Thompson v Primary Producers Improvers Pty Ltd [2004] NTCA 12

PARTIES:	THOMPSON, Kevin Douglas v PRIMARY PRODUCERS IMPROVERS PTY LTD (ACN 009 611 821)
TITLE OF COURT:	FULL COURT OF THE NORTHERN TERRITORY
JURISDICTION:	ON REFERRAL FROM THE SUPREME COURT PURSUANT TO SECTION 21 OF THE SUPREME COURT ACT IN PROCEEDING NUMBER LA12 of 2003 (20208047)
FILE NOS:	LA8 of 2004 & LA12 of 2003 (20208047)
DELIVERED:	22 October 2004
HEARING DATES:	24 August 2004
JUDGMENT OF:	MARTIN (BR) CJ, THOMAS J & PRIESTLEY AJ

CATCHWORDS:

WORKERS COMPENSATION

Work Health Act 1986 (NT) – reference of appeal to Full Court from a single Judge – whether non-cash component of wages should be "grossed up" to take into account the effect of income tax – non-cash components – whether remuneration for the purposes of calculating "normal weekly earnings" – s 49(d) whether "gross remuneration" means grossed up remuneration – appeal dismissed.

Fringe Benefits Tax Assessment Act 1986 (Cth)
Fringe Benefits Tax (Miscellaneous Provisions) Act 1986 (Cth), s 23L
Work Health Act (NT), s 49(1) and s 53.

Murwangi Community Aboriginal Corporation v Carole (2002) 171 FLR 116 at 118 and [2001] NTSC 85; *AAT King's Tours Pty Ltd v Hughes* (1994) 4 NTLR 185 at 193 and 194; *Francese v Corporation of the City of Adelaide* (1989) 51 SASR 522 at 526; *Victims Compensation Fund Corporation v Brown* (2003) 201

ALR 260; *GH Michell & Sons (Australia) Pty Ltd v Bockman* (1994) 176 LSJS 377; *NT Drilling Pty Ltd v McFarland* [2004] NTSC 23; *Haines v Bendall* (1991) 172 CLR 60 at 63; *Kingston and Anor v Keprose Pty Ltd* (1987) 11 NSWLR 404, applied.

Cullen v Trappell (1980) 146 CLR 1; *Atlas Tiles Limited v Briers* (1978) 144 CLR 202; *Gill v Australian Wheat Board; Gill v Grain Elevators Board of NSW* [1980] 2 NSWLR 795; *Daniels and Ors (formerly practising as Deloitte Haskins & Sells) v Anderson and Ors; Hooke v Daniels and Ors (formerly practising as Deloitte Haskins & Sells) Daniels and Ors (formerly practising as Deloitte Haskins & Sells) v AWA Ltd* (1995) 37 NSWLR 438 at 585, referred to.

REPRESENTATION:

Counsel:

Appellant:	C McDonald QC with J Neill
Respondent:	Mr Bryant with D Sweet

Solicitors:

Appellant:	Ward Keller
Respondent:	Cridlands

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IN THE FULL COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Thompson v Primary Producers Improvers Pty Ltd [2004] NTCA 12
Nos. LA8 of 2004 & LA12 of 2003 (20208047)

BETWEEN:

KEVIN DOUGLAS THOMPSON
Appellant

AND:

PRIMARY PRODUCERS IMPROVERS PTY LTD (ACN 009 611 821)
Respondent

CORAM: MARTIN (BR) CJ, THOMAS J & PRIESTLEYAJ

REASONS FOR JUDGMENT

(Delivered 22 October 2004)

Martin (BR) CJ:

Introduction

[1] This is an appeal against a decision of the Work Health Court. The appeal comes to this Court by way of reference from a single Judge.

[2] The appellant was employed by the respondent as a plant operator driving graders and other heavy equipment. On 3 October 1994 the appellant sustained severe and incapacitating injuries in a motor vehicle accident which occurred during the course of his employment.

[3] The appellant issued proceedings in the Work Health Court claiming benefits under the Work Health Act 1986 ("the Act"). The respondent accepted that the appellant had been incapacitated, but claimed that he was only partially incapacitated and had been able to earn an income since August 2001 such that he was not entitled to weekly payments of compensation pursuant to the Act.

[4] The Work Health Court found that the appellant was entitled to payments pursuant to the Act. In assessing the normal weekly earnings of the appellant, the Court included an amount of $200 to reflect the non-cash component of the appellant's wages. That non-cash component was the provision of food and accommodation at remote work sites. The Court rejected the appellant's submission that the allowance of $200 should be "grossed up" to take into account the effect of the appellant's liability to pay income tax on that amount.

[5] The appellant appealed against that part of the decision which determined that the allowance for board and lodging was not to be grossed up. The Judge referred that appeal to this Court.

[6] Prior to the injury, as required by the Fringe Benefits Tax Assessment Act 1986 (Cth), the respondent paid fringe benefits tax on the non-cash component of the appellant's remuneration. By virtue of s 23L of the Fringe Benefits Tax (Miscellaneous Provisions) Act 1986 (Cth), in the hands of the

appellant the benefit of that non-cash component was exempt income for the purposes of income tax.

[7] The conversion of the non-cash component of the appellant's remuneration into cash of $200 per week changes the character of that part of the appellant's remuneration for taxation purposes. It is no longer a fringe benefit. It is income in the form of cash upon which the appellant is liable to pay income tax. In other words, if the respondent is liable to pay only $200 per week to the appellant, as a consequence of the injury the appellant will be worse off. The value of the non-cash component (fringe benefit) to the appellant will be significantly reduced by the application of income tax to the cash value (non-fringe benefit) of that non-cash component. It is the case for the appellant that the amount of $200 per week should be "grossed up" by an amount sufficient to leave the worker with $200 per week clear after income tax has been deducted.

Right to Compensation

[8] The right of a worker to compensation pursuant to the Act is set out in s 53:

> "**Compensation in respect of injuries**
>
> Subject to this Part, where a worker suffers an injury within or outside the Territory and that injury results in or materially contributes to his or her –
>
> (a) death;
> (b) impairment; or
> (c) incapacity,

there is payable by his or her employer to the worker or the worker's dependants, in accordance with this Part, such compensation as is prescribed."

[9] The amount of compensation to be paid to a worker is set out in Div 3 of Pt V of the Act. Compensation payable for total incapacity and loss of earning capacity is set out in ss 64 and 65. Both sections involve a formula based upon "normal weekly earnings". That expression is defined in s 49(1) in the following terms:

> "Normal weekly earnings", in relation to a worker, means –
>
> (a) subject to paragraphs (b), (c) and (d), remuneration for the worker's normal weekly number of hours of work calculated at his or her ordinary time rate of pay;
>
> (b) in the case of a worker who had entered into concurrent contracts of service with 2 or more employers under which he or she worked full-time at one time for one employer and part-time at another time for one or more other employers – the gross remuneration for the worker's normal weekly number of hours of work calculated at his or her ordinary time rate of pay in respect of his or her full-time employment:
>
> (c) in the case of a worker who had entered into concurrent contracts of service with 2 or more employers under which he or she worked part-time at one time for one employer and part-time at another time for one or more other employers –
>
> (i) the gross remuneration for the worker's normal weekly number of hours of work calculated at his or her ordinary time rate of pay in respect of both or all of his or her part-time employments; or
>
> (ii) The gross remuneration that would have been payable to the worker if he or she had been engaged full-time in the part-time employment in which he or she usually was

engaged for the more or most hours of employment per week at the date of the relevant injury,

whichever is the lesser; or

(d) where

(i) by reason of the shortness of time during which the worker has been in the employment of his or her employer, it is impracticable at the date of the relevant injury to calculate the rate of relevant remuneration in accordance with paragraph (a), (b) or (c); or

(ii) subject to paragraph (b) or (c), the worker is remunerated in whole or in part other than by reference to the number of hours worked,

the average gross weekly remuneration which, during the 12 months immediately preceding the date of the relevant injury, was earned by the worker during the weeks that he or she was engaged in paid employment;" (my emphasis)

[10] A number of allowances are included in "normal weekly earnings". Section 49(2) provides as follows:

"(2) For the purposes of the definition of "normal weekly earnings" and "ordinary time rate of pay" in subsection (1), a worker's remuneration includes an over-award payment, climate allowance, district allowance, leading hand allowance, qualification allowance, shift allowance (where shift work is worked in accordance with a regular and established pattern) and service grant, but does not include any other allowance."

[11] The "normal weekly earnings" of a worker are not limited to the cash component of a worker's remuneration. In *Murwangi Community Aboriginal Corporation v Carole* (2002) 171 FLR 116, this Court held that non-cash benefits received by a worker in respect of rent, board and electricity were

part of the worker's remuneration and were not "other allowances" as contemplated by s 49(2). The essence of the Court's reasoning is found in the following passage [9]:

> "In our view there can be little doubt that the remuneration of a worker in this case is not limited to the wages paid to the worker but extends to include benefits of other kinds received by the worker in respect of services rendered for or on behalf of the employer. The identified non-monetary benefits form part of the reward for work done and services rendered and therefore comprise "remuneration … earned by the worker …"".

[12] As to the issue of "allowances" and the operation of s 49(2), the Court held that s 49(2) encompasses both payments that would qualify as an "allowance" and others that would not. The Court determined that the excluded payments were limited to allowances other than those specifically included in s 49(2). Non-cash benefits received by a worker in respect of rent, accommodation, electricity and food were held to be "part of the remuneration of the worker simpliciter" and not "other allowances" for the purposes of s 49(2).

[13] In substance, therefore, remuneration for the purposes of calculating normal weekly earnings includes non-cash components properly categorised as part of the reward for work done and services rendered.

[14] The Act does not specifically provide for the circumstances under consideration. Senior Counsel for the appellant based the appellant's contentions upon a beneficial construction of the Act which he submitted would achieve the purposes of the Act and fairness to the appellant.

Counsel recognised that the amount by which the value of the non-cash component should be grossed up to make allowance for taxation would necessarily depend upon the particular circumstances of the individual worker and their taxation liability. This would give rise to obvious practical difficulties from the perspective of the employer, but counsel submitted that the courts were used to dealing with these types of difficulties and a fair result could be readily achieved notwithstanding that mathematical precision would be impossible. Counsel also sought to draw comfort through an analogy with the principles applicable to the common law assessment of damages which he said was an example of the application of the proper principles notwithstanding the practical difficulties that might flow from that application.

Construction of the Act

[15] The preamble to the Act identifies that the Act is concerned with occupational health and safety in the Territory and with the rehabilitation of injured workers. The preamble also identifies that the Act is designed to "provide financial compensation to workers incapacitated from workplace injuries".

[16] The purpose of the Act was considered by this Court in *AAT King's Tours Pty Ltd v Hughes* (1994) 4 NTLR 185. In the context of questions concerning the onus of proof and whether regard could be had to overtime in assessing normal weekly earnings, the Court said (193 and 194):

> "In our opinion, it is a legitimate approach to the construction of the definition to look to the object of the legislation. The intention appears to be to provide to the worker during disability amounts by way of compensation calculated by reference to the normal weekly earnings which he could have counted upon receiving if there had been no disability. To that extent it reflects an "income maintenance" approach."

[17] The expression "income maintenance" was used by King CJ in *Francese v Corporation of the City of Adelaide* (1989) 51 SASR 522. The South Australian Court of Appeal was concerned with the construction of the Workers Rehabilitation and Compensation Act 1986 (SA) which established a scheme directed at estimating the amount a worker could reasonably have been expected to earn if the worker had not been disabled. In the following passage his Honour explained the notion of "income maintenance" in that context and distinguished the previous scheme which was based upon an assessment of past earnings (p 526):

> "It must be observed that the concept of average weekly earnings which are the measure of the compensation which is payable, is directed to the future and not to the past. It is directed to "the average amount which the worker could reasonably be expected to have earned for a week's work if the worker had not been disabled" – s 4(1). The average weekly earnings during the previous 12 months are relevant only as a factor which may be taken into account for the purpose of determining what could be expected to be earned during the period of disability – s 4(2). The underlying notion appears to be that of "income maintenance", as the heading to Div IV, in which s 35 appears, suggests, that is to say the maintenance during disability of the income which the worker would reasonably have expected to earn during the period of disability. The overtime excluded from average weekly earnings other than "overtime worked in accordance with a regular and established pattern" is therefore overtime which could reasonably be expected to have been worked during the period of disability if there had been no accident. Past overtime other than that worked in accordance with a regular and established pattern would also have to be excluded in the

computation of past average weekly earnings in so far as they are taken into account in estimating future weekly earnings.

In these respects the present Act differs markedly from its predecessor the *Workers Compensation Act* 1971. Under s 51 of that Act the weekly payment of compensation for total incapacity was equal to the average weekly earnings during the previous 12 months. There was no requirement to estimate what could reasonably have been expected to have been earned during disability. Overtime was completely excluded from the computation – *see s 63(d)*. The thrust of the present Act is quite different. The emphasis is upon estimating what the worker could reasonably have expected to earn during the period of disability. Average weekly earnings during the previous 12 months are merely taken into account as part of the process of estimation. The estimate is to include overtime worked in accordance with a regular and established pattern but not otherwise.

I think that those considerations throw light upon the meaning to be attributed to the expression "regular and established pattern" as used in the section. The objective of the provisions appears to be to provide to the worker during disability amounts by way of compensation equivalent to the earnings which he could have counted upon receiving if there had been no disability. I think that the expression should be understood in the sense which best achieves that objective.

Understood in that light, I think that the expression means no more than that the overtime, to be included in the computation of average weekly earnings, must be sufficiently established and worked with sufficient regularity to form part of the worker's regular income which is to be maintained during disability, and to constitute a solid basis for an estimate of the earnings which the worker could reasonably have been expected to earn during disability. … *If overtime is worked regularly and is an established incident of the employment so as to form in practice part of the regular income, a regular and established, albeit perhaps an uneven or disjointed, pattern exists*." (my emphasis).

[18] The approach of King CJ was followed by this Court in *AAT King's Tours*. The Court cited the passage from the judgment of King CJ that I have emphasised.

[19] In *Francese* King CJ adopted a purposive approach to the expression "regular and established pattern" which best achieved the objective of the legislation. His Honour adopted what might also be described as a liberal interpretation in favour of the worker. Such an approach accords with the beneficial character of the worker's compensation legislation.

[20] There can be no doubt that the court must adopt a purposive approach to the interpretation of the Act. As the Act is beneficial in character, it should be construed liberally in favour of the worker: *Murwangi Community Aboriginal Corporation v Carole* [2001] NTSC 85. However, it is also necessary to bear in mind the observations of Heydon J, with whom the other four members of the High Court agreed, in *Victims Compensation Fund Corporation v Brown* (2003) 201 ALR 260 at [33]:

> "To begin consideration of issues of construction by positing that a "liberal", "broad", or "narrow" construction will be given tends to obscure the essential question, that of determining the meaning the relevant words used require."

[21] The beneficial character of the South Australian worker's compensation legislation did not assist the worker in *GH Michell & Sons (Australia) Pty Ltd v Bockman* (1994) 176 LSJS 377. The circumstances under consideration in that case are of direct relevance to the issue before this Court.

[22] In *GH Michell*, the salary package of the worker had been comprised of cash together with the provision of a motor vehicle. The employer paid fringe

benefits tax on the value of the provision of the motor vehicle and no income tax was paid by the worker with respect to that benefit. As in the case of the appellant, when the worker received the monetary equivalent of the value of the motor vehicle component, that monetary amount was taxable in his hands. The worker claimed that the amount payable to reflect the value of the motor vehicle component should be increased to offset the taxation that he was required to pay as a result of the conversion of the non-cash component to cash.

[23] The Worker's Compensation Appeal Tribunal determined that once a money amount based on the value of the vehicle was included in the remuneration package in place of the use of the vehicle, the worker was required to bear the consequence of taxation. The Court of Appeal held that the decision of the Tribunal was correct, but in a judgment with which King CJ and Bollen J agreed, Mullighan J said he would express his reasons for the same conclusion in a different way. His Honour's reasons were as follows (382):

> "The respondent is entitled to income maintenance to be assessed in accordance with principles laid down in the Act. The amount of that benefit depends upon weekly earnings. Those earnings may include other than a cash component but they do not include the incidence of taxation upon those earnings. There is no reason to interpret the relevant provisions in the Act as to the method of assessment of income maintenance in that way. The obligation of the appellant is to pay income maintenance based upon earnings. If the taxation laws provide that the liability for taxation falls upon the employer in some respect, that does not affect the amount of the worker's earnings. Such is the case with the Fringe Benefits Tax Assessment Act. If there is a change in circumstances so that the liability for taxation falls upon the worker, that also does not affect his earnings. The liability for taxation arises independently of the Worker's Rehabilitation and Compensation Act and is irrelevant in the

> assessment of the level of income maintenance to which a disabled worker is entitled. The respondent is obliged to meet his taxation obligations, as is the case with all persons in the community with a taxable income, and the fact that the appellant was previously obliged to pay taxation with respect to a benefit which had formed part of the salary package of the respondent is of no significance in the assessment of the amount of income maintenance."

[24] The same issue was considered by Riley J in *NT Drilling Pty Ltd v McFarland* [2004] NTSC 23. The worker had submitted that a reduction in income by reason of the taxation regime as it applied to the cash value of a non-cash component would be in breach of the principle of income maintenance which underlies the Act. It was further submitted that the use of the word "gross" in relation to remuneration in s 49 of the Act demonstrated a legislative intention that the remuneration would be "grossed up" to offset the effect of income tax.

[25] Riley J rejected those submissions. The essence of his Honour's reasoning is found in the following passage [30]:

> "There is no suggestion that the "remuneration" referred to in paragraph (a) of the definition of normal weekly earnings means other than the remuneration of the worker before tax is deducted in the hands of the worker. In that sense it is gross remuneration. There is no reason to conclude that the word "remuneration" is to be understood in any different sense when used in paragraphs (b), (c) and (d) of the definition.
>
> Reference to the similarity of expression between paragraphs (a) and (b) of the definition demonstrates the word must be intended to have the same meaning in both paragraphs. Similar observations apply to the word where employed in paragraph (c) of the definition. In both paragraph (b) and paragraph (c) of the definition the word "remuneration" is qualified by the adjective "gross". Given the meaning of the word "remuneration" as discussed above, the

> expression "gross remuneration" cannot mean, as the worker submits, "grossed up remuneration". I agree with the conclusion of the learned magistrate that there is no reason to interpret the word "gross" as it is used in paragraph (d) to mean "grossed up"."

[26] Having reached the conclusion that the worker's submission should be rejected, Riley J referred to the decision in *Michell v Bockman* and cited the remarks of Mullighan J to which I have referred. His Honour rejected a contention for the worker that a relevant distinction exists between the South Australian legislation and the Act. He expressed the view that the provisions and underlying concepts of the two schemes are sufficiently similar for the decision of the South Australian Court of Appeal to be persuasive value. His Honour agreed with the reasoning in *Michell v Bockman*.

[27] Counsel for the appellant faced squarely the difficulties posed by the decisions in *Michell v Bockman* and *NT Drilling v McFarland*. He submitted that those decisions were wrong and that there are relevant distinctions between the South Australian and Northern Territory Acts. In addition, he submitted that the decisions were in error because they do not accord with the approach of Australian courts:

> "to the interrelationship between the assessment of damages in compensation cases in the broad sense and the incidents of taxation."

[28] In my opinion, there is no relevant distinction between the South Australian and Northern Territory legislative schemes. I do not regard the fact that the South Australian scheme looks to an estimate of future earnings as a point of

distinction for present purposes. Nor do I regard the absence of the word "gross" in the South Australian legislation as of any significance. There is a simple explanation for the inclusion of the word "gross" in subparas (b)–(d) of the definition of "normal weekly earnings" in the Act. When the definition of "normal weekly earnings" is read in its entirety, subpara (a) is concerned with remuneration from a single employer. The word "gross" does not appear in that subparagraph. By way of contrast, subparas (b) and (c) are directed to a worker who has earned remuneration from two or more employers during the relevant period. Hence the word "gross" is added to signal that the income from all employers should be taken into account. The expression "average gross weekly remuneration" is used in subpara (d) because that subparagraph contemplates the possibility of remuneration over the previous twelve months being earned from more than one employer or that a worker has been remunerated in whole or in part other than by reference to the number of hours worked. Thus the Legislature has directed that the "gross" remuneration from all employers or remuneration including both cash and non-cash components earned during the previous twelve months shall be the basis of the relevant calculation.

[29] In the absence of any relevant distinction between the South Australian and Northern Territory legislative schemes the decision of the South Australian Court of Appeal in *Michell v Bockman* is persuasive authority obstructing the appellant's path.

[30] The comparison with the principles applied to the assessment of damages is of limited assistance. The fundamental principle guiding the assessment of damages is compensation to the victim for that which has been lost. This principle was explained in *Haines v Bendall* (1991) 172 CLR 60 at 63 in the judgment of Mason CJ, Dawson, Toohey and Gaudron JJ in the following terms:

> "The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed; … compensation is the cardinal concept. It is the "one principle that is absolutely firm, and which must control all else": *Skelton v Collins* (1966) 115 CLR 94 at 128, per Windeyer J. Cognate with this concept is the rule, described by Lord Reid in *Parry v Cleaver* [1970] AC 1 at 13, as universal, that a plaintiff cannot recover more than he or she has lost."

[31] Consistent with that principle, in *Cullen v Trappell* (1980) 146 CLR 1, following the dissenting judgments of Gibbs and Stephen JJ in *Atlas Tiles Limited v Briers* (1978) 144 CLR 202, a majority of the High Court held that where earnings or profits lost would have been taxable if the plaintiff had received them, but the damages awarded to compensate the plaintiff are not taxable, in assessing damages for personal injuries based on a loss of earning capacity it is necessary to take into account the income tax which the plaintiff would have been liable to pay on the future earnings if he had received them. The Court was not dissuaded from the application of the fundamental principle by the practical difficulties that could attend the

assessment of the income tax that the plaintiff would have incurred in the absence of injury.

[32] Subsequent authorities have recognised the application of the principle regardless of whether taxation works in favour of the plaintiff or against the plaintiff. Adjustment is made to ensure that the plaintiff is neither under compensated nor over compensation: *Gill v Australian Wheat Board* [1980] 2 NSWLR 795 and *Daniels v Anderson* (1995) 37 NSWLR 438 at 585.

[33] While the scheme of the Act may be described in general terms as an income maintenance scheme, it is not a scheme that provides for compensatory damages. The Act does not attempt to put the worker in the same position as the worker would have been if the worker had not been injured. For example, in respect of incapacity extending beyond 26 weeks, the maximum compensation payable is 75 percent of the worker's loss of earning capacity (s 65). Provision is made for compensation for permanent impairment assessed by reference to a specified formula (s 71) related to normal weekly earnings.

Competing Views

[34] The rights of the worker are circumscribed by the words of the Act. Bearing in mind the context in which the relevant provisions appear, together with the purposes of the Act and the beneficial nature of its character, I must determine the meaning required by the words of the legislation.

[35] To the extent that the right to compensation depends upon "normal weekly earnings", the Legislature has based the assessment of "normal weekly earnings" on a worker's "remuneration". Subparagraph (d) of the definition of "normal weekly earnings" refers to "remuneration" … "earned".

[36] On one view, whether taxation liability falls upon the employer or the employee does not affect the worker's "remuneration". The "remuneration" is the reward for work done and services rendered before and independent of any consideration of the impact of the taxation laws. The respondent submitted that while the legislative scheme ensures that remuneration for the purposes of the Act includes relevant non-cash components of the remuneration, no reasonable construction of the Act can evince an intention to take into account the impact of taxation laws upon the non-cash component when converted into cash for the purposes of determining the worker's "remuneration".

[37] The construction urged by the respondent will have a significant adverse effect upon workers. Although the compensation scheme is to be distinguished from damages, nevertheless the general purpose and policy which underlies the Act seeks to avoid or ameliorate the adverse impact that injury and incapacity would otherwise have upon a worker's income. To that extent the construction urged by the respondent does not achieve the general purpose and policy of the Act.

[38] In the context of the non-cash component, what does a worker earn? While working the worker earns the value of the non-cash component to the worker and that value is exempt income for the purposes of income tax. When the non-cash component is converted into cash, the amount of cash into which that component is converted is determined by reference to the value of the non-cash component to the worker. The assessment is not of the cost to the employer.

[39] The appellant submitted that as the worker earned a value which was, as a matter of fact, exempt income, it is the value to the worker exempt or clear of taxation liability that the employer is liable to maintain. In substance the appellant argued that while the legislature may not have contemplated this precise factual situation, the nature and purpose of the legislative scheme supports this purposive and beneficial construction which promotes and achieves the object of the scheme. In support of this approach the appellant relied upon the remarks of McHugh J (as he then was) in *Kingston v Keprose Pty* Ltd (1987) 11 NSWLR 404 at 423:

> "In most cases the grammatical meaning of a provision will give effect to the purpose of the legislation. A search for the grammatical meaning still constitutes the starting point. But if the grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. It must give way to the construction which will promote the purpose or object of the Act.
>
> …
>
> Purposive construction often requires a sophisticated analysis to determine the legislative purpose and a discriminating judgment as to where the boundary of construction ends and legislation begins. But

> it is the technique best calculated to give effect to the legislative intention and to deal with the detailed and diverse factual patterns which the legislature cannot always foresee but must have intended to deal with if the purpose of the legislation was to be achieved."

Conclusion

[40] As Riley J pointed out in *NT Drilling v McFarland*, there is no suggestion that the "remuneration" identified in subpara (a) of the definition of "normal weekly earnings" is a reference to any amount other than the remuneration earned before tax is deducted. If the appellant is correct, because in the situation governed by subpara (d)(ii) the "remuneration" is comprised of both cash and non-cash components, the meaning of "remuneration" in subpara (d) is different from the meaning in subpara (a). When applied to both cash and non-cash components, on the appellant's case "remuneration" means cash component before tax, but non-cash component after tax.

[41] Notwithstanding the beneficial character of the Act and the adverse impact upon the worker to which I have referred, in my opinion an attempt to construe the provisions in the manner contended by the appellant crosses the boundary from permissible "construction" into "legislation". While "remuneration" is undoubtedly a wider concept than "pay", the ordinary meaning of "remuneration" is reward for services before tax. In my view "remuneration" for the purposes of "normal weekly earnings" must be given a consistent meaning throughout the definition, namely, remuneration before and independent of any taxation liability in the hands of the worker.

[42] The amount payable to the appellant to reflect the non-cash component of his remuneration is $200 a week and that amount is not to be grossed up to compensate for the appellant's liability to pay income tax. The appeal should be dismissed.

Thomas J:

[43] I have read the draft reasons for judgment prepared by Martin (BR) CJ. I agree with his reasons and agree the appeal should be dismissed. I have nothing to add.

Priestley AJ:

[44] I agree with the Chief Justice.
