually exclusively" for the businesses operated by Mr Martin, he was an independent contractor. Neither Aggforce nor Mr Martin were joined to the proceedings.

12 The arrangement made by Mr Still or Mr Cook with Mr Martin was that the pump truck was to go to the Hilton site and that the driver and offsider were to take directions from Mr Still. Mr Still had worked in the concrete pumping industry for 19 years. Mr Stewart had worked in this industry for 11 years, but he did not have experience working on a major multi-storey construction site such as this one. The largest job that he had previously done was "probably a six storey block of units". He and Mr Still had known one another for some time and each considered the other to be experienced in concrete pumping. Mr Fox had previously worked as a concrete linesman/pump truck offsider, but he had no experience of working on a major construction site. The biggest jobs that he had worked on involved the construction of two storey houses or townhouses.

13 *The accident*. Mr Still met the pump truck on its arrival and directed it to level 4, the access level to the site. The three men took a number of pipes from the pump truck up to level 12, where the concrete was to be poured. They linked up the pipes on level 12 to the static line, a pipe attached to one of the columns, which ran down to level 4. They then returned to level 4 and connected the line from the truck to the static line. During the concrete pumping Mr Fox assisted Mr Still on level 12 while Mr Stewart remained with the pump truck on level 4. After the pour was completed, and the pump had been turned off, Mr Still and Mr Fox went down to level 4 to assist Mr Stewart to uncouple the pipes. Mr Stewart then reversed the pump truck out of the way and a forklift driver moved a waste bin into position at Mr Still's direction. This was done in readiness for the final phase of the operation, which involved cleaning the static

line and the pipes that were connected to it at either end ("line cleaning"). After the waste bin was moved into position the forklift backed away. This left Mr Stewart, Mr Still and Mr Fox as the only persons in the vicinity of the end pipe on level 4.

14 The end pipe was moved by Mr Stewart, Mr Still and Mr Fox into a position over the waste bin. It was not chained or otherwise secured to the bin. On previous occasions Jamie had secured the pipe to the waste bin with chains, which he supplied. Mr Still understood that proper practice required that the pipe be attached to the bin, "just in case it blew back, or a sponge got stuck and it built up pressure and blew". The primary judge found that, contrary to Mr Still's denial, before he returned to level 12 to commence the line cleaning he had been present on level 4 and had seen that the pipe was not attached to the waste bin.

15 The process ordinarily employed in line cleaning is to blow a purpose-built sponge through the pipes. On this occasion a four-inch sponge was blown through the pipes without difficulty. Mr Still and Mr Stewart believed that a four-inch sponge was an ineffective means of cleaning these pipes, which included pipes with a five-inch diameter. After the first phase of the operation, Mr Still substituted a hessian bag filled with dacron (a composite material used as insulation) for the purpose-built cleaning sponge. Mr Still and Mr Stewart were in telephone contact throughout the line cleaning. The dacron-filled bag became blocked in the pipe. Mr Stewart advised Mr Still of the blockage and they agreed that Mr Still would increase the air pressure in an effort to clear it. Before this was done Mr Stewart directed Mr Fox to move away from the pipe. Mr Fox moved to a position around 30 feet away from the pipe. The pressure was increased and the dacron-filled bag was expelled with force, causing the pipe to "whiplash" away from the waste bin and strike Mr Fox.

16 At the time of the accident the only persons present on level 4, apart from Mr Stewart and Mr Fox, were the forklift driver and a labourer. Both of these men were wearing Leighton safety wear and it appears that each was a Leighton employee. The primary judge found that Mr Still was in charge of the concrete pumping operation and that Mr Stewart followed his directions. No person associated with Leighton or Downview gave any directions in connection with the operation.

Line cleaning, the Pumping Code and the general law

17 *Line cleaning*. Mr Stewart was familiar with the process of line cleaning. On the smaller sites on which he had previously worked the sponge had been blown from the pump truck end of the line and expelled through the delivery

pipe. A different method, the "blow-back" method, was employed on the Hilton site to avoid the concrete residue being deposited on level 12. Mr Stewart had not cleaned pipes using this method. The primary judge considered that Mr Stewart's lack of familiarity with the "blow-back" method was immaterial, since the principles involved in line cleaning with compressed air were similar. She found that Mr Stewart was aware of the danger of projectiles being expelled during the cleaning process and of the need to monitor the process carefully.

18 *The Pumping Code*. Despite his experience in the concrete pumping industry, Mr Stewart was not familiar with the approved industry code of practice ("the Pumping Code")[2]. Among its provisions the Pumping Code covered the topic of line cleaning. Clause 3.18 provided:

> "Line cleaning should only be carried out by experienced and trained pumping personnel. Extreme care should be taken when using compressed air to clean the pipeline. Air pressure will cause anything inside the pipeline to act as a high-velocity projectile.
>
> The following safety precautions should be followed:
>
> (a) There should always be a connection to atmosphere (air relief valve) as well as the air entry point to the pipeline. This connection is to allow the system to be depressurised before removing any pipeline.
>
> (b) Remove the rubber delivery hose at the end of the pipeline. If left on, the hose can whip around dangerously as the line is blown out.
>
> (c) A positive catchment device should be attached to the discharge end of the pipeline to safely catch the cleaning device but at the same time allow the concrete to flow.
>
> (d) Keep all workers away from the discharge end while the concrete is under pressure.

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2 WorkCover Authority of New South Wales, "Code of Practice: Pumping Concrete", gazetted 3 December 1993, commenced 1 March 1994, approved as an industry code of practice under s 44A of the *Occupational Health and Safety Act* 1983 (NSW), and taken to be an approved industry code of practice for the purposes of Pt 4 of the *Occupational Health and Safety Act* 2000 (NSW) by operation of cl 9 of Sched 3 to that Act.

(e) Never attempt to take a line apart to clean out a blockage or to dismantle it until after the pressure has been relieved."

19 There was no expert evidence concerning the proper practice with respect to line cleaning. The primary judge found that there were two causes of the accident: use of the dacron-filled bag and the failure to tie the end of the pipe to the waste bin. In the way that the trial was conducted, the latter omission was the relevant cause. Her Honour's conclusion, that Mr Stewart's conduct in failing to secure the end of the pipe was negligent, was based, at least in part, on her view that the omission was contrary to the Pumping Code.

20 *The duty of principals to independent contractors*. The common law does not impose a duty of care on principals for the benefit of independent contractors engaged by them of the kind which they owe to their employees[3]. However, it is recognised that in some circumstances a principal will come under a duty to use reasonable care to ensure that a system of work for one or more independent contractors is safe. The principles were explained by Brennan J in *Stevens v Brodribb Sawmilling Co Pty Ltd*[4]:

> "An entrepreneur who organises an activity involving a risk of injury to those engaged in it is under a duty to use reasonable care in organising the activity to avoid or minimise that risk, and that duty is imposed whether or not the entrepreneur is under a further duty of care to servants employed by him to carry out that activity. The entrepreneur's duty arises simply because he is creating the risk and his duty is more limited than the duty owed by an employer to an employee. The duty to use reasonable care in organising an activity does not import a duty to avoid any risk of injury; it imports a duty 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 who are competent themselves to control their system of work without supervision by the entrepreneur. The circumstances may make it necessary for the entrepreneur to retain and exercise a supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury. But once the activity has been organised and its

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3 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

4 (1986) 160 CLR 16 at 47-48 (citation omitted).

> 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 control their own systems of work, or in not retaining a supervisory power or in leaving undefined the contractors' 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."

21 It is common in the construction industry for the principal contractor to arrange for the works to be carried out by subcontractors rather than by employing its own labour force. Among the advantages that accrue to the principal contractor in adopting this model for its undertaking is that it does not incur the obligations that the law imposes on employers. An employer owes a personal, non-delegable, duty of care to its employees requiring that reasonable care is taken. This is a more stringent obligation than a duty to take reasonable care to avoid foreseeable risk of injury to a person to whom a duty is owed. While an employer is not vicariously liable for the negligent conduct of an independent contractor, it may incur liability where the negligent conduct occasions injury to its employee. This is because it will have failed to discharge the special duty that it owes to its employees to ensure that reasonable care be taken, whether by itself, its employees or its independent contractors, for the safety of its injured employee[5]. In this case, if the pipe had struck the forklift driver, an employee of Leighton, there may be little doubt as to Leighton's liability in respect of the injury to him. The distinction that the common law draws between independent contractors and employees has been the subject of criticism[6]. However, as five Justices of this Court observed in *Sweeney v Boylan Nominees Pty Ltd*[7], whatever the logical and doctrinal imperfections and

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5 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 686-687 per Mason J; [1984] HCA 61; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; [1994] HCA 13.

6 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 366-367 per McHugh J; [1997] HCA 39. See also the discussion in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 36 [32] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ, 53-58 [84]-[93] per McHugh J; [2001] HCA 44.

7 (2006) 226 CLR 161; [2006] HCA 19.

difficulties in the origins of the law relating to vicarious liability, the concept of distinguishing between independent contractors and employees is one too deeply rooted to be pulled out[8].

22 In particular, and as was emphasised in *Sweeney*[9], the authorities in this Court do not support any principle that "A is vicariously liable for the conduct of B if B 'represents' A (in the sense of B acting for the benefit or advantage of A)". Earlier, in *Scott v Davis*[10] the Court refused to recognise an "agent" in a non-technical sense as an actor attracting principles of vicarious liability.

23 Mr Fox gave evidence that a Leighton foreman was present on level 4 at the time of the accident. It was his case that Leighton was required to supervise the line cleaning because of the nature of the activities on the site and his vulnerability[11]. The primary judge preferred the evidence of Mr Stewart to that of Mr Fox on the question of the persons present at the scene of the accident. She did not find that a Leighton foreman had been present and she rejected the claim that Leighton was subject to a duty requiring that it supervise the operation.

The Court of Appeal's reasons

24 The Court of Appeal (Giles, McColl and Basten JJA) considered that the primary judge was correct to reject Mr Fox's case that Leighton was subject to a duty requiring that it supervise the concrete pumping and line cleaning[12]. The Court rejected the submission that Leighton had a non-delegable duty of care owed to persons coming onto the site to take care for their safety[13]. It observed that to import a duty akin to that of an employer to retain a degree of control over

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8 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 173 [33] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

9 (2006) 226 CLR 161 at 172 [29].

10 (2000) 204 CLR 333 at 342 [18], 422-424 [268]-[273], 440 [311], 459-460 [357]-[358]; [2000] HCA 52.

11 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 47 per Brennan J.

12 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 446-447 [53].

13 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 446 [51].

the work would be inconsistent with the relationship between principal and independent contractor[14].

25 The Court of Appeal characterised Mr Fox's case at trial as having been substantially based on Leighton's failure, through its supervisor, the foreman about whom Mr Fox testified, to ensure that safe work practices were adopted[15]. The Court considered that the primary judge had been distracted by the factual issue concerning the foreman, on which she found against Mr Fox, and that she had failed to deal with a broader case, which was that "Leighton ha[d] a general law duty to ensure safe work practices and to take reasonable steps to ensure that those working on the site were properly trained"[16]. The particulars of negligence in the case against Leighton included the failure to ensure that Mr Fox and Mr Stewart had undergone occupational health and safety ("OHS") induction training at the site before commencing work in accordance with the Occupational Health and Safety Regulation 2001 (NSW) ("the Regulation") and the failure to ensure that the operation was carried out in accordance with cl 3.18 of the Pumping Code. The latter particular was repeated in the case against Downview and was directed to the case based on the failure to supervise the line cleaning.

26 The Court of Appeal found that Leighton was subject to a general law duty of care to subcontractors and others coming onto a construction site within its control, the scope of which included "training in matters of safety to subcontractors"[17]. Discharge of the duty required that Leighton take reasonable steps to ensure that persons coming onto the site to work had undergone the relevant induction training[18]. Leighton conducted site induction training for all persons working on the site. The only evidence of the content of this training was given by Mr Still. He said that it was "just your average general site induction – tell you all the safety procedures and stuff like that"[19].

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14 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 447 [53].

15 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 444 [43].

16 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 444 [44].

17 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 445 [48].

18 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 445 [49].

19 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 448 [61].

27 The Court of Appeal inferred from the statutory scheme that it was probable that OHS induction training for persons engaged in concrete pumping would have included training in relation to line cleaning and the matters addressed in cl 3.18 of the Pumping Code[20]. In this respect the Court's reasons were affected by an error, to which it will be necessary to return. The Court found that Leighton was negligent in its failure to take steps to ensure that both Mr Stewart and Mr Fox undertook the relevant induction training[21]. The Court considered that the evidential basis for a finding of causation was "sparse"[22]. However, given the evidence that Mr Stewart had taken the precaution of directing Mr Fox to stand clear before attempting to clear the blockage in the line, the inference should be drawn that had he received training in the need to tie the end of the pipe to the waste bin he would have done so[23]. The failure to give instructions in this regard was a cause of the accident for which Leighton was liable[24].

28 Leighton complains that, notwithstanding the Court of Appeal's recognition of the distinction that the common law draws between principals in relation to the independent contractors they engage and employers in relation to their employees, the Court imposed on it a duty in scope that is as ample as the duty to which an employer is subject with respect to training its employees in matters of work safety.

The statutory obligations with respect to health and safety training

29 Before turning to the nature of the duty that the Court of Appeal formulated, it is necessary to refer to the scheme of the *Occupational Health and Safety Act* 2000 (NSW) ("the OHS Act") and the Regulation; to the obligations imposed thereunder on Leighton; and to the contractual arrangements between Leighton and Downview. These matters are critical to understanding the Court of Appeal's approach to the liability of Leighton and Downview.

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20 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 447 [54].

21 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 446 [49].

22 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 448 [58].

23 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 447-448 [57].

24 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 448 [60].

30 *The Court of Appeal's error as to the "Code of Practice" referred to in the Regulation.* Leighton acknowledged that, as the principal contractor for the Hilton site, it had the legal authority to determine who was permitted to come onto the site[25]. Duties are imposed on principal contractors in respect of construction work under Ch 8 of the Regulation. Part 8.2 of the Regulation deals with OHS induction training in respect of construction work. Clause 213(1) of the Regulation provides that a principal contractor for a construction project must not direct or allow another person to carry out construction work on the project unless the principal contractor is satisfied that the person has undergone OHS induction training. The Court of Appeal referred to this obligation on Leighton and went on to say[26]:

> "A similar obligation was imposed on each 'self-employed person': reg 215. Further, such training was required to 'cover the relevant health and safety topics set out in the Code of Practice': reg 217(a). The relevant code of practice for present purposes was that for 'pumping concrete' which included cl 3.18".

31 The conclusion, that for a person engaged to carry out concrete pumping the reference in cl 217(a) of the Regulation to the "Code of Practice" is to be understood as a reference to the Pumping Code, was wrong. The definition in cl 212 of the Regulation of "Code of Practice" reveals that in truth the reference in cl 217(a) to "the Code of Practice" is a reference to a document prepared by the WorkCover Authority of New South Wales titled "Code of Practice: Occupational Health and Safety Induction Training for Construction Work" ("the Code of Practice") as in force on the date of the commencement of the Regulation. The Code of Practice commenced on 1 April 1999. It was prepared in association with the introduction of Pt 15 into the Construction Safety Regulations 1950 (NSW)[27]. Part 15 made provision for OHS induction training and imposed on principal contractors the obligation which is now found in cl 213(1) of the Regulation[28]. The OHS Act repealed the Construction Safety

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25 See Occupational Health and Safety Regulation 2001 (NSW), cll 209, 210.

26 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 441-442 [34].

27 Construction Safety Amendment (Amenities and Training) Regulation 1998 (NSW), Sched 1, Item 2.

28 Construction Safety Regulations 1950 (NSW), reg 162A(1).

Regulations 1950[29]. The Code of Practice was an approved industry code of practice under s 44A of the *Occupational Health and Safety Act* 1983 (NSW) and, by force of the transitional provisions, is an approved industry code of practice under Pt 4 of the OHS Act[30]. The Code of Practice was in force at the date of the commencement of the Regulation.

32 *The content of OHS induction training*. OHS induction training referred to in Pt 8.2 of the Regulation covers instruction on health and safety in three areas: general training, work activity based training and site specific training[31]. The Code of Practice deals with the content of each type of training. General training and work activity based training are to be provided by way of a documented training course[32]. Training in each of these areas is required to be provided only once subject to the proviso that a person re-entering the industry after an absence of two consecutive years or more requires re-training[33]. It need not be site based. That is, a person working on a site can come to it with training given earlier without any need for further training on that site.

33 The Court of Appeal was correct in understanding that the content of OHS induction training for a person in the concrete pumping industry should include, inter alia, training in the health and safety topics contained in the Pumping Code. This formed part of the course content for the work activity based OHS induction training under cl 218 as specified in the Code of Practice[34].

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29 *Occupational Health and Safety Act* 2000 (NSW), cl 3 of Sched 3.

30 *Occupational Health and Safety Act* 2000 (NSW), cl 9 of Sched 3.

31 Occupational Health and Safety Regulation 2001 (NSW), cl 216(1).

32 Occupational Health and Safety Regulation 2001 (NSW), cll 217, 218; WorkCover Authority of New South Wales, "Code of Practice: Occupational Health and Safety Induction Training for Construction Work", gazetted 27 November 1998, commenced 1 April 1999 ("the Code of Practice"), pars 4.1.1, 4.2.1.

33 Occupational Health and Safety Regulation 2001 (NSW), cll 217, 218; the Code of Practice, pars 4.1.3, 4.2.3.

34 Paragraph 4.2.4 of the Code of Practice provides that work activity OHS induction training must include at least the following health and safety topics: (a) common hazards, risks and control measures involved in carrying out the work activity; (b) participation in the hazard identification, risk assessment and control process; (c) relevant OHS legislative responsibilities, codes of practice and their application

(Footnote continues on next page)

34 The objective of the site specific component of OHS induction training is the provision of information about procedures, risks and hazards that are specific to a particular workplace or site. A documented training course is not required for site specific OHS induction training[35]. Site specific OHS induction training must be provided to all persons carrying out any construction work and must be provided for every site[36]. The content of this training addresses site specific hazards, site orientation, including the location of safe access amenities and first aid, site specific safety rules or procedures, accident, emergency and evacuation procedures, and the equipment that is available on site[37].

35 It will be recalled that the Code of Practice commenced on 1 April 1999. Under the Regulation, as it stood at the time of the accident, an employee or self-employed person who had carried out construction work in the course of employment for any period within the two years immediately preceding 1 April 1999 was deemed to have undergone the general health and safety and work activity based health and safety components of OHS induction training[38].

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to the work activity; (d) an industry sector overview of OHS work activity performance using data such as workers compensation/injury records, lost time etc to identify high risk activities or hazards; (e) work methods to be used including control measures being implemented to prevent injury; (f) correct use, handling, storage and transport of plant (including tools, equipment and personal protective equipment) in accordance with the manufacturer's recommendations; (g) correct use, handling, storage and transport of materials and hazardous substances, including the provision and use of Material Safety Data Sheets; and (h) electrical safety.

35 The Code of Practice, par 4.3.1.

36 The Code of Practice, par 4.3.3.

37 Occupational Health and Safety Regulation 2001 (NSW), cl 219; the Code of Practice, par 4.3.4.

38 Occupational Health and Safety Regulation 2001 (NSW), cl 221. Note that a person is only deemed to have undergone the work activity based health and safety component in relation to the particular type of construction work the person had carried out within that two year period.

36 It appears that the Court of Appeal assumed that the site induction to be provided by Leighton to a person engaged to carry out concrete pumping was required to include instruction in the health and safety topics contained in the Pumping Code. In fact Leighton's obligation under cl 213(1) of the Regulation, reflected in its Works Contract with Downview, was to be satisfied that a person carrying out construction work on the site had undergone OHS induction training, rather than providing that training itself. The relevant obligation of Leighton would require only that it be satisfied that the person had completed OHS induction training in general health and safety topics and work activity based health and safety topics, or that the person had carried out relevant construction work in the course of employment within the period of two years immediately preceding 1 April 1999, and completion of the site specific OHS induction training.

37 *Other statutory duties on Leighton and Downview*. In addition to Leighton's obligation under cl 213(1) of the Regulation, Leighton and Downview were subject to statutory duties as employers and as persons in control of premises used as a workplace under Pt 2 of the OHS Act. These duties included ensuring that all systems of work and the working environment of the employees were safe and without risks to health[39] and providing such information, instruction, training and supervision as may have been necessary to ensure the employees' health and safety at work[40]. The duties extended to ensuring 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[41]. These are comprehensive duties directed at securing favourable health and safety outcomes. Breach of the obligations is attended by criminal sanction. They are obligations of strict liability subject only to the defences set out in s 28 of the OHS Act, proof of which lies on the defendant.

38 *Duties imposed on Leighton by the Regulation*. Leighton was required by the Regulation to ensure that each subcontractor provided it with a written safe work method statement in respect of the work to be carried out[42]. It was obliged to ensure that Downview was directed to comply with the safe work method

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39 *Occupational Health and Safety Act* 2000 (NSW), s 8(1)(c).

40 *Occupational Health and Safety Act* 2000 (NSW), s 8(1)(d).

41 *Occupational Health and Safety Act* 2000 (NSW), s 8(2).

42 Occupational Health and Safety Regulation 2001 (NSW), cl 227(2).

statement and with the requirements of the OHS Act and the Regulation[43], and to ensure Downview's activities were monitored to the extent necessary to determine whether it was complying with each of these requirements[44]. These obligations were reflected in Leighton's Works Contract with Downview, which required Downview to establish its own health and safety plan. It required Downview to supply safe work method statements detailing the processes to be employed by Downview and their related risks and hazards and describing how Downview intended to control these risks and hazards[45].

39 *Leighton's obligations under the Works Contract.* As noted, Leighton's obligations under the OHS Act and the Regulation were reflected in the terms of the Works Contract between it and Downview. Approval to subcontract was at Leighton's discretion[46] and any secondary subcontractor not approved in writing by Leighton would not be permitted to enter the site[47]. Leighton required all persons engaged on the site on work under the Works Contract to attend a site induction prior to commencing that work[48]. The Works Contract provided that[49]:

> "The Site Induction to be conducted by Leighton will outline general industry and site specific procedures, occupational health and safety issues and environmental, industrial relations and quality system requirements. …
>
> The Site Induction to be conducted by Leighton is intended to outline procedures and requirements that will generally apply to all persons working on the Site and does not relieve the Contractor of its responsibility to properly induct persons engaged to perform the work

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43 Occupational Health and Safety Regulation 2001 (NSW), cl 227(3)(a).

44 Occupational Health and Safety Regulation 2001 (NSW), cl 227(3)(b).

45 The Works Contract, special condition 6.

46 The Works Contract, cl 13.1.

47 The Works Contract, cl 13.2.

48 The Works Contract, cl 32.1.

49 The Works Contract, cl 32.1.

under the Works Contract as to particular procedures and requirements relevant to that work."

40 The first work method statement provided by Downview was rejected by Leighton as inadequate. Downview was required to amend it to take into account marked-up comments. These directed Downview's attention to the applicable legislation, regulations and codes of practice, including the Pumping Code.

41 The revised work method statement prepared by Downview and submitted under cover of a facsimile dated 8 January 2003 identified the activity of "concrete pumping" and listed the potential hazards of this activity. These included being "struck by concrete or a piece of pipe from weak joint or burst in pip[e] – Blockage in line". Among the control measures identified to address these hazards was the provision of training "by owner of pump", tool box meetings, site inductions and having "a competent person in charge of the pump".

42 *No claim for breach of statutory duty*. The case against Leighton and Downview was not pleaded as involving breach of statutory duty. No doubt this was because the terms of the OHS Act prevent the duties imposed by it on employers and others giving rise to correlative private rights[50].

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50 Section 32(1) of the *Occupational Health and Safety Act* 2000 (NSW) provides that nothing in Pt 2 is to be construed as conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of any provision of Pt 2; s 46(2) provides that a person is not liable to any civil or criminal proceedings by reason only that the person has failed to observe an approved industry code of practice. Both the primary judge and the Court of Appeal referred to s 39A of the Act which makes provision for the regulations to provide that nothing in a specified provision or provisions of the regulations is to be construed as conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of the provision or provisions but that the failure of the regulations so to provide is not to be construed as conferring a right of action. This provision was inserted into the Act by the *Workers Compensation Legislation Amendment Act* 2003 (NSW), which commenced after the date of Mr Fox's injury. However, nothing is said to turn on this. The Court of Appeal and the primary judge each correctly referred to ss 32(1) and 46(2) of the *Occupational Health and Safety Act* 2000 (NSW).

The case against Leighton – the nature of the duty

43 *A controversy about the Court of Appeal's reasoning*. In this Court there was an issue as to the extent of the duty that the Court of Appeal found that Leighton owed to Mr Fox. Leighton asserted that the Court of Appeal had imposed on it a duty requiring it to train every worker coming onto the site across the spectrum of trades and professions in safe work practices. This, it was said, is an unthinkable burden for the common law to impose on a principal who has contracted to construct a large building. Mr Fox submitted that the duty that the Court of Appeal formulated was informed by the statutory obligations to which Leighton was subject and required no more than that Leighton take steps to ensure that each person working on the site provide satisfactory evidence of having undertaken OHS induction training.

44 *The controversy resolved*. While each of these competing submissions finds some support in the language of the Court of Appeal's reasons for judgment, as this controversy suggests the Court of Appeal did not in terms formulate the nature of the duty which it found Leighton owed for the benefit of Mr Fox. As a starting point for ascertaining the nature and extent of the duty, the Court of Appeal posed two questions. The first question was "whether Leighton took all reasonable care to ensure that persons coming onto the site did in fact undergo induction training". The Court of Appeal said that that "may be seen as an element of maintaining a safe workplace"[51]. The second question turned on "the extent to which Leighton was required to exercise direct supervision over subcontractors to ensure that the workplace was reasonably safe, for all persons on the site"[52].

45 The Court of Appeal saw the first question as arising from a particular of negligence in the first amended statement of claim to the effect that Leighton failed to ensure that Mr Fox and Mr Stewart had undergone OHS induction training at the site before commencing work. The Court described the broader case that Mr Fox had advanced at trial as "Leighton having a general law duty to ensure safe work practices and to take reasonable steps to ensure that those working on the site were properly trained"[53]. The Court noted Mr Fox's

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51 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 444 [42].

52 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 444 [42].

53 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 444 [44].

evidence, that he had been instructed to put on his vest and hard hat by a Leighton foreman, and said that, if this evidence were accepted, it would at least provide a basis for an inference that Leighton knew that two men had come onto the site, perhaps for the first time, and had "failed to ensure that they undertook induction training"[54].

46 The Court of Appeal observed that while Leighton was not vicariously responsible for the negligence of subcontractors it remained "the principal contractor with overall responsibility for the safety of the site"[55]. The Court referred to the "continuing obligations of a principal contractor" as reflected in the Regulation and in the general law[56]. The reference to the general law was to the categories of case in which it is recognised that a principal may incur liability: for the tortious acts of independent contractors that it has directly authorised; for failure to co-ordinate the activities of independent contractors[57]; and for breach of specific duties as an occupier[58]. The Court[59] went on to suggest that the operation of multiple subcontractors on a construction site and the relative confinement of such sites may give rise to a different conclusion to that reached with respect to the liability of a road authority for road works undertaken by a subcontractor in *Leichhardt Municipal Council v Montgomery*[60].

47 The critical passage in the Court of Appeal's analysis of the issue of duty is set out below[61]:

> "The older case-law concerning accidents on construction sites does not indicate that a general law *obligation to provide training in*

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54 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 444 [45].

55 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 444 [47].

56 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 444 [47].

57 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 31.

58 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 444-445 [47].

59 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 445 [47].

60 (2007) 230 CLR 22; [2007] HCA 6.

61 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 445 [48].

> *matters of safety to subcontractors* working on a site was envisaged as falling within the requirements of the duty of care of a principal contractor. It is also clear that construction sites were relatively dangerous workplaces in the past. The *obligation to ensure a reasonable level of safety* is, however, now well-recognised. The *need for induction training* is now a recognised part of major construction works. So much was recognised by Leighton in its contract with Downview; cl 32, whilst imposing obligations on Downview, acknowledged continuing obligations on the part of Leighton." (emphasis added)

The reference to cl 32 is a reference to the passage quoted above[62] referring to the site induction which Leighton was to provide. The critical passage in the Court of Appeal's analysis continued[63]:

> "Those obligations should properly be seen as part of Leighton's general law duty of care to subcontractors and others coming onto a construction site within its control. Although senior counsel for Leighton suggested that its obligations of training and supervision were delegated to Downview, the contractual provisions did not support that conclusion, nor did the Regulation provide support for Leighton to delegate responsibility in that manner."

48 It may be accepted that Leighton, as the occupier of the site, owed a duty to persons coming onto it to use reasonable care to avoid physical injury to them. However, this says nothing about whether Leighton owed a duty to Mr Fox to take reasonable care to prevent him suffering injury on the site as the result of the negligent conduct of Mr Stewart. The relationship between principal and independent contractor is not one which, of itself, gives rise to a common law duty of care, much less to the special duty resting on employers to ensure that care is taken. The factors that the Court of Appeal took into account in concluding that the older case-law had been supplanted and that the common law now recognises a duty owed by a principal contractor to subcontractors and others coming onto a construction site "to provide training in matters of safety to subcontractors working on [the] site"[64] may be summarised as follows. Leighton

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62 See [39].

63 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 445 [48].

64 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 445 [48].

had the legal authority to control who was admitted to the site[65]; a significant number of tradespeople and other workers were on the site at any one time[66]; construction sites are relatively dangerous workplaces[67]; and "induction training is now a recognised part of major construction works"[68]. All, save the last, are matters which in the opening sentence of the first critical passage quoted above[69] the Court of Appeal correctly recognised would not give rise to a duty of care owed by a principal contractor to an independent contractor.

49 The obligation imposed on Leighton under the Regulation, while not founding an action for breach of statutory duty, is central to the Court of Appeal's conclusion that a common law duty existed. 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 OHS Act and the Regulation into a duty of care at common law. This is because, as Gummow J explained in *Roads and Traffic Authority (NSW) v Dederer*[70], "whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden."

50 The Court of Appeal gave no consideration to whether Leighton had implemented a reasonable system for ensuring that workers coming onto the site were identified, were required to undergo site induction and were required to show evidence of completion of general and work activity based OHS induction training. The parts of the critical passage which were emphasised in the above quotation indicate that the liability that was imposed on Leighton was special or strict – a duty to provide induction training. The conclusion that the Court intended to impose a special or strict duty is supported by its peremptory treatment of breach. The Court simply said that "the relevant omission was to

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65 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 445-446 [49].

66 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 444 [47].

67 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 445 [48].

68 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 445 [48].

69 See [47].

70 (2007) 234 CLR 330 at 345 [43]; [2007] HCA 42.

take steps to ensure that Messrs Stewart and Fox undertook the relevant induction training"[71]. It went on to say[72]:

> "Accordingly, the existence of a duty on the part of Leighton should be upheld on the sole basis articulated [in the critical passage quoted above]. If a duty existed, it was clearly breached in the circumstances in that Leighton did not provide any induction training to the appellant or Mr Stewart."

51 Thus Leighton is correct in contending that the Court of Appeal imposed on it a duty to provide induction training to Mr Fox and Mr Stewart in the safe method of line cleaning, a function that forms part of the activity of pumping concrete.

52 *No justification for recognising a duty to train.* If Leighton owed a duty to Mr Fox and Mr Stewart to provide induction training to them in the safe method of line cleaning, it owed 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. There is no reason in principle to impose a duty having this scope on a principal contractor. The latter is unlikely to possess detailed knowledge of safe work methods across the spectrum of trades involved in construction work. And a duty to provide training in the safe method of carrying out the contractor's specialised task is inconsistent with maintenance of the distinction that the common law draws between the obligations of employers to their employees and of principals to independent contractors[73].

53 *A narrow submission by Mr Fox.* The statutory scheme contemplates that a worker will undergo general and work activity based OHS induction training on one occasion (subject to the need for re-training in the event of re-entering the industry) and that site specific OHS induction training will be undertaken at each site at which work is carried out. The obligation on the principal contractor created by cl 213(1) of the Regulation to be satisfied that a worker coming onto the site has undergone general and work activity based OHS induction training would ordinarily be discharged by obtaining a copy of the worker's statement of

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71 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 445 [49].

72 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 447 [54].

73 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161.

satisfactory completion of the general and work activity based components of the training[74]. In this Court, as noted, Mr Fox advanced a case narrower than that which the Court of Appeal had favoured. Mr Fox submitted that the relevant duty on Leighton "merely requires it [Leighton] to ensure each person working on a site it controls provides satisfactory evidence of having completed induction training". This, it was said, was not an unduly onerous, costly or time-consuming obligation to impose on a principal contractor. The contention was that Leighton's negligence lay in its failure to ensure that Mr Fox and Mr Stewart had undergone OHS induction training and, whether the training was provided on site or on an earlier occasion, the Court of Appeal was correct in holding that on the probabilities the training would have drawn attention to the need to tie down the pipe. The submission assumes a common law duty requiring that a principal contractor be satisfied not only that workers coming onto the site have been trained in matters of health and safety relating to the site over which it has control but also that they have undertaken training in the safe conduct of their specialty. Even if Mr Fox could make this proposition good, his submission fails to overcome a number of further obstacles.

54 *Obstacles to accepting Mr Fox's narrow submission*. First, any obligation on Leighton not to allow workers who had not undertaken OHS induction training to work on the site is one that would have been discharged by the exercise of reasonable care. The conduct of the trial, consistently with pleading of the particulars of negligence, did not address the question of what measures Leighton might have taken to confirm that workers coming onto the site had undergone OHS induction training. Leighton had no notice that Mr Stewart and Mr Fox were coming onto the site. The adequacy of its measures to ascertain who was coming onto the site does not appear to have been an issue at trial[75].

55 Second, the topic of health and safety in an approved industry code of practice is only one of many topics to be covered in the work activity based component of the OHS induction training[76]. That circumstance weakens the conclusion that OHS induction training would in the case of Mr Stewart and Mr Fox have included instruction in cl 3.18 of the Pumping Code. In the absence of expert evidence that conclusion should not have been drawn.

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74 Occupational Health and Safety Regulation 2001 (NSW), cl 220.

75 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 444 [45].

76 See fn 34.

56 Third, there was no evidence of whether or not Mr Stewart or Mr Fox had undergone work activity based OHS induction training for persons in the concrete pumping industry before attending the Hilton site on 7 March. So much, in so far as Mr Stewart is concerned, is acknowledged in the written submissions filed on Mr Fox's behalf. It was said that "[c]lause 32.1 [of the Works Contract], whatever it was intended to mean, was wide enough to ensure that [Mr Fox] and Mr Stewart were made aware of the Pumping Code assuming that he had not been trained in that area previously". Since Mr Stewart's evidence was that he had been in the concrete pumping industry for 11 years at the time of the accident it is not clear that he was required to undergo general or work activity based OHS training[77].

57 *Conclusion*. The Court of Appeal's conclusion that Leighton was negligent by reason of an assumed failure to provide OHS induction training to Mr Fox and Mr Stewart cannot be sustained. Nor is it possible to sustain the Court of Appeal's finding of liability by accepting the narrower case advanced by Mr Fox, that Leighton was negligent by its failure to take reasonable steps to ensure that Mr Fox and Mr Stewart had completed OHS induction training.

The case against Downview

58 In relation to the case against Downview, the Court of Appeal said that[78]:

> "[Downview] failed to take any steps to ensure that persons coming onto the site on 7 March [2003] underwent induction training. As a result, Mr Stewart and Mr Fox did not undergo [induction] training. … Apart from any contractual obligation to Leighton, Downview had a general law obligation to those participating in carrying out its contracting work to conduct operations safely and to do that it was obliged to contract with competent and properly trained operators. By leaving it to its own subcontractors to engage other labour and equipment, it effectively abandoned its responsibilities in that respect."

59 It is not clear whether the Court of Appeal was stating a general law obligation to which Downview was subject of a more extensive kind than that

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77 Occupational Health and Safety Regulation 2001 (NSW), cl 221.

78 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 451 [70].

recognised in *Stevens v Brodribb Sawmilling Co Pty Ltd*[79]. Had Downview failed to engage a competent contractor, it may not have avoided liability for the negligent failure of the contractor to take reasonable care to adopt a safe system of work[80]. However, provided that the contractor was competent, and provided that 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[81].

60 The Court of Appeal elsewhere said that the duty owed by Downview to Mr Fox was similar to the duty owed by Leighton to Mr Fox and the analysis of causation was the same[82]. For the reasons that have been given neither the Court of Appeal's conclusion about the formulation of the duty owed by Leighton nor the finding of causation can stand. The Works Contract between Leighton and Downview, which recognised the statutory duties to which each was subject with respect to health and safety on the construction site, did not impose on Downview a duty of care requiring for its discharge that Downview provide work activity based OHS induction training to independent contractors coming onto the site.

61 The Court of Appeal criticised the contractual relationship between Downview and its concrete pumping subcontractor as "extraordinarily haphazard"[83]. The Court's criticisms in this respect may be relevant to the factual issue of whether Downview had engaged the services of a competent contractor. However, the Court of Appeal did not overturn the primary judge's findings on this issue. The fact that Downview was mistaken as to the identity of its subcontractor loses its significance in the light of those findings. Among those findings was a finding that Downview had subcontracted the task of concrete pumping to Mr Still and Mr Cook and that Mr Still, who was in charge of the

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79 (1986) 160 CLR 16.

80 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 47-48 per Brennan J.

81 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 47-48 per Brennan J.

82 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 451 [71].

83 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 449 [63].

operation on 7 March, was an experienced and competent contractor. The primary judge accepted Downview's submissions that Mr Cook and Mr Still (and perhaps Mr Gelle) had attended the site on a number of occasions before the accident and that there was no evidence of any unsafe work methods adopted by Toro, or at least none of which Leighton or Downview were aware.

62 In *Stevens v Brodribb Sawmilling Co Pty Ltd*[84] Mason J explained 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 where there is a need for direction and co-ordination of the various activities being undertaken, the entrepreneur will come under a duty to prescribe a safe system of work. Mr Fox submitted that Downview's liability should be sustained upon this basis. He pointed to the fact that this was a busy building site with many people in and about it. However, as the Court of Appeal observed, there is nothing unreasonable about subcontracting the work of concrete pumping[85]. It is an activity that requires specialised equipment and which lends itself to being carried out by independent contractors. The primary judge's findings that the line cleaning was a self-contained operation that did not require co-ordination with other activities on the site was not disturbed. Mr Fox's submission cannot be sustained.

Orders

63 For these reasons, each appeal should be allowed and orders 1 and 5 made by the Court of Appeal should be set aside. In light of the undertaking given by Leighton and Calliden with respect to Mr Fox's costs, order 2 made by the Court of Appeal will stand.

64 In each matter, order:

1. Appeal allowed.

2. Set aside orders 1 and 5 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 7 March 2008, and in lieu thereof order that the appeals to that Court be dismissed.

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84 (1986) 160 CLR 16 at 31.

85 *Fox v Leighton Contractors Pty Ltd* (2008) 170 IR 433 at 446 [52].

3. Appellant to pay the costs of the first respondent of the appeal to this Court.