Consolidated Press Holdings Limited v Wheeler [1999] NTSC 58

PARTIES:	CONSOLIDATED PRESS HOLDINGS LIMITED v MAXWELL RAYMOND WHEELER and ANOR.
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	209 of 1995
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JUDGMENT OF:	KEARNEY J

CATCHWORDS:

WORKERS' COMPENSATION – APPEAL – ENTITLEMENT TO AND LIABILITY FOR COMPENSATION

Persons liable to pay compensation – worker injured when employed by uninsured company constructing and repairing a concrete water tank pursuant to sub-contract with principal contractor - whether principal contractor or Nominal Insurer liable to pay compensation to the worker – meaning of "work undertaken by the principal contractor" in *Work Health Act* (NT), s 127(1) - varying judicial formulations of the appropriate test – relevance of "part and parcel" test – application of test a conclusion of fact

Work Health Act (NT), s 127(1)

Frauenfelder v Reid (1962-63) 109 CLR 42, reversing *Frauenfelder v Reid* (1961-62) 80 WN (NSW) 158, applied
Moir v Schrader (1936) 56 CLR 310, considered
Hockley v West London Timber and Joinery Co [1914] 3KB 1013, referred to
Cusack v Wright [1942] WCR 22, referred to
Skates v Jones [1910] 2 KB 903, considered
Spiers v Elderslie Steamship Co Ltd (1909) SC 1259, referred to
Workcover Authority of NSW v Dependable Taxi Trucks & Couriers (Sydney) Pty Ltd (1994) 10 NSW CCR 310, considered
Matchett v Wincol Homes Pty Ltd (1995) 11 NSW CCR 294, referred to
Luckwill v Auchen Steamship Company Ltd (1913) 108 LT 52, considered
Bush v Hawes [1902] 1 KB 216, considered

WORKERS' COMPENSATION – APPEAL – ENTITLEMENT TO AND LIABILITY FOR COMPENSATION

Persons liable to pay compensation – liability of principal contractor for injury to employee of sub-contractor – whether principal contractor entitled to be indemnified by the Nominal Insurer – meaning of "any person liable to pay compensation to the worker independently" of *Work Health Act* (NT) s127(3) – whether those words to be accorded their ordinary meaning – whether subcontractor the "employer" in s 167(1) –

Work Health Act (NT), s 126(1), s 127(2), s 127(3), s 127(5), s 129(1), s 167(1), s 168
Workers' Compensation Act 1927 (Tas), s 6(1), s 6(4)

Douglas v Minister for Aboriginal and Torres Strait Islander Affairs (1994) 34 ALD 192, followed
Cape Brandy Syndicate v IRC [1921] 2 KB 403, followed
Reardon v Scolyer [1984] Tas R 69, followed
Odgen Industries Pty Ltd v Lucas [1970] AC 113, followed
Australian Alliance Assurance Co Ltd v Attorney-General (Qld) [1916] St R Qd 135, followed
Minister for Resources v Dove Fisheries Pty Ltd (1993) 116 ALR 54, followed
Cooper Brookes (Wollongong) Pty Ltd v F.C.T. (1981) 147 CLR 279, applied.

REPRESENTATION:

Counsel:

Appellant:	T.J. Riley Q.C.

First Respondent:	J. E. Reeves
Second Respondent	I. Nosworthy

Solicitors:

Appellant:	Cridlands
First Respondent:	Martin & Partners
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Consolidated Press Holdings Limited v Wheeler [1999] NTSC 58
No. 209 of 1995

BETWEEN:

CONSOLIDATED PRESS HOLDINGS LIMITED
Appellant

AND:

MAXWELL RAYMOND WHEELER
First Respondent

and

THE NOMINAL INSURER
Second Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 31 May 1999)

The appeal

[1] This is an appeal from a decision of the Work Health Court in Alice Springs of 9 October 1995; Mr Gray CM held that the appellant was liable to pay workers' compensation in respect of an injury suffered by the first respondent ("the worker") on 28 October 1988.

[2] His Worship found that the worker was a 'worker' within the meaning of that term in the *Work Health Act* ("the Act"). He had been employed at the

relevant time by Rocter (NT) Pty Ltd ("the company"). On 28 October 1988 he was injured while at work, during the course of his employment by the company. The injury occurred at the company's work site on Dungowan Station in the Territory, where it was constructing and repairing concrete water tanks, pursuant to a contract it had with the appellant. For practical purposes, there was no distinction between the work of constructing the tanks, and the work of repairing them; both involved the same type of work.

[3] It was common ground that the injury was a fractured right wrist; this incapacitated the worker initially fully and then partially, the injury substantially limiting his use of his right arm and hand. He gave notice of his injury as required by the Act; at the time the matter came before his Worship, he had been receiving weekly compensation payments since October 1991. Judgment had been entered against his employer, the company, on 6 July 1994; in fact, the Act had deemed it liable to pay compensation, well before that date. So there was no dispute that the company was liable to pay compensation to the worker, in accordance with the terms of the Act.

[4] It was also common ground that the company did *not* hold, in respect of its liability under the Act to its workers, the insurance policy which s 126(1) of the Act required it to hold. I note that in such a case, the second respondent (herein "the Nominal Insurer") would normally be liable under s 167(1) of the Act to pay compensation to the worker, with a concomitant right under s 172(2) to recover the amount from the company.

[5] His Worship noted at p29 for his reasons for decision the admission in the following terms by the appellant: that it "was insured by the Territory Insurance Office at all relevant times in relation to its liability under the Act, and that the policy covered subcontractors at all relevant times in respect of liability under the Act". The question before his Worship, essentially, was which of the two, the appellant or the Nominal Insurer, was liable to pay compensation to the worker. Neither the company nor Laverton Nominees Pty Ltd, named as parties to the proceedings, appeared before his Worship, or at the hearing of this appeal.

[6] His Worship held that the appellant was liable under s 127(1) of the Act, as it then stood, to pay compensation to the worker; and that it was *not* entitled to be indemnified in that regard by the Nominal Insurer, under the then s 127(3) and s 167. It is this two-fold determination which is the subject of this appeal; the first is dealt with at pars [8]-[74], and the second at pars [75]-[111].

The grounds of appeal

[7] The 7 grounds of appeal the appellant ultimately relied on were that his Worship had erred in law in the following respects –

1. in finding that the work being done by the company as sub-contractor to the appellant was "work undertaken by the principal contractor [the appellant]", within the meaning of those words in the then s 127(1) of the Act;

2. in finding that the appellant was not entitled to be indemnified by the Nominal Insurer by operation of the then s 127 and s 167 of the Act;

3. in failing to find that the appellant was entitled to be indemnified by the Nominal Insurer by operation of the then s 127(3) of the Act;

4. in finding that the appellant was liable to the worker for workers' compensation payments;

5. in failing to find that the Nominal Insurer was liable to the worker for workers' compensation payments, pursuant to the then s 167(1) of the Act;

6. in failing to properly interpret or consider the definition of "work undertaken by the principal contractor" within the meaning of the then s 127(1) of the Act; and

7. in failing to properly apply the provisions of the then s 127 and s 167 of the Act.

I turn to these grounds of appeal. Grounds 1 and 6 in essence cover the same point; so do Grounds 2 and 3. Grounds 4 and 5 will be determined by the result of Grounds 1 and 6; and Ground 7 by the result of Grounds 2 and 3.

Grounds 1 and 6 in par [7]: the "work undertaken" issue

[8] His Worship rightly considered that the interpretation and application of the then s 127(1) was the "central legal issue" in the case. Section 127 specifies

the circumstances in which a person engaging a contractor to carry out work, is liable to pay workers' compensation to an employee of that contractor who is injured in the course of that work. At the relevant time, s 127(1) provided:

> "Where a person (in this section referred to as the 'principal contractor'), *in the course of or for the purpose of his trade or business*, contracts with another person (in this section referred to as 'the contractor') for the execution by or under the contractor of the *whole or a part of any work undertaken by the principal contractor*, the principal contractor shall be liable to pay to a worker employed in the execution of the work compensation under this Act which he would have been liable to pay if that worker had been immediately employed by him." (emphasis added)

[9] It can be seen that s 127(1), which imposes a direct liability upon a 'principal contractor' to pay compensation, specifies two conditions both of which must be satisfied before that liability exists. The first is that the principal contractor made the contract for the repair/construction of the water tanks "in the course of or for the purpose of [its] trade or business"; that was admittedly the case here on the facts, and was never in issue. The second condition for the principal contractor to be liable, gives rise to the matter in issue on this ground of appeal: was the construction/repair of the tank, part of "work undertaken" by the appellant? The words "work undertaken by the principal contractor" are words about which "great difficulty has always been felt", as Dixon CJ put it in the leading authority on provisions such as s 127(1), *Frauenfelder v Reid* (1962-63) 109 CLR 42 at 47. It is convenient to note some aspects of that authority, at this point.

[10] The facts in *Frauenfelder v Reid* (supra) were that the subdivisional fencing on a sheep station in New South Wales had been destroyed by a bush fire. The graziers engaged a contractor to re-erect about 10 miles of this fencing. They provided material, posts and wire. In the course of executing that work Mr Frauenfelder, an employee of the contractor was injured; he sought compensation from the graziers under the NSW provision similar to s 127(1). Before the Workers' Compensation Commission, the graziers were held liable to pay workers' compensation; his Honour held first, that the fencing work was "work undertaken by the principal contractor [the graziers]"; and second, that it was not "agricultural work" within the meaning of a proviso to the NSW provision which would have excluded the principal from liability, and which does not exist in s 127(1). This decision was reversed by the Full Court on appeal; see *Frauenfelder v Reid* (1961-62) 80 WN (NSW) 158. The majority considered that it was open on the evidence for the Commission to make its first finding, but not the second. Hardie J, dissenting from the majority on the first point, considered that the first finding was not open without evidence of the principal's course of business, and the manner and extent to which fencing repair and renewal work was carried out from time to time; on that basis, his Honour agreed that the appeal must be allowed, and found it unnecessary to consider the second finding. The High Court upheld the worker's appeal, agreeing with the majority of the Full Court on the first point, and with the Commission on the second.

[11] Dixon CJ observed at 47:

> "The phrase ["work undertaken by the principal"] seems to suggest or imply that the principal must undertake with someone or other [other than 'the contractor'] to do the work, yet that obviously is not the meaning. The question has been dealt with in England, where the provision originated, and in Australia. This Court had occasion to discuss it in *Moir v Schrader* (1936) 56 C.L.R. 310, where some of the English authorities are collected. There is obviously *a question* in this case *whether [the graziers] can be considered as having "undertaken" the work of subdivisionally fencing their property* after the devastation of the bush fire. It is of course work undertaken not for the benefit of strangers but for the benefit of their own business." (emphasis added)

[12] His Honour said no more about *Moir v Schrader* (supra), but turned to explore the question emphasized in par [11] at 47-48:

> "In *Skates v Jones & Co.* [1910] 2 K.B. 903, *Farwell* LJ says: 'The man of business or tradesman is not made a principal because he is in business or in trade, but because the particular work in question is his own trade or business' [at p910]. *This means that he is regarded as having undertaken to execute or have executed the particular class of work because it is essential to the trade or business he has assumed to conduct.* The form of the section suggests that something went wrong in the drafting in the manner in which it is expressed, but *the courts have adopted an interpretation which appears to cover cases where the necessary conduct of the business involves the performance of particular work.* If that be so the owner of the business is regarded as having 'undertaken' it for the purposes of the section. At all events, in the present case the view seems open that [the graziers] should be treated as having 'undertaken' the subdivisional fencing of their property. From this view in the Supreme Court *Hardie J* dissented on the ground that *the work of fencing could not be considered a component part* of the operations involved in conducting the grazing property as a business or trade; it had no direct connexion with the relations of the proprietors to outsiders. Having regard to the construction which has been given to the provision judicially, I think *the view should be adopted that it is capable of embracing work done on a station which forms a recognized or necessary incident of conducting a station*, although it is not work which does directly relate to or affect outsiders or the relations of the station owners with outsiders." (emphasis added)

[13] Three general points may be noted about what Dixon CJ said in par [12]. First, the first and final passages emphasized gave a more expansive meaning to the immediately preceding quotation from Farwell LJ, than it had hitherto had, as regards what the "particular work" must be. His Lordship there spoke of the work in question as being treated as "work undertaken by the principal", if it *was* the principal's "own trade or business"; there was no reference in the corresponding English provision to "the whole or a part of any work undertaken", as there is in s 127(1). Dixon CJ here construed what his Lordship said as meaning that the work in question was "work undertaken by the principal" if it was '*essential'* to the conduct of the principal's own business, or (in the final passage emphasized) a '*recognized or necessary incident*' of conducting that business. These concepts do not appear to be the same as the concept his Lordship had in mind in 1910; work may be regarded as essential to, or a recognized or necessary incident of, the conduct of the principal's business, without *being* that actual business. Dixon CJ had earlier referred as appeared in par [11], without comment, to the fact that the words "work undertaken by the principal" had been discussed in *Moir v Schrader* (supra). In that case his Honour had concluded at 324 – see par [56] – that it was not sufficient to qualify as "work undertaken" that the work in question was "necessary" to enable the principal to conduct his trade or business; it also had to be "a component part" of the operations of his business, if it was to qualify. His Honour's conceptual approach in *Moir v Schrader* (supra)

appears to accord more closely with that of Farwell LJ in *Skates v Jones & Co* (supra) in par [12]. I consider that his Honour's formulation in *Frauenfelder v Reid* (supra) shows in the intervening 26 years he had modified his view of what the words "work undertaken by the principal contractor" entail, in a way which made them less of a limitation on the liability of a principal under s 127(1).

[14] Second, in the second passage emphasized in par [12], Dixon CJ states that the effect of court decisions is that it is sufficient to attract liability to the principal under s 127(1) if the performance of the work in question is *involved* in the *necessary conduct* of the principal's business. This appears to mean that it is sufficient for the work to be treated as "work undertaken by the principal", if that which is necessary for the principal's business to be carried on involves the work in question being performed. Again, this contemplates that the work in question, while it must be performed if the principal is to conduct his business, need not be the actual business itself or part of it.

[15] Third, in the third and fourth passages emphasized in par [12], Dixon CJ appears either to be spelling out what he considers is meant by the test whether the work in question is "a component part" of the principal's trade or business – that is, that it embraces work which is "a recognized or necessary incident of conducting" that business – or is indicating that the "component part" test should not be applied to the work in question, and the

proper test is whether it is a "recognized or necessary incident" of conducting the business. I think the latter is what his Honour had in mind.

Certainly his Honour's approach in this respect stands in sharp contrast to the approach he had earlier adopted in *Moir v Schrader* (supra) to the words "work undertaken by the principal", where he construed them in a way which had a more limiting effect on the liability of the principal under s 127(1); see generally pars [23]-[25], [56]. In *Moir v Schrader* (supra) at 321-3 his Honour had cited decisions of the Court of Appeal (Eng), including observations by Pickford LJ in *Hockley v West London Timber and Joinery Co* [1914] 3 KB 1013 at 1019 where, in holding that the work in question in that case was not "work undertaken by the principal" because it was "not part(s) of the actual operation of [the principal's business]", his Lordship said that –

> "The authorities make it quite clear that it is not enough that the work [in question] should be incidental to, or even necessary for, the preparation of the work which is actually done by the principal."

Dixon J (as his Honour then was) had considered at 323 that "the interpretation adopted by the English Court of Appeal" to "work undertaken by the principal" should be applied to Australia. It seems clear enough that his Honour's approach to that interpretation had changed radically by 1963, though he did not say so in *Frauenfelder v Reid* (supra).

[16] In *Freuenfelder v Reid* (supra) Windeyer J said at 50:-

> "Without attempting an exhaustive definition it must, I think, be accepted that the expression 'work undertaken by the principal' … *covers also any work the doing of which is part and parcel* of the business undertaking of the principal. Whether or not some particular work falls within the enactment then becomes ultimately a question of fact." (emphasis added).

In etymological terms, "part and parcel" is an idiomatic doublet. It emphasizes that to qualify as "work undertaken by the principal" the work in question must be an essential or integral portion of the principal's business undertaking.

[17] Owen J said at 57 after quoting, at par [56], what Dixon J concluded in *Moir v Schrader* (supra):

> "It is, of course, common knowledge that the erection and repair of fencing is work *necessary* to be done to enable a grazing business to be carried on and, although it could not be said in the present case that the [graziers'] trade or business was that of erecting fences, I think it was open to the learned Commissioner to find, as he did, that the work here in question was a 'component part' of the grazing business carried on by them." (emphasis added; quotes in original)

[18] I note in passing that in the Full Court in *Frauenfelder v Reid* (supra) Hardie J had summarized the view of the members of the High Court in *Moir v Schrader* (supra), at 168-9:-

> "… all four judges agreed that the section [corresponding to s127(1)] came into operation only when the work in question was not only carried out in the course of or for the purposes of the trade or business, but also when it was of a particular type of work or activity. Starke J [(1936) 56 C.L.R., at p.319], limited the operation of the section to work which is 'part and parcel of his own trade or business or in the usual course of his trade or business'. Dixon J (as he then was) [(1936) 56 C.L.R., at p.324] limited it to work that formed 'a component part of the operations' and not to work which is 'preliminary or ancillary or incidental to them'. His Honour

> expressed the view [(1936) 56 C.L.R., at p.323], that the question must be determined from a consideration of 'the course of the principal's trade or business and the manner in which he conducts it'. His Honour indicated [(1936) 56 C.L.R., at p325] that activities do not become a component or essential part of the business for the purpose of this principle unless they have become sufficiently 'repeated and systematic'. Evatt J (as he then was) referred [(1936) 56 C.L.R., at p330] to the contract requiring the performance of work ' which is an essential part of the very trade or business in which the principal is at the time engaged'. On the same page he makes reference to the activity in question being 'the central feature of the business'. McTiernan J refers to operations being 'habitually performed' [(1936) 56 C.L.R., at p334]. His Honour indicated [(1936) 56 CLR at p336] that the question was to be decided by a consideration of the question as to whether the work in question was 'proper to the respondents' undertaking', i.e., was 'an integral part' of it.
>
> It is clear that the decision in *Moir v Schrader* [(1936) 56 C.L.R., 310] draws an emphatic distinction between activities which constitute an integral or essential or component part of the particular business conducted and those which, though carried out for the purposes of the particular business, are ancillary or incidental or collateral to the main or central feature of the business".

I respectfully agree with his Honour's summary of what was said in *Moir v Schrader* (supra), to which I next turn.

[19] In *Moir v Schrader* (supra) the respondents, a solicitor and a retired bank manager, bought some timbered land. They did so, intending to subdivide it and sell off the subdivided areas as farm blocks. They set about clearing and cutting down the timber, preparatory to subdivision. They resolved to cut up the small trees into firewood blocks and sell the firewood to the public. To this end, they arranged with contractors, who were doing certain work for them preparatory to the subdivision, to cut the smaller trees into lengths suitable for firewood. They obtained machinery and tools to enable

the contractors to do this, and contracted with them to erect a shed over this machinery. During a test of this machinery when installed, a worker employed by the uninsured contractors was injured; he claimed against the respondents.

[20] The Commission found that the respondents were principals in a firewood business which had commenced at the time, and in the course of and for the purposes of that business had contracted with the contractors for them to execute part of the work undertaken by the respondents; and awarded compensation against them pursuant to the equivalent of s 127(1) of the Act. The Full Court of the Supreme Court on a reference held that the Commission had erred in law: the respondents were not 'principals', were not carrying on a firewood business at the time, and in any event there was no evidence on which the Commission could find that the worker was cutting firewood blocks for any such firewood business. On appeal to the High Court, Starke and Dixon JJ considered that there was no evidence to warrant a finding that the case was within the equivalent of s 127(1). Starke J considered that the work in question had to be part of "work undertaken by the principal", citing *Skates v Jones & Co* (supra) and *Hockley v West London Timber and Joinery Co* (supra); his reasons are at par [22]. Dixon J's reasons are at par [23]-[25]. Evatt and McTiernan JJ differed from the Full Court; they considered at pars [26] and [27] that there was evidence which supported the decision of the Commission that the work

in question was part of the principal's business. The Court being equally divided, the decision of the Full Court was affirmed.

[21] I note that one learned author has suggested that in *Moir v Schrader* (supra) there was "little in common in the reasons given by the four members of the High Court" and that it was "by no means clear what [the] principles are", for which it was later cited as authority in *Cusack v Wright* [1942] WCR 22; see C.P.Mills *Workers Compensation (New South Wales)* 2nd ed., 1979, at 165-6. In *Cusack v Wright* (supra) the injured worker was employed by a person who had contracted with a grazier to burn off his land preparatory to growing wheat on it. The Full Court of the Supreme Court held that the grazier had not undertaken the work of clearing of land; and that there was "ample material" to warrant the Commission's finding that the work of burning off was not "work undertaken by the [grazier] in the course of or for the purpose of his trade or business as a wheat farmer". It can be seen that the Full Court considered that the work of burning off, while a necessary preliminary to the principal's business of wheat growing, was not part of that business.

[22] In *Moir v Schrader* (supra) Starke J at 319-320 expressed his reasons as follows. He considered that it was –

> "… now … settled that the [NSW provision similar to s 127(1) of the Act] refers to cases in which a person contracts for the execution by a contractor of any work *part and parcel of his own trade or business*, or in the usual course of his trade or business." (emphasis added).

His Honour continued:

> "I rather doubt the finding of the commission that the respondents had commenced a firewood business. Assuming, however, that that finding was open to the commission, *is there any evidence* which supports the further finding [of the Commission] *that the work which [the contractors] contracted to perform* for the respondents *was part and parcel of the firewood business,* or in the usual course of that business? In my judgment, there is no evidence to warrant any such finding. … *That work* [to erect a shed and install a saw-milling plant, for which they were engaged] *may have been incidental to and even necessary for the purpose of carrying on a firewood business, but it was not part and parcel of the work of a firewood business,* or in the usual course of such a business." (emphasis added)

It can be seen that his Honour applied the "part and parcel" test, later applied by Windeyer J in par [16], drawing a distinction between work which is an essential or integral part of the principal's business, and that which is "incidental to" the business or "even necessary" for the purpose of carrying it on.

[23] At 320 Dixon J observed that in England the provision equivalent to s 127(1) did "not extend to all work done in the course of or for the purpose of the trade or business of the principal". Rather, the principal's liability was "*limited to workmen employed in the execution of work forming part of the operations which constitute the exercise of the principal's trade or business*" (emphasis added). His Honour (at 320) then cited the passage from Farwell LJ's judgment in *Skates v Jones & Co.* (supra) at 910 set out in par [12], and (at 321) noted Kennedy LJ's observations in that case at 912 to the effect that the principal 'undertakes' work "because he has adopted it as his particular trade or business". He then referred (at 321-3) to other

English cases which illustrated "the limitation" which this view of "work undertaken" imposed. Thus in *Spiers v Elderslie Steamship Co Ltd* (1909) SC 1259, although the shipowners' business involved maintaining their ships' boilers in good condition, the operation of cleaning them was not one which they undertook as part of their business.

[24] His Honour at 320 and 324 expressed his own views, in the two passages quoted in par [56]. It is clear from what his Honour there said that he considered that to fall within s 127(1) "work undertaken" had to be "work for the performance of which [the principal] has assumed responsibility" (at 324), that being a matter to be determined "from the course of the principal's trade or business and the manner in which he conducts it" (at 323. As can be seen from the second passage quoted in par [56], his Honour at 324 considered that the work in question, to qualify as "work undertaken by the principal", had to be not simply "necessary to enable the principal to carry out the operations" of his trade or business, but had also to "form a component part" of those operations, as opposed to merely contributing or conducing to their performance, or being "preliminary or *ancillary or incidental* to them". (emphasis added). It may be noted that the words last emphasized appeared in the corresponding but differently-worded s 4 of the *Workmen's Compensation Act* 1897 (Eng); there it is expressly provided that the section does *not* apply where the contract is for work "which is merely ancillary or incidental to, and is no part of, or process in, the trade or business carried on by such undertakers respectively". No such exception

is expressed in the statutory provision considered in *Moir v Schrader* (supra), or in s 127(1).

[25] His Honour did not consider on the facts that the respondents had commenced any business of selling firewood. At 324 he considered that the injury occurred when the worker was "performing work which the principals had not 'undertaken'." At 326 he held that "the work the principals assumed to perform or undertake [the subdivision and sale of land] did not include the cutting of the firewood", which was an "incident of a land speculation". The question of what work the respondents 'undertook' depended 'on the scope of the trading or business activities they assumed'.

[26] Evatt J considered (at 330) that the test for whether the work in question was "work undertaken by the principal", was whether it was work which was "an essential part of the very business or trade in which the principal is at the time engaged." This appears to be the same as the "component part" test of Dixon J in par [24] and the "part and parcel" test of Starke J in par [22]. The contractor has to be "really conducting a portion of the principal's own business". His Honour considered (at 330) that "cutting wood by means of a saw was the central feature of the business then carried on by the respondents, and was part of 'work undertaken' by the respondents"; this was a question of fact.

[27] Like Dixon J at par [24], McTiernan J considered at 334-5 that the English cases showed that it was "not sufficient" to establish liability under the

equivalent of s 127(1) "to prove that the work [the worker] was doing at the time he was injured was incidental to or even necessary for the respondent's business". However, His Honour considered (at 336) that the work in which the worker was then engaged was "an integral part of the [respondent's] undertaking of clearing the land and selling the wood."

It is next convenient to trace what happened in the present case in the Work Health Court.

The case in the Work Health Court

[28] The work contracted for was the construction (or repair) of several 22,000 (or 45,000) gallon water tanks, to be used in the course of or for the purpose of the appellant's business of raising cattle; in this instance, in the course of the appellant doing so by agisting its cattle on Dungowan Station, held by Laverton Nominees Pty Ltd under a pastoral lease.

[29] The appellant's submission before his Worship as to whether this work was "work undertaken by the principal" was that on a proper construction of s 127(1) of the Act, the worker was employed at the time by the company in the performance of a contract for the construction (or repair) of a water tank on Dungowan, and that work did *not* form part of the normal work (cattle raising by agistment) undertaken by the appellant.

[30] In terms of s 127(1) his Worship found that the work being executed by the company for the appellant on Dungowan Station was contracted for "in the course of or for the purpose of [the appellant's] trade or business"; and,

importantly, that it was "work undertaken by the [appellant as] principal contractor". This second finding is the subject of this ground of appeal. The first finding is not contested.

[31] In reaching that conclusion his Worship focused in his reasons for decision on the meaning of the phrase "work undertaken by the principal contractor" in s 127(1). He noted in that regard that the appellant "relied heavily" on what was said in *Moir v Schrader* (supra); he discussed the submissions in relation thereto. He noted the appellant's submission to the following effect: that one test of the meaning of the phrase, derived from *Moir v Schrader* (supra), was whether the work in question had ever been done *directly* by the principal; that the evidence showed that the principal had *always* engaged in tank construction through contractors; that pastoral companies in general did *not* undertake the work of constructing water tanks; and that because the appellant itself had never *itself* carried out such work, the work in question was *not* "part and parcel" of its operations or business, and therefore *not* part of the "work undertaken" by it, in terms of s 127(1). His Worship found that the work in question involved a level of expertise that could only be provided by an outside contractor, not by a pastoralist.

[32] His Worship also noted what was said by Dixon CJ and Windeyer J in *Frauenfelder v Reid* (supra) at 47-8 and 50 respectively, relating to the construction of the phrase "work undertaken by the principal", and its application in the circumstances of that case.

[33] His Worship noted that the submissions by the Nominal Insurer also relied on *Frauenfelder v Reid* (supra), particularly the approach of Dixon CJ at 47-48. Its submission was that the "necessary conduct" of the business of agisting cattle required that the work of constructing or repairing water tanks be carried out. And hence that that work, being by its *nature* "necessary" to the conduct of the principal's business, was 'work' within the concept of "work undertaken by the principal", under all 3 tests formulated by the members of the Court in *Frauenfelder v Reid* (supra) in par [37]. It further submitted that the appellant had a clear obligation, under the terms of its agistment agreement with Laverton Nominees Pty Ltd, to construct and/or repair the water tanks on Dungowan; it had agreed with that company to undertake a variety of activities for the purpose of raising its cattle on Dungowan.

[34] Having considered the evidence and the various submissions, his Worship at pp27-28 expressed his conclusions on whether the work in question was "work undertaken by the principal", viz:

> "I am satisfied that pursuant to the Agistment Agreements, [the appellant] was in fact running a pastoral business which by virtue of its very nature involves the provision of water to cattle (so much is common sense) and as a matter of logic involved the construction and/or repair of water tanks for the purposes of providing that water. *The provision of water was* fundamentally and inescapably *part and parcel of the running of a pastoral business. The provision of tanks* (or tank/bore related facilities) to get that water to the cattle *was therefore also part and parcel of [the appellant's] business.* … Tanks are a *necessary element in the achievement of a basic requirement of the business* – watering cattle. Tanks had to be provided either by building new ones or repairing old ones. Construction or repair of water tanks was therefore, in my opinion,

> clearly 'work undertaken by the principal contractor ([the appellant])' and was well and truly within the scope of section 127(1). The fact that on the evidence it involved a level of expertise which could only be provided by an outside contractor is ultimately not decisive.
>
> In my opinion the situation is directly analogous to the erection and repair of fencing on a grazing or pastoral property which was the activity involved in [*Frauenfelder v Reid* (supra)]. To paraphrase Owen J in that case [at 57], it is common knowledge that erection and repair of watering facilities (including tanks) is necessary to enable a grazing business to be carried on and is therefore 'a *component part*' of the grazing business being conducted. [The appellant] was not running a business of tank construction and repair any more than the [graziers], in *Frauenfelder*, were running a business of fence construction and repair.
>
> In summary, I adopt and apply *the wide meaning* given to the [equivalent of s 127(1)] in *Frauenfelder* and *find* that in constructing (or repairing) the water tanks in question, [the appellant] was undertaking an activity which was, by reference to the nature of its business, *part and parcel* of that business." (emphasis by underlining, in original; other emphasis added)

It can be seen that his Worship referred to the work in question as being "necessary [to] … a basic requirement of the business", applied the "part and parcel" test in making his ultimate finding in par [6], referred to the "component part" test, and construed the words in issue as having "the wide meaning" given them in *Frauenfelder v Reid*. The words "part and parcel", and "component part" are 2 of the 3 formulations by the judges in *Frauenfelder v Reid* (supra); see par [37].

[35] Before reaching this conclusion his Worship had noted (p19), in considering what the words "work undertaken by the principal" meant, that:

> "Provisions in various pieces of legislation cast in language similar to, or identical with that of section 127, have been the subject of much judicial scrutiny".

In par [34] his Worship in his conclusions explicitly adopted and applied what he termed "the wide meaning" given in *Frauenfelder v Reid* (supra) to a provision similar to s 127(1), before making his finding by applying the "part and parcel" test. As to the reference to "the wide meaning", I note that his Worship had earlier observed (p24) that the Court of Appeal in New South Wales in *WorkCover Authority of NSW v Dependable Taxi Trucks & Couriers (Sydney) Pty Ltd* (1994) 10 NSW CCR 310 at 318, in applying the "part and parcel" test, had described *Frauenfelder v Reid* (supra) as having –

> "*given an extensive meaning* [to the words 'work undertaken by the principal'] … *The expression was held* not to be limited to work which the principal had contracted to do for someone else**,** but *to cover also any work the doing of which was part and parcel of the business undertaking of the principal:* see Dixon CJ at 47-8, Windeyer J at 50, and Owen J at 57. *I think this Court is bound to apply that construction"*. (emphasis added)

I consider that his Worship followed the approach in *Workcover Authority of NSW* (supra). I note in passing that neither Dixon CJ nor Owen J used the expression "part and parcel" in their judgments in *Frauenfelder v Reid* (supra); this was the test used by Windeyer J at 50 – see pars [16] and [37]. It was also the test used by Starke J in *Moir v Schrader* (supra) in par [22], in *Workcover Authority of NSW* (supra), and in *Matchett v Wincol Homes Pty Ltd* (1995) 11 NSW CCR 294 at 304 – 306.

[36] *Work Cover Authority of NSW* (supra) involved a provision similar to s 127(1). A worker employed by the uninsured respondent was injured while at a company's premises, delivering goods to the company. He sought to recover from the Authority (the equivalent for the present purposes of the Nominal Insurer) or, alternatively, the company. An award was made against the Authority. The Court of Appeal allowed the appeal; applying *Frauenfelder v Reid* (supra), it made an award against the company. It held that by virtue of the statutory provision corresponding to s127 (1) the company was 'the principal' for the purposes of the phrase 'work undertaken by the principal'; this was because on the evidence the worker's delivery of the goods to the company was "work undertaken by the principal" (the company) because the delivery and receipt of such goods was "part of work undertaken by [the company]", and the delivery was made pursuant to the principal's contract in that regard with the respondent, made "in the course of [the company's] trade or business".

The submissions on appeal

[37] *Frauenfelder v Reid* (supra) is the most recent relevant decision of the High Court on provisions such as s 127(1). Like the Court of Appeal in New South Wales in *Work Cover Authority of NSW* (supra) I am bound to apply the High Court's construction of the subject words in s 127(1); as was the learned Chief Magistrate. In *Frauenfelder v Reid* (supra) all 3 members of the High Court held that the graziers were liable to pay compensation in respect of Mr Frauenfelder's injury; see pars [12], [16] and [17]. As to

whether the fencing work was "work undertaken by the principal contractor [the graziers]" their Honours formulated the applicable test in different ways, characterizing the work of fencing variously as: "a recognised or necessary incident of conducting a station" (Dixon CJ at 47-48, see par [12]); "part and parcel of the business undertaking of the [grazier]" (Windeyer J at 50, see par [16]); and a 'component part' of [the graziers'] grazing business" (Owen J at 57, see par [17]).

[38] In reaching his conclusion in par [34] that the work of constructing and repairing water tanks was "work undertaken by the principal contractor", his Worship had noted (p24) that the three "tests imposed by the [High] Court in *Frauenfelder*" - which he there described respectively as "necessary conduct of the business", "part and parcel of the business undertaken" (sic), and "a component part of the business" - had been relied on by the Nominal Insurer; it had submitted that the work in question met those tests, and was hence within the scope of "work undertaken by the principal".

A preliminary issue

[39] Against that background Mr Nosworthy of counsel for the Nominal Insurer submitted that his Worship's application in par [34] of the *Frauenfelder* legal tests to the evidence in the case gave rise only to a question of fact, and therefore could not found an appeal under s 116(1) of the Act, which limits an appeal to "a question of law". He submitted that this had been

admitted before his Worship by the then counsel for the appellant, who had characterized the question whether the subject work fell within s 127(1) as a question of fact, relying on what Windeyer J said in *Frauenfelder v Reid* (supra) in the last sentence quoted in par [16].

[40] Mr Riley QC of senior counsel for the appellant accepted that *once* the correct legal test to determine whether the work was "work undertaken by the principal contractor", had been applied, whether the subject work fell within that category involved only a question of fact. However, he submitted that while his Worship had correctly identified the relevant authorities, he had deduced from them *the wrong legal test,* in applying s127(1)*;* by doing so he had misapplied the law in the course of reaching his conclusion that the work in question was "work undertaken by the principal". I consider that the question whether or not his Worship identified and applied the correct legal test in determining that the work was "work undertaken by the principal" involves a question of law, within the meaning of s 116(1) of the Act.

The appellant's submissions

[41] In *Frauenfelder v Reid* (supra) their Honours formulated the test to determine whether the work being carried out was "work undertaken by the principal", in 3 different verbal formulations; see par [37]. His Worship had specifically sought to identify these tests at p24 of his reasons; see par [38]. In his conclusions at par [34] it can be seen that he used the language of the

formulation by Windeyer J – "part and parcel" – and purported to paraphrase and apply the "component part" test formulated by Owen J in par [17], before adopting and applying "the wide meaning … in *Frauenfelder*", and finally expressing his finding in terms of Windeyer J's "part and parcel" test set out in par [16].

[42] Mr Riley nevertheless submitted that his Worship in par [34] had applied the wrong legal test to decide whether the work carried out was "work undertaken by the principal", in terms of s 127(1). He submitted that it was necessary to examine the *authorities from which* the tests in *Frauenfelder v Reid* (supra) at par [37] were derived, in order to determine their proper ambit and application as a matter of law; in that connection, he referred to *Skates v Jones* (supra) at 907 and *Moir v Schrader* (supra) at 319, 322-3. I turn to the former case; the latter has been considered at pars [19]-[27].

[43] Mr Riley noted that in *Skates v Jones* (supra) at 907–8, Cozens-Hardy MR observed that:

> "It seems to me that the only question open to discussion in this Court is this: Was the particular work 'undertaken' 'in the course of or for the purposes of' the trade or business of the principal? It is not everything done in the interest of the trade or business which falls within [the relevant provision]. I shrink from saying that a cotton spinner who finds one of his boilers out of order and contracts with a boilermaker to replace it with a new boiler is liable to pay compensation to one of the workmen employed by the boilermaker. That work was *required* by the cotton spinner, but not '*undertaken'* by him. He never held himself out as a boilermaker. It was not part of his trade or business to erect boilers, and the whole section has no application to him. If, however, a man who carries on the trade of a builder builds a house for himself, but contracts with another builder to do part of the work, I think such a case would fall within the

> section. This construction of the section is consistent with the views of Lord M'Laren and the Lord Justice-Clerk [in *Zugg v J & J Cunningham Ld* (1908) SC 827]".

Mr Riley submitted that this approach, which imposes a limitation on what falls within "work undertaken" s 127(1), had been consistently applied. It contemplated that the work in question had to be work which the principal usually undertook in the course of or for the purposes of his own trade or business. He submitted that while the construction of the tank was *required* to provide water to the cattle, it was *not* part of "work undertaken by the principal [the appellant]" in this sense, within s 127(1). Further, the appellant did not construct such tanks itself; it lacked the capacity to do so.

[44] Mr Riley submitted that *Hockley v West London Timber and Joinery Co* (supra) showed that work was not "work undertaken by the principal", merely because it was work incidental to, or reasonably necessary for the purposes of, the principal's trade or business. He submitted that the authorities on the corresponding provision in the Workmen's Compensation Act 1897(Eng) showed that where the work in question was merely ancillary to, or incidental to and no part of or process in the trade or business of the principal, it was not "work undertaken by the principal". I note in that regard that work of that character constituted a statutory exception in that Act; that would account for the focus on of those words in those authorities; see par [24]

[45] Mr Riley submitted that the same approach was evident from the decision in *Moir v Schrader* (supra), where he relied on the approach of Starke J at 319; see par [22]. His Honour found in that case that there was no evidence to support the Commission's finding that the work of the contractors – the erection of a shed and the installation of a saw milling plant – was "part and parcel of the firewood business, or in the usual course of that business", even though that it may have been "incidental to and even necessary for the purpose of carrying on a firewood business". Following that approach, Mr Riley submitted that in this case the work of constructing the tank, while 'incidental to' and 'even necessary for' the watering of the cattle on agistment, was preliminary to the operations of a cattle station, and not part and parcel of the carrying on of those operations. That is, it was not part and parcel of the normal running of a cattle station, not something that pastoralists did from day to day; in this respect it was unlike the fencing work which was the subject of the decision in *Frauenfelder v Reid* (supra). Further, it was not something which the pastoralists themselves were capable of doing. However, in this connection, I note the last sentence in the quotation from Windeyer J at par [16].

[46] Mr Riley also relied on what Dixon J said in *Moir v Schrader* (supra) at 322. See generally pars [23]-[25] and note par [31]. His Honour had noted that one indicator which might show that the work in question was not "work undertaken by the principal" was that the principal never did that work himself, but always entrusted it to contractors. Mr Riley observed that that

situation obtained in this case. He also observed that Dixon J had cited with apparent approval from what Pickford LJ said in *Hockley v West London Timber and Joinery Co* (supra) at 1019; see par [15].

[47] Mr Riley noted that in *Frauenfelder v Reid* (supra) no member of the High Court had suggested that they were departing from *Moir v Schrader* (supra), or that *Skates v Jones* (supra) had been wrongly decided. I note however, Dixon CJ's *construction* in that case of what Farwell LJ said, at pars [12] and [13]. Mr Riley submitted that *Frauenfelder v Reid* (supra) was distinguishable from the present case, because in that case their Honours held that the work of fencing was an incident of running a station, a normal part of conducting that business, being work often carried out by station owners; whereas here the construction/repair of the tanks in the present case involved work which was "one off", requiring an expertise which pastoralists lacked. Accordingly, he submitted that his Worship at par [34] had wrongly drawn an analogy with *Frauenfelder v Reid* (supra), because while the fencing in that case was "part and parcel" of the operations of a pastoral property, like the mustering of cattle, the construction of a large water tank is not. Mr Riley submitted that the approach of Dixon CJ and Windeyer J in *Frauenfelder v Reid* (supra) was entirely consistent with what Starke J and Dixon JJ had said in *Moir v Schrader* (supra). He considered that in *Moir v Schrader* (supra) all four members of the High Court had applied the same test.

[48] He submitted specifically that his Worship had erred in his reasons set out at par [34], when concluding that "the provision of tanks … to get that water to the cattle was *therefore* also part and parcel of [the appellant's] business". He submitted that this was akin to arguing that because the trade or business of Qantas was running an airline, in the course of which its aeroplanes needed to take off and land, therefore the construction of an airport runway was part and parcel of Qantas' business. I note that the accuracy of analogies varies according to the similarity of the facts; what if Qantas had owned and operated the airport?

[49] Mr Riley submitted that his Worship in paraphrasing Owen J at par [34] had misunderstood what his Honour had said in *Frauenfelder v Reid* (supra) at 57; see par [17]. Simply because certain work was *necessary* to the operation of a business, did *not* make it a 'component part' of that business. I accept that. In this case, he submitted, the appellant had been simply contracting with an expert to carry out work which it could not carry out by itself. I observe that that fact does not prevent such work from being "work undertaken by the principal".

[50] As to Mr Nosworthy's submissions in par [52] that the work entailed "a joint effort" as his Worship had found at p25, and so was "work undertaken" as a matter of fact – see par [54] - Mr Riley submitted that the appellant had merely provided some basic materials – sand, cement and alike – and this was said to be usual on the stations. His Worship had not relied in anyway in his conclusions at par [34] on his finding that the construction/repair of

the tanks was “a joint effort”, and that lack of reliance had not been sought to be attacked by the Nominal Insurer. In any event, he submitted that it did not carry the matter any further. I consider that the finding of “a joint effort” is of evidential value only.

[51] Mr Riley submitted that the obligations of the appellant under its agistment agreements, the significance of which was stressed by Mr Nosworthy in par [54], did not show that it was part of the appellant’s business undertaking on Dungowan to construct the tanks. I consider that those obligations were relevant to the nature of the appellant’s business undertaking.

The Nominal Insurer’s submissions

[52] Mr Nosworthy submitted that what had to be considered was what the appellant in this case had actually done. In that regard, the evidence from the appellant itself was that it had contracted with the company for the latter to carry out the work of constructing/repairing the tanks; and that the appellant had supplied some of the materials to enable this work to be carried out. This was the basis on which his Worship had found as a fact at p.25 that the construction of the tanks was “a joint effort”. Mr Nosworthy submitted that for that reason alone the work in question was “work undertaken by the principal”; I do not accept that that conclusion follows, but the supply of materials by the appellant was relevant to the question in issue.

[53] He submitted that the provision of water and the construction of fencing were the two fundamental requirements in running a cattle station in the Territory; he stressed that what was involved in this case was the repair of an existing water point. In light of the observations by Dixon J in *Moir v Schrader* (supra) at par [24] as to the importance of "the manner in which [the principal] conducts [his trade or business]", Mr Nosworthy submitted that it was necessary to examine what the evidence had disclosed as to the manner in which the appellant had conducted the raising of cattle on Dungowan. I consider that this is a legitimate approach.

[54] As to that, he noted that the appellant was required by its agistment agreement to maintain the water points, an obligation consistent with the obligation on the Crown Lessee to do so under the Crown Lease. He noted the factual matters which his Worship had recounted in his reasons, relating to the nature of the work in question, and his acceptance of the worker's evidence.

In summary, Mr Nosworthy submitted first that the work in question was "part and parcel" of "work undertaken by the principal", in the sense that the work involved in repairing/constructing the tanks was a component part of running the station. Second, he submitted that the appellant had *as a matter of fact* undertaken the work in question, by providing materials for the work to be carried out; I indicated at par [52] that I do not consider that the conclusion follows.

Conclusions

[55] In *Frauenfelder v Reid* (supra), when considering the phrase "work undertaken by the principal", both Dixon CJ (at 47) and Owen J (at 56) had noted that its meaning had been considered both in England, where s 127(1) had its origins in the *Workmen's Compensation Act* 1906, and in Australia. Their Honours had also referred to the earlier decision of the High Court in *Moir v Schrader* (supra). Unfortunately, there is little analysis of *Moir v Schrader* (supra) in the judgments: Windeyer J does not refer to it at all; Dixon CJ merely notes its existence – see par [11]; however, Owen J quotes at 56-7 some parts of what Dixon J said in that case at 324 – see par [56].

[56] In *Frauenfelder v Reid* (supra), Owen J at 56 quoted Dixon J's conclusions in *Moir v Schrader* (supra) at 320 and 324 that:

> 320 "… the liability of the principal is limited to workmen employed in the execution of work forming part of the operations which constitute the exercise of the principal's trade or business".
>
> 324 "… when, *although the work* performed by the injured workman *is necessary* to enable the principal *to carry out* the operations the execution of which he has adopted as his *trade or business*, *yet that work does not form a component part of the operations and only contributes or conduces* to their performance *or is preliminary or ancillary or incidental* to them, then the workman must look to his direct employer for compensation". (emphasis added)

[57] In then proceeding to express (at 57) the test in terms that the work in question must be "a 'component part' of the …[principal's] business", Owen J clearly applied what Dixon J had said in *Moir v Schrader* (supra).

His Honour appears thereby (as had Dixon J in *Moir v Schrader* (supra) at 324) to have sought to distinguish work which was a "component part" of the principal's grazing business from work which 'only contributes or conduces' thereto, or is 'preliminary or ancillary' or incidental to it. Owen J then expressed his conclusion on the case before him simply at 57; see par [17]. It can be seen that his Honour accepted that the work in question – erecting fences – was not the graziers' business, which was a grazing business, and considered it was work not only 'necessary' to enable that business to be carried on, but that on the facts it was open to find that it was work which nevertheless was a 'component part' of that business, and hence "work undertaken by the principal".

[58] As noted in par [55] in *Frauenfelder v Reid* (supra) both Dixon CJ (at 47) and Owen J (at 56) observed that a provision comparable to s 127(1) had been considered in a number of English cases. In particular, their Honours both cited (at 47 and 56-7 respectively) the passage from the judgment of Farwell LJ in *Skates v Jones & Co* (supra) at 910 set out in par [12] above. In par [13] I considered that Dixon CJ appeared to have expanded the interpretation of those words in *Frauenfelder v Reid* (supra), beyond that which he gave them in *Moir v Schrader* (supra). I consider that while Owen J in *Frauenfelder v Reid* (supra) at 57 on the face of it did *not* give an expanded interpretation to those words – his Honour considered at par [17], that the work in question had to be a "component part" of the principal's trade or business – by not requiring that the particular work be the

principal's trade or business, his Honour expanded the scope for the application of the test beyond that which it had in *Moir v Schrader* (supra). Dixon CJ now considered it sufficient if the work, "essential" to the principal's business, was a "recognized or necessary incident" of it. Windeyer J did not discuss the English cases; his Honour's approach is discussed in par [66].

[59] Mr Riley has submitted that the restrictive approach to s 127(1) in the earlier cases still underlay the tests set out in broad terms in *Frauenfelder v Reid* (supra) in par [37], and that his Worship's reasoning in par [34] showed that he had failed to appreciate or to apply the tests in their true sense, and so had erred, as a matter of law.

[60] As to this submission, it seems clear that in *Frauenfelder v Reid* (supra) Dixon CJ took a wider view of what fell within "work undertaken by the principal" than the view his Honour had adopted in *Moir v Schrader* (supra). Moreover, in the application by Windeyer J of the "part and parcel" test and the application by Owen J of the "component part" test – see pars [66] and [58] – neither Judge required that the work in question had to be the graziers own trade or business; this also means that their Honours took a broader approach than that enunciated in *Moir v Schrader* (supra). The application of these tests involved only questions of fact; see par [16].

[61] I incline to agree with Mr Mills when he states (op.cit.) at 166:

> "One difficulty about *Frauenfelder's* case is that it appears to deprive the phrase 'undertaken by the principal' of virtually any significance at all; the test as propounded in that case is *almost identical* with that suggested in the same case for determining whether the contract is 'for the purposes of' the principal's trade or business …". (emphasis added)

In this connection I note that in *Frauenfelder v Reid* (supra) at 46-47 Dixon CJ considered that "it may be taken for granted" that the graziers had contracted with the contractor "for the purpose of their trade or business for graziers", because "[I]t is obvious that subdivisional fencing is *essential* for carrying on the operations of a grazier" (emphasis added). His Honour's approach to the test for "work undertaken by the principal" – whether it is "a recognized or necessary incident of conducting a station" - is, to use Mr Mills' words, "almost identical" to the 'essential' test.

[62] I also note that Windeyer J at 50 took a similar approach to determining whether the contract is "for the purposes of" the principal's business. His Honour said:

> "It goes without saying that fencing the run into paddocks is part of the ordinary development and management of an Australian grazing property. It is to-day *essential* for the *efficient conduct* of any pastoral undertaking. And the maintenance of the fences in good repair is an *ordinary part* of station management" (emphasis added)

His Honour saw the contract for the fencing as part of the appellant's conduct of its grazing business, because it was 'essential' to its 'efficient conduct'. His Honour's "part and parcel" test to determine whether the work in question is "work undertaken by the principal", is similar to the test

he enunciated to determine whether the contract is "for the purposes of" the principal's business. Owen J at 57 treated it as "common knowledge" - that the erection and repair of fencing is work necessary to be done to enable a grazing business to be carried on"; see par [17]. It is not clear whether his Honour was applying this as a test to determine whether the contract was "for the purposes of" the principal's business.

[63] At p20 of his Worship's reasons, he said:

> "In his judgment [in *Moir v Schrader* (supra) at 320] Dixon J said:
>
> > 'The meaning of the expression 'work undertaken by the principal' has been the subject of much difference of opinion …. As I understand the interpretation which the expression has received, *the liability* of the principal *is limited* to workmen employed in *the execution of work forming part of the operations which constitute the exercise of the principal's trade or business'."* (emphasis added)

I note that later in *Moir v Schrader* (supra), at 322, after discussing the authorities, Dixon J cited with approval the words of Pickford LJ in *Hockley v West London Timber and Joinery Co* (supra) at 1019:

> "The authorities make it quite clear that it is not enough that the work that is being done should be incidental to, or even necessary for, the preparation for the work which is actually done by the principal".

Dixon J continued at 323-4:

> "… that principle, or interpretation of the section [corresponding to s 127(1)], is well settled in England …. Unfortunately the principle which that interpretation of the words "any work undertaken" ascribes to the legislation is not susceptible of exact definition and of completely certain application. It is based upon the view that from

> the course of the principal's trade or business and the manner in which he conducts it, *he will be found to have assumed responsibility for the performance of a class of work, the fulfilment of given functions or the pursuit of a system of activities.* What he has thus adopted as his proper operations, he may accomplish by means of direct employees, or by means of contracts which remove him from the relation of employer with the workmen who do the work. Whichever be his method, he is to be responsible for the workers' compensation payable to those injured in the course of the work *for the performance of which he has assumed responsibility, the work which he has* '*undertaken*'. (emphasis added)

His Honour continued at 324, in a passage quoted by his Worship at p20 of his reasons, and by Owen J in *Frauenfelder v Reid* (supra) at par [56]:

> "But when, *although the work* performed by the injured workman *is necessary to enable the principal to carry out the operations* the execution of which he has adopted as his trade or business, *yet that work does not form a component part of the operations* and only contributes or conduces to their performance or is preliminary or ancillary or incidental to them, then the workman must look to his direct employer for compensation." (emphasis added)

I consider that the test here expressed - in effect, that the work in question must be necessary and component part of the operations of the principal's trade or business - is narrower than the test subsequently formulated by his Honour in *Frauenfelder v Reid* (supra) at par [12].

[64] Mr Riley submitted that his Worship failed to consider the test as formulated in *Moir v Schrader* (supra), and that that failure is apparent in the result his Worship reached. His Worship's conclusions are set out in par [34]. His Worship did not articulate his conclusions in terms of the broader formulation of the test by Dixon CJ in *Frauenfelder v Reid* (supra). Mr Riley submitted that if his Worship had correctly understood the

judgment of Owen J in *Frauenfelder v Reid* (supra), he would not have paraphrased his Honour's judgment in the words he used in par [34]. I consider that there was error in the paraphrazing; see par [74].

[65] Mr Riley also submitted that while in *Frauenfelder v Reid* (supra) it was clear that "the maintenance of the fences in good repair is an ordinary part of station management" and such repairs "may be done by boundary riders or station hands employed by the pastoralist", as Windeyer J put it at 50, the construction of the water tanks was *not* part of station management, *not* part of a station manager's undertaking. That is because while fencing is a common everyday occurrence on these stations, the construction of 22,000 (or 45,000) gallon water tanks is not. Indeed, as his Worship acknowledged at p27 of his reasons "on the evidence [that work] involved a level of expertise which could only be provided by an outside contractor …".

[66] As to that submission I note that in *Frauenfelder v Reid* (supra) Windeyer J in characterizing (at 50) "the maintenance of the fences in good repair" as "an ordinary part of station management", did so in the following context:

> "It goes without saying that fencing the run into paddocks is *part of the ordinary* development and *management* of an Australian grazing property. It is to-day *essential for the efficient conduct* of any pastoral undertaking. And the maintenance of the fences in good repair is an *ordinary part of station management*. *Repairs* may be done by boundary riders or station hands employed by the pastoralist. The construction of fences of any length is often done by independent contractors. *However it is accomplished,* fencing work *of all kinds* on a station can be regarded, I think, as *part and parcel* of the station owner's undertaking". (emphasis added)

It may be that Windeyer J here was merely indicating that "fencing … into paddocks" is part of "ordinary" station "management", work "essential for the efficient conduct of any pastoral undertaking"; and that even though the construction of lengthy fencing is "often done by independent contractors", irrespective of how it is done "*all kinds*" of station fencing work is properly regarded as "part and parcel of the station owner's undertaking". That would accord with the view of Owen J who considered (at 57) that it was "common knowledge" that "the erection and repair of fencing is work necessary to be done to enable a grazing business to be carried on", and that even though "it could not be said in the present case that the [graziers'] trade or business was that of erecting fences", it was "open to the learned Commissioner to find, as he did, that the work here in question was a 'component part' of the grazing business carried on by them"; see par [17].

[67] On the other hand, Windeyer J may have intended in the passage quoted in par [66] to distinguish between operations involved in station management which are to be regarded as *extraordinary*, because they require specialist expertise and so must be contracted out, as opposed to operations to be considered *ordinary* because although they may be contracted out for *convenience* there is no lack of capacity in the management to carry them out.

[68] Some support for this interpretation may be derived from the observation of Dixon J in *Moir v Schrader* (supra) at 322 that "[t]he fact that [certain work] is *never done for himself* by a particular [businessman] but *is always*

entrusted to contractors *may show* that the work 'undertaken' by that [businessman] does not embrace such operations" (emphasis added). Clearly Dixon J did not consider that it *necessarily* followed from the fact that the work was always "entrusted to contractors", that it was not work "undertaken" by the principal contractor; it "*may"* show that it was not. When would that be the case? His Honour referred at 322 to *Luckwill v Auchen Steamship Company Ltd* (1913) 108 LT 52 and *Bush v Hawes* [1902] 1 KB 216, to illustrate the proposition. In the former case, the Court of Appeal (Eng.) dismissed an appeal against a decision that the owners of a steamship were *not* 'principals' for the purposes of this provision, in relation to work undertaken under a contract for the scaling of their vessel's boilers. The Court at 53 considered that the trial judge's conclusion was "right for the reasons stated by his Honour". Those reasons in summary were: the shipowners *always* employed independent contractors to scale their ships' boilers, except at a foreign port, because this was "an operation which ordinary ship's firemen were not competent to perform"; and this practice was "the practice of shipowners in this country at large". Their Lordships noted that the learned Judge considered that the case was indistinguishable from the similar 'boiler-scale' case of *Spiers v Elderslie Steamship Company* (supra), the reasoning in which had been adopted by the Court of Appeal in *Skates v Jones & Co* (supra).

[69] In *Bush v Hawes* (supra) a builder entered into a contract to erect a building which was to have an iron roof. It was no part of his usual business to

construct or erect such a roof; none of his employees could do this work. He subcontracted out the work, during which one of the subcontractor's workers was killed. The Court of Appeal held that the test for whether the work was "ancillary" to a builder's business (and thus specifically outside the 1897 Act then in force), was whether the work in question was that of the particular builder, and not whether such work was generally undertaken by persons carrying on a business similar to this. What had to be considered was the nature of the particular builder's work.

[70] In referring to *Luckwill v Auchen Steamship Co, Ltd* (supra) in *Moir v Schrader* (supra), Dixon J appears to have contemplated that where there was a necessity to engage an independent contractor to carry out the work, a finding that the work was not work "undertaken by the principal *could* be justified. See, however, the passages in his Honour's judgment in *Moir v Schrader* (supra) at 323-4, in par [63], where he stresses that the principal may accomplish "what he has adopted as his proper operations" of his business, either by his "direct employees" or "by means of contracts".

[71] I think that the better view of what Windeyer J meant in the passage quoted at par [66] is that set out later in that paragraph. In any event once the correct legal test is applied to the work in question to determine whether it is "work undertaken by the principal", the resulting conclusion as to whether it is or is not, is a question of fact.

[72] I think that there can be no doubt that the approach of their Honours in *Frauenfelder v Reid* (supra) to the equivalent of s 127(1) differed from the earlier approach in *Moir v Schrader* (supra), even though the difference was not spelled out. In particular, the approach of Dixon CJ in the later case – that it is sufficient if the work is a "recognised or necessary incident of conducting a station" – is less restrictive of a principal's liability under s127(1) than his approach in *Moir v Schrader* (supra); see generally pars [13]-[15].

[73] I consider that on a fair reading of his Worship's reasons for decision in par [34], he did not apply the wrong legal test in this case. I do not consider that his Worship was required to apply the test as formulated in *Moir v Schrader* (supra), as submitted by Mr Riley in par [64]. The "part and parcel" test has been applied as the correct test, after *Frauenfelder v Reid* (supra); see the decisions cited in par [35]. It was that test which his Worship applied in par [34], in reaching his conclusion; a conclusion resulting from the application of the correct legal test gives rise to a question of fact which is not open to challenge on appeal.

[74] As to Mr Riley's submission in par [49] I indicated earlier, in par [64], that I consider that his Worship erred in the course of paraphrasing in par [34] the words of Owen J in par [17], in *Frauenfelder v Reid* (supra). That error was made in the course of drawing an analogy with the fencing work in that case. The error did not in my opinion affect his Worship's conclusion that the provision of the tanks to secure a 'basic requirement' of the business – the

watering of the cattle – was itself "part and parcel" of the appellant's business.

I do not consider that his Worship erred as suggested by Mr Riley in par [48]. With respect, the analogy Mr Riley suggested is not apposite, as stated. In my opinion, his Worship was correct in holding in par [34] that "the provision of water [to cattle] was …. part and parcel of [the appellant's] business". It was open to find that the construction or repair of tanks to provide that water is work integral to the provision of the water. It was open to his Worship to find that that work was "part and parcel of [the appellant's] business". That conclusion is one of fact, following the applications of the correct legal test. Minds may reasonably differ on whether any particular work is "part and parcel" of a principal's business; that factual decision here was one solely for his Worship to make.

Accordingly, I reject grounds of appeal 1 and 6. It follows that grounds 4 and 5 are also rejected.

Grounds 2 and 3 in par [7]: the indemnity issue

[75] These grounds are directed to the other matter in issue on the appeal: the determination by his Worship that the appellant, found liable to pay compensation to the worker, was *not* entitled to be indemnified in that respect by the Nominal Insurer; see par [6]. The statutory provisions relevant to this issue are as follows.

Subsections 127(2) and (3) provided at the time:-

> "(2) *Where compensation is claimed from or proceedings are taken against a principal contractor* by a worker, a reference in this Act to the worker's employer *shall be construed as including a* reference to the principal contractor but any amount of compensation payable shall be calculated by reference to the earnings of the worker under the employer by whom he is immediately employed".
>
> (3) Where the principal contractor is liable to pay compensation under this section, he shall be entitled to be indemnified by *any person who would have been liable to pay compensation to the worker independently of this section*". (emphasis added).

By amendment to the Act in 1991, *after* the events which gave rise to this litigation, s 127(5) was introduced, viz:-

> "(5) Nothing in subsection (3) shall be construed as requiring the Nominal Insurer established by section 150 to indemnify a principal contractor under this Act".

Of course, s 127(5) does not apply to this litigation.

Section 129(1) provided at the time, as far as is material:-

> "(1) Where a person (in this section referred to as 'the principal') has contracted, …, with another person (in this section referred to as 'the contractor') for work to be done by or on behalf of the contractor, the principal may obtain from an approved insurer a policy of insurance or indemnity (in accordance with Schedule 2, with the necessary changes) which, in relation to the work specified in the policy of insurance or indemnity as work to be done by or on behalf of that contractor, covers –
>
> (a) the principal's liability under this Act;
>
> (b) the contractor's liability under this Act; and

(c) ….".

Section 167(1) provided at the time:-

"(1) Where –

(a) a claim has been made against *an* employer that *the* employer is liable to pay compensation;

(b) in relation to the claim, *the* employer has agreed to pay compensation or *his* liability to pay compensation has been established in accordance with this Act;

(c) the liability of *the* employer to pay the compensation is not covered in full by a policy or policies of insurance or indemnity obtained in accordance with this Act; and

(d) *the* employer defaults in payment of any amount of the compensation for a period exceeding one month,

the person entitled to the compensation may make a claim for compensation against the Nominal Insurer". (emphasis added).

By an amendment in 1991 after the events which gave rise to this litigation, s 167(1)(e) was introduced as a further condition to be met before a claim could be made against the Nominal Insurer, viz:-

"(e) a principal contractor, within the meaning of section 127, is not liable under that section to pay the compensation".

Needless to say, like s 127(5), s 167(1)(e) does not apply in this case. It can be seen that from the time the 1991 amendments came into force in January 1992, the matter now in issue in grounds 2 and 3 had been legislatively resolved in favour of the Nominal Insurer.

Section 168 provided:

> "Subject to this Act, where a person makes a claim under section 167(1) against the Nominal Insurer, the Nominal Insurer shall pay to that person the compensation payable at the date of the claim or becoming payable thereafter".

The proceedings in the Work Health Court on the indemnity issue

[76] Having determined (see par [34]) that the appellant was liable under s 127(1) to make compensation payments to the worker, his Worship turned to consider whether the appellant was entitled to be indemnified in respect of those payments. In terms of s 127(3), his Worship identified the question this issue required to be addressed in the following terms (at p29):-

> "Would any (other) person have been liable to pay compensation [to the worker, independently of [s 127]?".

His Worship noted that s 167(1) as set out in par [75] was substituted in 1991 by a new s 167 which contained, inter alia, s 167(1)(e) as set out in par [75].

[77] The appellants' argument before his Worship had proceeded in 9 steps, viz:-

(1) the company was the direct or immediate employer of the injured worker;

(2) in terms of s 167(1)(a), the worker had claimed against the company;

(3) in terms of s 167(1)(b), the company's liability to pay compensation had been established;

(4) in terms of s 167(1)(c), the company was uninsured;

(5) in terms of s 167(1)(d), the company was in default;

(6) the worker as "the person entitled to the compensation" in terms of s167(1) was therefore entitled under that provision to "make a claim for compensation against the Nominal Insurer", since s 167(1)(e) did not then exist;

(7) the appellant as principal contractor was liable to pay compensation to the worker under s127(1);

(8) in terms of s 127(3), the principal contractor was "entitled to be indemnified by any person who would have been liable to pay compensation to the worker independently" of s 127; and

(9) the Nominal Insurer, being "liable [under s 167(1) and s 168] to pay compensation to the worker independently" of s 127(1) was required to indemnify the appellant pursuant to s 127(3).

That is to say, since the condition in s 167(1)(e) did not exist at the time the conditions in s 167(1) as it then stood were all met, thus enabling the worker to claim under that provision against the Nominal Insurer; and the appellant, as the principal contractor liable under s 127(1) to pay compensation to the worker, was entitled by s 127(3) to be indemnified by the Nominal Insurer.

[78] Mr Nosworthy, who was counsel for the Nominal Insurer before his Worship, had reminded his Worship in the course of final submissions about an admission by the appellant, in the following terms (at 153):-

> "… further it was conceded that the [appellant's] policy covered subcontractors at all relevant times … it covers not only the [appellant], but it also covers the [company]. So that in fact by the concession … there is cover for [the company] a subcontractor, of a direct nature through the T.I.O.".

He pointed out at the time – see par [82] - that this gave rise to a "fourth question" which however, he submitted that his Worship was not required to answer: that is, that the worker might have a claim against the T.I.O. Needless to say, all of Mr Nosworthy's submissions were made in the presence of the then counsel for the appellant. Mr Nosworthy advanced 3 submissions before his Worship, on the indemnity issue.

[79] In one of its submissions, the Nominal Insurer relied on the appellant's admission before his Worship on the basis that it meant that the appellant had been insured by the Territory Insurance Office at all relevant times, the policy covering both its own and its subcontractor's liability under the Act. In light of that admission, the Nominal Insurer put this submission in the following 9 steps-

(1) section 127 falls within Division 3 of Part VII of the Act, headed "Workers Compensation Insurance";

(2) Division 3 commences with s 126 which sets out the primary obligation of "every employer" to take out a policy of insurance which accords with Schedule 2 to the Act, to cover his liability to pay workers' compensation;

(3) Schedule 2 comprises the statutory form of the "Employer's Indemnity policy", pursuant to s 126(4);

(4) *inter alia*, this proforma Policy after dealing with the obligations of the Insurer, states:-

> "Provided lastly that this policy shall be subject to the Act and the Rules and Regulations made thereunder, *all of which shall be deemed to be incorporated in and form part of this policy*" (emphasis added);

(5) the effect of the appellant's admission that it was insured under the Act, read with the proviso in (4) above, is that the appellant was insured under a policy which fully complied with the Act;

(6) by its admission, the appellant's policy also covered the company, as subcontractor to the appellant;

(7) in terms of s 167(1), the company was therefore *directly* covered by a policy of insurance under the Act (emphasis added);

(8) it followed from (7) that the pre-condition set out in s 167(1)(c) to the worker's entitlement to claim for compensation against the Nominal Insurer under s 167(1), was not met; and

(9) since the worker therefore had no claim against the Nominal Insurer under s 167(1), the Nominal Insurer was not liable to pay compensation to the worker, and accordingly the appellant as principal contractor had no claim for an indemnity against the Nominal Insurer pursuant to s 127(3), since the Nominal Insurer was not a "person who would have been liable to pay compensation to the worker", as required by s 127(3).

I note that at no time before his Worship during Mr Nosworthy's submissions did the then counsel for the appellant suggest steps (6) and (7) above mis-stated the effect of the admission he had made on behalf of the appellant. It can be seen that this submission proceeded on the basis that the company was the worker's employer, for the purposes of the worker's claim under s 167(1), and was covered by the appellant's policy.

[80] Mr Nosworthy's second submission to his Worship did not found upon the appellant's admission referred to in par [79], in so far as it was said to relate to the company. It proceeded by the following steps:-

(1) in terms of s 127(2), the worker had made a claim or taken proceedings against the appellant;

(2) by virtue of s 127(2), the appellant thereby is deemed to have become the "employer" of the worker, wherever a reference to the worker's employer appears in the Act;

(3) reference to the worker's employer appears in pars (a)-(b) of s167(1);

(4) by virtue of (2), so far as the worker's claim under s 167(1) is concerned, the appellant is to be deemed to be his employer;

(5) the appellant was however admittedly "covered in full", for the purposes of s167(1)(c); and

(6) therefore the same consequences then follow as are set out in steps (8) and (9) in par [79].

It can be seen that this submission proceeded on the basis that the appellant, not the company, was the "employer" for the purposes of the worker's claim under s 167(1).

[81] Mr Nosworthy's third submission was that on the facts, and by the admission, the case fell squarely within s 129(1), and accordingly both the appellant and the company were insured by the T.I.O., with the results that steps (8) and (9) in par [79] followed.

[82] Mr Nosworthy's fourth submission was that the admission also meant that there was direct cover for the company by the T.I.O., so that the company could claim directly against the T.I.O; however, he submitted, his Worship did not have to determine that matter. See par [78].

[83] Section 126(1) requires that "every employer" effect the insurance to cover his liability "to all workers employed by him". Having recounted the

submissions in pars [77] and [79], his Worship posed the question at p30: "who is the 'employer' for the purposes of this dispute?". In answering it, he noted that the word "employer" is defined in s 3 as "…. a person by or for whom a worker is engaged or works ....", and that the evidence was that the worker was employed by the company, which had not taken out insurance as required by s 126(1). His Worship at p30 of his reasons noted that the appellant's argument in par [77] "appears straightforward enough but ignores s 127(2)", a provision which he considered at p31 was "critical to the determination of this issue", because "it expands the definition of "employer"". He considered that this "expanded definition" applied "in any case where the worker claims against a principal contractor as he does here"; and that "[i]t applies across the entire Act and therefore covers Section 167".

[84] His Worship at p 31 then accepted the Nominal Insurer's submission at par [80] that because the worker had claimed against the appellant as principal contractor, a prerequisite to enlivening s 127(2), the appellant was thereby "deemed to be the worker's employer", and "any reference to the worker's employer meant [the appellant]". It is clear that his Worship then treated the reference in s 167(1) to "employer" as meaning the appellant, and not the company, for the purposes of this case. This had been the thrust of the Nominal Insurer's submission in par [80].

His Worship considered at p31 that:-

> "…… the purpose of [s127(2)] is clearly to maximise the prospect of an injured worker recovering compensation in the event that his direct or immediate employer is uninsured (as here)".

His Worship further considered at p31 that the effect of s 127(2), when read with s 127(5) when introduced in 1991, meant that "there is little doubt that the statutory policy is to minimise the potential exposure of the Nominal Insurer".

[85] His Worship then expressed his conclusions on the indemnity issue at p.31 as follows:-

> "However, even without [s 127(5)], I am satisfied that the terms of subsection 127(2) dictate a finding that [the appellant], as a deemed employer, which was 'covered in full by a policy of insurance in accordance with this Act' (in the words of the subsection) cannot escape liability. Its status as employer coupled with its insurance cover means that it cannot rely on subsection 167(c), [sic, s167(1)(c)] which I am satisfied does not apply.
>
> In my opinion [the appellant] is liable for compensation payments to the worker".

In later listing at p42 his conclusions on the various aspects of the claim, his Worship included:-

> "10. [The appellant] is not indemnified by the Nominal Insurer by operation of sections 127 and 167".

In light of the issue which was then before his Worship - whether the appellant, found liable to the worker, was entitled to be indemnified by the Nominal Insurer - and the submissions made to him in relation thereto, it is

somewhat difficult to follow his Worship's expression of his conclusions, above. However, his reasoning may have been –

(1) the effect of s 127(2) is that the appellant is the "employer" referred to in s 167(1), in this case;

(2) because the appellant was "covered in full" by a policy of insurance, the condition in s 167(1)(c) was not satisfied;

(3) accordingly, the worker could not claim against the Nominal Insurer under s 167(1);

(4) the Nominal Insurer was therefore not liable under s 167(1);

(5) the Nominal Insurer therefore did not fall within s 127(3); and

(6) therefore, the appellant was not entitled to be indemnified by the Nominal Insurer.

The submissions on appeal

[86] Mr Riley submitted, along the general lines of par [77], that the facts established by his Worship were:-

(1) the company was the direct employer of the worker;

(2) the worker had made a claim against the company (whom Mr Riley categorized as '*an* employer', in terms of s 167(1)(a)), for compensation for his injury;

(3) in terms of s 167(1)(b), the worker has secured a judgment against the company by which the company is required to pay him compensation. Further, under the Act the company is deemed to have accepted liability to pay compensation;

(4) in terms of s 167(1)(c), the company did not hold a policy of insurance under the Act, at the relevant time; and

(5) in terms of s 167(1)(d), the company had not paid compensation to the worker.

In the light of these facts, measured against the requirements of pars (a)-(d) in s167(1), Mr Riley submitted that the Nominal Insurer was liable to pay compensation to the worker, pursuant to s 167(1) and s 168, as they stood at the time. Further, this liability was wholly independent of s 127, in terms of s 127(3). It followed, in his submission, that the appellant as "principal contractor … liable to pay compensation" under s 127(1), was entitled under s 127(3) to be indemnified by the Nominal Insurer.

[87] I noted in par [83] that his Worship had considered at p30 that the similar submission in par [77] before him "appears straightforward enough, but ignores section 127(2)". As to that observation, Mr Riley submitted that his Worship had fallen into error when assessing the effect of s 127(2). The principal contractor did not thereby become *the* employer of the worker; it became, for all intents and purposes of the Act, *an* employer of the worker, with the liabilities of *an* employer, but it was *not* thereby substituted for the

company as *the* worker's employer wherever there was "a reference in this Act to the worker's employer".

[88] I note that the 'reading' provision in s 127(2) is expressed inclusively, and not in substitutionary terms: "a reference in [the] Act to the worker's employer" is to be "construed as *including* a reference to the principal contractor", when the condition in s 127(2) is met. In general, drafting an this inclusionary way extends the meaning of the words in question – here the words "the worker's employer" – beyond their usually accepted meaning; see, for example, *Douglas v Minister for Aboriginal and Torres Strait Islander Affairs* (1994) 34 ALD 192 at 203. His Worship in his conclusions set out in par [85] appears, tacitly, to have construed "including" in s 127(2) as equivalent to " meaning and including", so that when the condition in s 127(2) was met, a reference in the Act to 'the worker's employer' became solely a reference to the appellant. I consider that such a construction of s 127(2) is erroneous; the general approach to the meaning of "including" applies in the case of s 127(2). It follows that Mr Riley's submission in par [87] must be upheld. I note in passing that the corresponding Tasmanian provision referred to in par [95], as well as the corresponding provisions in the New South Wales and Victorian workers' compensation legislation of 1926 and 1958 respectively, are expressed in substitutionary terms.

[89] As to his Worship's reference in par [84] to the 1991 amendment introducing s 127(5), Mr Riley submitted that since this provision did not

exist at the relevant time, reference to it was of no assistance. I accept that proposition.

[90] He submitted that his Worship in his conclusions in par [85] was saying that because the appellant, "a deemed employer", was "covered in full" for insurance in terms of s 167(1)(c), that precondition to the worker's entitlement to claim against the Nominal Insurer did "not apply". I note that that is a literal reading of what his Worship said. Mr Riley submitted that this approach to s 167(1)(c) involved a misunderstanding of how that provision worked. Section 167(1)(c) was one of the preconditions which had to be met before "the person entitled to the compensation" from the employer, could claim payment from the Nominal Insurer. Section 167(1)(a), another of the preconditions, required a claim for compensation to have been made "against *an* employer"(emphasis added). Mr Riley submitted that, in the circumstances of the present case, the relevant reference in s 167(1)(a) was to the worker's claim against *the company*. The immediately following reference in s 167(1)(a) to "the employer", clearly referred to the same employer, the company. It was the company which had been found liable, in terms of s 167(1)(b). Against that background, the reference in s 167(1)(c) and (d) to "the employer" also clearly referred *only* to the company, in the circumstances of this case.

[91] Applying the result of his submission in par [90],Mr Riley submitted that since the preconditions in pars (a)-(d) of s 167(1) had all been met as regards the company, the Nominal Insurer could not escape its obligation

under s 167(1) and s 168 to pay the compensation to the worker, on the basis that *another* employer – the appellant as principal contractor, a deemed employer under s127(2) – might be liable to pay compensation at that time.

[92] He submitted that the approach he suggested in par [90] to applying s 167(1) to these circumstances, fitted in well with s 127(1). Under that provision a principal contractor became directly liable to pay compensation to a worker, as if the worker "had been immediately employed by him", once the two preconditions in s 127(1) to that liability had been met. Section 127(1) was the *only* basis on which a principal contractor could, as such, become liable to pay compensation under the Act. Mr Riley submitted that s 127(3) then proceeded to spell out the circumstances in which a principal contractor who was liable under s 127(1) became entitled to be indemnified; and the description in s 127(3) of the indemnitor as "any person who would have been liable to pay compensation to the worker independently of this section", neatly fitted the Nominal Insurer, on the approach to s 167(1) he had suggested in par [90]. The result was that in the present case the appellant was entitled to the indemnified by the Nominal Insurer.

[93] Mr Riley submitted that the approach of the legislature in this respect changed three years later, in 1991, when s 127(5) and s 167(1)(e) were introduced. He submitted that these amendments changed the law, as set out in par [75]. I note that the responsible Minister in his Second Reading Speech (Hansard, 15 August 1991, p 1589) referred to the 1991 amendments as a measure "to protect the Nominal Insurer from the *possibility* … of

having to indemnify a principal contractor…". (emphasis added). There is no suggestion that these amendments were declaratory provisions, merely intended to make the existing meaning of the Act clearer. It is clear that the 1991 amendments cannot be used to construe the provisions of s 127 and s 167 as they stood in 1988 unless those provisions are ambiguous; see *Cape Brandy Syndicate v I.R.C.* [1921] 2 KB 403 at 414. Here the amendments were clearly introduced to remove a possible legal liability faced by the Nominal Insurer.

[94] As to his Worship's conclusions as expressed in par [85], Mr Riley submitted that the appellant did not rely on s 167(1)(c), but *only* on s127(3). The only relevance of s 167(1) to the appellant's case was that it served to identify the *Nominal Insurer* as a "person who would have been liable to pay compensation", in terms of s 127(3).

[95] Mr Riley relied on *Reardon v Scolyer* [1984] Tas.R.69, as a persuasive authority. The problem remains, however, for this Court to determine the intended effect of s 127 and s 167 for itself – see *Ogden Industries Pty Ltd v Lucas* [1970] AC 113 at 127. Nevertheless, what Cox J said in that case is of assistance. The case involved provisions of the *Workers' Compensation Act* 1927 (Tas). Section 6(1) of that Act is identical with s 127(1) of the Territory Act; s 6(2) closely accords with s 127(2), except that it is expressed in a substitutionary manner rather than inclusively, with "references to the principal" being "*substituted* for references to the employer". The facts were that the worker's employer was uninsured. The

worker claimed against his employer, the Nominal Insurer and the principal contractor. He obtained judgment against the principal contractor, who claimed an indemnity from the Nominal Insurer pursuant to s 6(4). It can be seen that there are similarities with the present case. Cox J held that the Nominal Insurer was liable to indemnify the principal contractor.

[96] The submissions by the principal contractor were along the same general lines as those in pars [77] and [86]. It was put to his Honour at 73 that because the principal contractor provision "had been enacted long before the provisions dealing with a Nominal Insurer had been inserted", prima facie the "expression 'any person' [in s 6(4)] would not include the Nominal Insurer". As to this submission his Honour said at 73 :-

> "I do not accept that proposition. Parliament must be taken to have known when inserting [the provisions relating to the Nominal Insurer] that [the provisions relating to the liability of a principal contractor] contained that provision [for an indemnity] and may well have intended that the Nominal Insurer should be liable to give that indemnity. I do not see any intrinsic significance in the fact that one section preceded the others in the time of its enactment".

In the present case, both s 127 and s 167 were original provisions of the Act when it came into force in 1986. Both provisions are to given some meaning and effect; in general they are to be given the construction which that produces "the greatest harmony and the least inconsistency", as Cooper CJ put it in *Australian Alliance Assurance Co Ltd v Attorney-General (Qld)* [1916] St R Qd 135 at 161, or the "more reasonable result" as Gummow J put it in *Minister for Resources v Dover Fisheries Pty Ltd* (1993) 116 ALR

54 at 63. The consequences of a particular interpretation are to be taken into account; see *Cooper Brookes (Wollongong) Pty Ltd v F.C.T.* (1981) 147 CLR 297 at 320-1.

[97] Cox J at 73 considered that the "proper interpretation" of the provision equivalent to s 127(2) lay "at the heart of the present problem". The Nominal Insurer had there submitted that the preconditions to its liability to the worker did not exist, since "principal" should be read for "employer" in that provision, and the principal was (as in this case) insured; cf par [80]. It had submitted (see 73) that the policy of the Act in creating a Nominal Insurer was to provide for the benefit of the worker "a last haven of security" in the event that the judgment debtor could not meet his full liability to pay compensation; and that it was not the policy of the Act by creating a Nominal Insurer "to relieve employers or principals or their insurers".

[98] Dealing with these submissions at 74-75 his Honour said:-

> "The question still remains whether or not the [principal contractor] which has in fact paid the judgment debt to the [worker] is entitled to an indemnity from the Nominal Insurer pursuant to [the equivalent to s 127(3)]. *Prima facie* it would appear so for the literal meaning of that subsection brings the Nominal Insurer within its ambit. It is however argued that the policy of the Act is that the Nominal Insurer is only to be involved in liability if the employer, principal [contractor] or insurer cannot satisfy the [worker's] legitimate claims and that [the provision corresponding to s 167(1) enabling proceedings to be taken against the Nominal Insurer] was not enacted to relieve employers or principals who had an obligation to insure....
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> ———

> It is debatable what considerations moved the Parliament to include the provisions relating to the Nominal Insurer. I doubt if any would dispute that the prime object was the protection of workers against impecunious employers and/or their insurers, but whether or not justice demands that if a principal [contractor] (whether insured or not) can be found to meet the claims of the worker, he should have recourse to the nominal insurer's fund or should bear the loss himself as an incidental expense occasioned by the fact that in the course of or for the purposes of his trade or business he contracted with another for the execution by that contractor of work undertaken by him …. is a question which does not admit of so obvious an answer that the policy of the Act can be immediately detected.
>
> It was said of the forerunner of [the equivalent of s 127(1)] that its object was to prevent an employer from escaping liability by contracting with someone else to provide labour or to execute work, and to give a workman employed by a contractor a double security for his compensation which but for this provision he might lose through the poverty of his direct employer (*Willis' Workman's Compensation,* 31st edn., p.191). Another object it was said by Lord Brampton in *Cooper & Crane v Wright* [1902] A.C. 302, at p.308, 'was to impose the obligation of providing such statutory compensation upon those to whom good sense would naturally point as the fittest persons to bear it, and to define for the convenience of injured workmen seeking compensation the persons from whom they are entitled to claim it'. The introduction of a Nominal Insurer from whom a worker or a principal can in turn recover does not defeat these objects nor render the section otiose.
>
> My conclusion is that the words of [the equivalent of s 127(3)] should be given their ordinary meaning and that the [principal contractor] is accordingly entitled to be indemnified by the nominal insurer".

Mr Riley submitted that *Reardon v Scolyer* (supra) was direct and clear support for his submission. I accept that it is.

[99] As to *Reardon v Scolyer* (supra), Mr Nosworthy submitted that the addition of certain words at the end of the Tasmanian equivalent to s 127(3) made a difference. However, I note that Cox J specifically referred to those words

at 72, and considered that they provided "no reason for reading down the very broad expression 'any person'", which also appears in s 127(3). Mr Nosworthy referred to other differences between the wording in the Tasmanian Act and the Territory Act, submitting that the decision was of no assistance in the present case. I do not consider that those differences are material, for present purposes.

[100] Mr Nosworthy submitted that s 127(3) had work to do, apart from the Nominal Insurer; it preserved the rights of a principal contractor who was found liable to pay compensation under s 127(1). For example, it enabled him to take action against a negligent third party for an indemnity, pursuant to s 176(3).

[101] In seeking to ascertain the legislative intent behind s 127(3), Mr Nosworthy noted that an uninsured employer who paid compensation to his injured worker could not obtain an indemnity from the Nominal Insurer; he asked, rhetorically, why the legislature should be thought to have given a more favoured position to a principal contractor, a deemed employer?

[102] He submitted that, since the purpose of a provision such as s 127(1) was clearly to enable a worker to have the means of obtaining compensation in certain circumstances where his ordinary recourse against his true employer fails (as here) – most frequently, where his true employer is not insured – if the principal contractor found liable is then entitled to an indemnity from the Nominal Insurer, what is the purpose of continuing to have s 127(1)? He

submitted that on this construction it does no useful work; if the legislature intended the Nominal Insurer to be liable in cases such as this, s 127 could have been omitted from the Act.

[103] Mr Nosworthy submitted that the later 1991 amendments, in the form of s167(1)(e) and s 127(5), merely affirmed the existing law and legislative intent, and were inserted ex abundante cautela. The Act always saw the Nominal Insurer as the insurer of last resort, if the worker's action against his employer and the principal contractor failed.

[104] Assuming that "the employer" referred to in s 167(1) was the company, as the appellant claims in par [86], Mr Nosworthy submitted along the lines of par [79] that the Nominal Insurer still was not a "person who would have been liable to pay compensation to the worker independently of this section", within the meaning of s 127(3). This was because, if it was the company which was "the employer" referred to in s 167(1)(c), it was in fact "covered in full" by a worker's compensation insurance policy contemplated by s 129(1), being the appellant's insurance policy. Hence the precondition in s 167(1)(c) is not met and the worker cannot claim against the Nominal Insurer under s 167(1). It was not to the point that the company had not taken out insurance itself, as required by s 126(1); s 167(1)(c) did not require, to avoid default by the company that the company, itself have taken out the "policy" of insurance referred to, but only that the liability of the employer to pay compensation be "covered in full by a policy … of insurance … *obtained in accordance with this Act*". (emphasis added). This

had occurred, in relation to the appellant's policy, bearing in mind the admission by the appellant. Although his Worship had noted at p30 that it was common ground that the company was not insured, that observation was to be understood in the sense that the company had not taken out its own *policy,* as required s 126(1).

[105] As a separate submission to that in par [104], Mr Nosworthy submitted along the lines of par [80] that because of the 'reading' provision, s 127(2), the appellant should be treated as "the employer" referred to in s 167(1). On that basis, s 167(1)(c) was not met, on the facts. The result was that on either scenario - that is, in par [104] or par [105] – a claim against the Nominal Insurer under s 167(1) could not succeed, and accordingly, the Nominal Insurer was not within the scope of s 127(3).

[106] Mr Nosworthy also relied on s 129(1); see par [75]. He submitted that the appellant's policy in this case fell squarely within s 129(1); and that the existence of s129(1) pointed to the legislature's intention that the Nominal Insurer was to be the insurer of last resort.

Conclusions

[107] It is clear that the question raised by this issue is one of discerning the legislative intent as expressed in the Act, and in particular in s 127 and s167. Cox J in *Reardon v Scolyer* (supra) gave the words in the equivalent of s 127(3) their "ordinary meaning"; I consider that that is also the meaning which those words should be given in this case. I am persuaded

that the approach in pars [77] and [86] is correct. It is clear, I think, that in this case the reference to the "employer" in s 167(1) is to be treated as a reference to the company. This approach leads to the conclusion that, if the preconditions in s 167(1) are met as regards the company, in the present case the Nominal Insurer should indemnify the appellant.

However, whether the precondition in s 167(1)(c) is met depends on the content of the admission made by the appellant before his Worship. The parties were ultimately in dispute as to the extent of that admission.

[108] Mr Riley did not concede that the admission was to the effect that the appellant had insured both itself and the company as is, for example, contemplated by a policy in s 129. He submitted that, properly understood, the admission was that the appellant was covered by insurance against its own liability under the Act in relation to its own workers and that this included any liability it incurred under s 127(1) to a contractor's worker. He submitted that it was not a concession that the company was thereby insured against its separate liability as an employer. He attacked his Worship's conclusion that the company was "directly covered by the policy", referring to other observations by his Worship to the effect that the company "was not covered by a workers' compensation policy".

[109] Mr Nosworthy submitted that this was a misconstruction of the admission made. He submitted that the policy had issued under s 129. Pursuant to Schedule 2, the provisions of the Act were deemed to be incorporated in the

policy; see par [79] Mr Nosworthy relied on the way in which the matter had been argued before his Worship; see par [78]-[82]. He noted that he had mentioned his "fourth argument" in par [78], as an issue which his Worship did not have to resolve; that submission, and his submission before his Worship in par [79], proceeded on the basis that the admission was that the policy covered the company. His submissions before his Worship had never been sought to be controverted by the then counsel for the appellant, who made the admission, as having been put on a misconception of it. The case had been argued on the basis that the concession was to the extent for which he contended. His Worship's reference to the company being "not covered" was a reference to its not having taken out its own insurance, as required by s 126.

[110] I consider that Mr Nosworthy is correct. The case had been argued throughout on the basis that the admission by the appellant was that the policy covered not only its own liability, but also that of the company. It is too late in the day to seek to reopen the basis upon which the concession was made. It may be that the true significance of the extent of the admission, as understood by his Worship and the parties at the time, was not apparent at the time it was made.

[111] It follows in my opinion that his Worship was correct in finding that the Nominal Insurer was not liable to indemnify the appellant. I consider that grounds of appeal 2 and 3 must be rejected; grounds 7 must also be rejected.

Order

[112] For these reasons, the appeal is dismissed and his Worship's decision of 9 October 1995 is affirmed. I will hear the parties as to costs.

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