PARTIES:	C & L WILKINSON (T/A CHRIS WILKINSON) v AMP GENERAL INSURANCE PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA EXERCISING TERRITORY JURISDICTION
FILE NO:	No 1 of 1994
DELIVERED:	Darwin, 5 February 1997
HEARING DATES:	21 - 24 May 1996
JUDGMENT OF:	MARTIN CJ.

CATCHWORDS:

Contracts - Particular parties - Principal and Agent - Whether person was an agent for plaintiff employer for purposes of receiving notices from defendant insurer - Agency connotes an authority or capacity in one person to create legal relations between a person occupying position of first person principal and third parties - Not sufficient to establish agency to show that work was done at request of and for benefit of another.

Work Health Act (NT)

Colonial Mutual Life Assurance Society Ltd v The Producers and Citizens Cooperative Assurance Company of Australia Limited (1931) 46 CLR 41, referred to.
Henderson v Amadio (1996) 140 ALR 391, referred to.
International Harvester Company of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company (1958) 100 CLR 644, referred to.

Worker's Compensation - Entitlement to and liability for compensation - Persons liable to pay compensation - Liability for indemnity - Northern Territory - Whether defendant insurer liable to indemnify plaintiff employer pursuant to policy of insurance under the Work Health Act (NT) - Whether contract of insurance not renewed because of plaintiffs' failure to pay premiums - Evidence lacking of primary facts needed to be established, from which inference as to postage of payment advices to plaintiff employer may reasonably be drawn - Statutory cover remained in force.

Work Health Act (NT), s138A

Australian Trade Commission v Solarex Pty Ltd (1988) 78 ALR 439, considered.

Worker's Compensation - Insurance or levy - Northern Territory - Liability of insurer - Whether, if insurance expired or lapsed, waiver or novation by defendant such that defendant extended indemnity to plaintiffs for relevant period - Appropriation - Issue of later notice to plaintiff employer inconsistent with continued existence of right of defendant insurer to maintain that policy had expired.

Work Health Act (NT), s138A

Craine v The Colonial Mutual Fire Insurance Company Ltd & Another (1920) 28 CLR 305, referred to.
Re Walsh; Ex Parte Deputy Commissioner of Taxation (NSW) (1982) 42 ALR 727; on appeal to Full Federal Court (1983) 47 ALR 616; on appeal to the High Court (1984) 156 CLR 337, referred to.

Worker's Compensation - Insurance or levy - Northern Territory - Liability of insurer - Whether plaintiff employer breached terms of policy by making payment, settlement or admission of liability in respect of claim by employee without written authority of defendant insurer - No evidence to indicate employee not entitled to be compensated by plaintiffs in accordance with provisions of Work Health Act (NT) - Counterclaim dismissed.

Work Health Act (NT)

REPRESENTATION:

Counsel:

Appellant:	Mr J B Waters
Respondent:	Mr G J Parker

Solicitors:

Appellant:	Caroline Scicluna & Associates
Respondent:	Cridlands

Judgment category classification:	B
Judgment ID Number:	mar96023
Number of pages:	28

mar96023

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

No. 1 of 1994

BETWEEN:

C & L WILKINSON (T/A CHRIS WILKINSON)

Plaintiff

AND:

AMP GENERAL INSURANCE PTY LTD

Defendant

CORAM: MARTIN CJ.

REASONS FOR JUDGMENT

(Delivered 5 February 1997)

The plaintiffs claim to be indemnified by the defendant pursuant to a policy of insurance issued by the defendant in respect of the plaintiffs' liability under the *Work Health Act* (NT) ("the Act). It is shown that on 21 September 1993 Mr Bird, a worker in the employ of the plaintiffs, was injured in the course of his employment, giving rise to a claim for compensation against the plaintiffs under the Act.

The defendant denies that it is liable upon the basis that although it had relevantly insured the plaintiffs up to 1 May 1993, the contract of insurance was not renewed beyond that date because of the plaintiffs' failure to pay premiums. As to that, the plaintiffs say that if the insurance expired or lapsed the defendant waived the consequences, or that there had been a novation such that the defendant extended indemnity to the plaintiffs for the relevant period. Further, the plaintiffs say that the defendant is estopped by its conduct from denying that it must indemnify the plaintiffs. The defendant makes a counterclaim, which is contested and will be left for consideration if the occasion arises. The issues involved not only significant factual disputes between the parties, but also those arising from the application of provisions of the Act.

As to the Act, it is to be noted that the conduct of insurance business under its provisions is highly regulated. Insurers must be approved (s119), every employer who is not a self-insurer is to obtain from an approved insurer a policy of the insurance or indemnity for the full amount of his liability under the Act (s126(1)) and an approved insurer shall not, except with the consent in writing of the Authority, refuse to issue or renew a policy of insurance or indemnity to an employer who has tendered the premium for such a policy and who has complied with the approved conditions (s126(3)). The terms of the policy are fixed by s126(4) and Schedule 2. Contravention of sub(4) does not annul the policy or diminish or affect the liability of the insurer to the person insured under it (subs(5)), and an insurer under a policy referred to in sub(1) is

liable under the policy as if it were in accordance with subs(4) (subs(6)). Employers are required to submit statements of payments to workers in accordance with s130 when applying for the issue or renewal of a policy and not later than 28 days after the issue, date of renewal or the date upon which the policy expires, give to the insurer a statement containing that information. Further, not later than 28 days after the expiration of each such period, the employer is to supply to the insurer a full and correct statement of the amounts actually paid by him during the period. Applying those provisions in practice, as appears from the evidence in this case, when a proposal is made for insurance under the Act the employer provides an estimate of the wages to be paid for the period of the prospective insurance, a premium is calculated and payable and at the end of the period the employer provides the insurer with the actual amounts paid and an estimate of those for the future period. The insurer then adjusts the premium originally assessed (called the "Deposit Premium") in accordance with the actual wages paid compared with the estimate, and also calculates the premium for the ensuing period based on the estimate then provided. If the wages paid exceed the estimate then the additional premium payable is described as the "Extra Premium" or abbreviated "E/P". In this case there was no insistence by the defendant upon compliance by the plaintiffs with the statutory requirements as to time.

Where the insurance or indemnity period is 12 months, and the premium payable is more than $500, the employer may, in such manner as is agreed between himself and the insurer or, in default of agreement, as is prescribed, elect to pay the premium by special instalments (see s131). It is not suggested

that an agreement may not be made between the employer and the insurer for a payment of premiums by instalments other than in the manner envisaged in that section, and the Act does not prohibit it.

Section 138A is important. It provides that an insurer shall not later than 28 days before the day on which a policy of insurance or indemnity against liability under the Act is due to expire, notify, in writing, the employer who obtained the policy or a person acting as the agent of the employer of the date on which the policy is due to expire and that the policy will expire on that date unless a premium, as agreed by the insurer and the employer, for the renewal of the policy is paid or agreed to be paid on or before that date. Where the insurer fails to comply with that provision and the employer has not obtained other insurance under the Act, then by force of that section there exists between the insurer and the employer a policy of insurance or indemnity against liability under the Act providing the same cover as provided by the expired policy commencing on the date of the expiration of that policy and expiring 28 days after a notice as required by subs(1) is given to the employer. Premiums payable in respect of policies under the Act are monitored by a committee established under Division 4 of Part VII.

The overall effect of the compulsory scheme, regulated in the manner described, is that an insurer once having issued a policy is obliged to offer renewal and there would be little reason for an insured not to renew.

Some months after they commenced business in partnership, described as Cabinet/Joinery, a proposal was made by the plaintiffs to the defendant for insurance under the Act for the period from 7 September 1989 to 7 March 1990, six months. The proposal was expressed to be in relation to liability under the *Workmen's Compensation Act* of South Australia and the *Wrongs Act* of South Australia which have no application in the Northern Territory, but that does not seem to have concerned anyone. Mr Tubbenhauer was an agent for the defendant for some purposes, such as receiving proposals for insurance and he did so on this occasion. He apparently could not accept any such proposals, but forwarded them to the defendant where that decision was made. He had assisted the plaintiffs on a fairly regular basis previously in relation to insurances with the defendant and continued to do so in relation to subsequent wages declarations and by providing estimates of what he thought the premiums might be after adjustments. He acted as a liaison between the plaintiffs and the defendant in matters such as requests for time to pay and arrangements to make payments by instalments, and it appears that from time to time he received copies of various documents directed from the defendant to the plaintiffs such as premium advice, renewal premium advice and the like. The whole of the relationship as between the plaintiffs and the defendant respectively and Mr Tubbenhauer was not explored, but in my opinion he did not constitute an agent of the plaintiffs for the purposes of receiving notices from the defendant. Agency connotes an authority or capacity in one person to create legal relations between a person occupying the position of the first person principal and third parties (*International Harvester Company of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Company* (1958) 100 CLR

644). To establish that A was B's agent it is not enough to show that A did work for B at the request of B, and for the benefit of B (*Colonial Mutual Life Assurance Society Ltd v The Producers and Citizens Cooperative Assurance Company of Australia Limited* (1931) 46 CLR 41 cases referred to by Heerey J. in *Henderson v Amadio* (1996) 140 ALR 391 at 508).

Endorsements on the 1989 proposal show an estimate of wages which would produce a premium of $3,013.91 for a year. The amount payable for the six months was $1,506.95. The proposal was signed by Mr Wilkinson and a receipt for a sum including the premium for six months was issued on 1 September 1989. There does not seem to be any reason why such a policy of insurance could not be for a period of less than 12 months. This seems to be acknowledged by s131(1)(a). The policy schedule attached to the policy shows the period of insurance as being for the lesser period.

The policy itself directs that the "Policy Schedule" should be read in conjunction with it. It recites that the policy is issued pursuant to the *Work Health Act* of the Northern Territory and that in consideration of the payment of the "above mentioned premium" (to which I can find no reference except in the Policy Schedule) if, "between the inception day as per the schedule at 4 o'clock in the afternoon of the Expiry day as per the schedule, and thereafter to 4 o'clock in the afternoon of the last day of any subsequent period in respect of which the premium has been paid to and accepted by the Insurer, the Employer shall be liable to pay compensation under the Act ... ". It is expressly provided that the policy is 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”. The conditions attached to the policy are in accordance with those originally prescribed. They include a condition relating to adjustment of premium. Condition 13 provides that the insurer may at any time, by giving written notice to the Employer, cancel or lapse the policy. It includes details as to how notice is to be given, and for adjustment of premiums and concludes “provided that the policy may not be cancelled of (sic - or) lapsed without prior consent of the Authority.” (that is, the Work Health Authority established by the Act). The prescribed conditions were amended in 1991 and no longer contain any reference to lapsing of a policy. It was thereafter directed only to cancellation. The policy being subject to the Act, the wording of the conditions in the policy must be taken to have been amended accordingly. The references to lapsing of the policy are disregarded as from the date of the amendment taking effect, 1 July 1991. Although there was argument about it, no question of rectification of the policy arises. It was altered by the Statute.

It is provided in clause 14 that no condition or provision of the policy shall be waived or altered except with the prior consent of the insurer endorsed on the policy, nor shall notice to an agent, nor shall knowledge possessed by an agent, or by any person, be held to effect a waiver or alteration in the contract or any part of it. The policy has upon it a signature under the typescript “J K Staveley Managing Director” which appears on later documents. The policy bore the number T W002168G.

There do not appear to be any documents in evidence such as might be expected in relation to renewal of the policy for the six months after 7 March 1990, but Mrs Wilkinson's evidence is that she paid a further $1,506.95 on or about 30 June 1990, that is, three months after the expiry of the initial period of insurance. The total of the two premiums paid for the period of 12 months, expiring on 7 September 1990, was adjusted creating a liability of $487.98 which was paid by the plaintiffs on 28 March 1991, that is, a little over six months after that period had expired. The deposit premium for the period 7 September 1990 to 7 September 1991 was assessed at $2,898 which was paid by the plaintiffs on 29 April 1991, being shortly after Mrs Wilkinson says she was informed that that amount was due. For reasons and by what means unexplained, the next evidence in relation to the insurance is a wages payment declaration showing an expiry date of 1 May 1992. Whatever may have been the reason, no issue has arisen in respect of that change of date. The declaration and attached statements are not entirely satisfactory being bedevilled with alterations, but show that after all necessary adjustments there was payable in respect of the premium for 1 May 1991 to 1 May 1992 together with the deposit premium for 1 May 1992 to 1 May 1993, $3,530.34. There is another document "Premium Calculation (for office use only)" which is quite uncertain as to the effective dates, it referring to an expiry on 1 May 1992, but also referring to a period from 1 July 1990 to 30 June 1991 and a future period from 30 June 1992 to 30 June 1993. That document also bears a number of marks which would indicate that perhaps it is not to be relied upon, but it shows a balance payable of $6,452.08.

Arrangements were made for the $3,530.34 to be paid quarterly, but I have been unable to find any account or other evidence emanating from the defendant by way of an account or premium advice or the like for that sum. Precisely what it represents cannot be satisfactorily determined. However, the plaintiffs have not denied liability for it and in fact have started to pay that sum by quarterly instalments. They say they paid one such sum of $883 at the office of Mr Tubbenhauer on 31 August 1992. There issued from the office of the defendant sometime after 8 September 1992 a document headed "Extra Premium Advice" which recites:

> "Your quarterly/half-yearly premium is now due and continuation of cover is conditional upon payment of the amount due. As this is the first and final account we would appreciate receiving your payment within 14 days. Many thanks."

It will be recalled that an extra premium may be payable at the conclusion of a period of insurance where the amount of wages actually paid during that period exceeds the estimate made at the commencement of the period. It is a debt in respect of a past period of insurance. It is not, as the document describes it, a quarterly or half yearly premium. The period of insurance in that "Extra Premium Advice" is said to be 1 May 1992 to 1 November 1992, and the premium said to be payable is $1,766, that is, twice the quarterly instalment of $883. That would be explicable if the sum of $3,530 previously referred to was payable by quarterly instalments over the period from 1 May 1992 to 1 November 1992, the first of such instalments being due on 1 May and the next on 1 August. In any event Mrs Wilkinson says she paid a further

$883 on 30 October 1992. It does not appear to be contested that those two payments of $883 each were paid prior to 1 November 1992, the latter of them just a day or two beforehand.

After 24 June 1992, the defendant had sent a "Renewal Premium Advice" for a period of 12 months from 1 May 1992 to 1 May 1993 for a sum, after adjustments, totalling $6,452.08. The wording on the document included:

> "Thank you for forwarding your wages declaration. Your renewal premium has been adjusted for the previous period of insurance and any deposit premium deducted. As this is the first and final account we would appreciate receiving your payment within 7 days. Many thanks."

That notice does not comply with s138A. Mrs Wilkinson was probably mistaken in her evidence that she thought she made arrangements to pay that amount by instalments.

As already indicated, there is difficulty in tying all this paperwork together, but doing the best I can, it seems that the Extra Premium Advice for $1,766 was for two quarterly payments of the Extra Premium for the year expired May 1992, and the Renewal Premium was for a renewal for 1 May 1992 to 1 May 1993. It was prepared after the commencement of that period, probably waiting until wages declarations were received from the plaintiffs. It includes an adjustment "1991/92 - $3,230.08" and I am tempted to think that by whatever means the amount of $3,530 previously referred to had been

adjusted down to that figure and thus the Extra Premium payable to 1 May 1992 was that reduced amount. That leaves the Renewal Premium for 1992/93 standing unpaid and no arrangements made to pay it. The evidence is confused in relation to just what it was Mrs Wilkinson thought she had arranged to pay by the quarterly instalments. She said that she had been informed that there had been a considerable increase in premiums to about $9,000. Recognising there was a problem in meeting such a sum, she saw Mr Tubbenhauer and enquired as to whether it could be paid over time, and she says he suggested it be paid quarterly. There were no accounts in evidence for such a sum prior to Mr Bird's accident, but one of a like amount emerged in December 1993, after the accident. Perhaps a figure of this nature had been foreshadowed by Mr Tubbenhauer at some stage and Mrs Wilkinson was thinking about what could be done if it emerged.

The confusion arising from the defendant's documents and the course of dealing with the plaintiffs is by no means reduced by the events which follow. It is the case for AMP that on 8 September 1992 it printed an "Extra Premium Advice" in which it specified the period of insurance as 1 November 1992 to 1 February 1993 and sought payment of a quarterly premium of $883. Setting aside the wording of the document, it is clear enough that that was intended to be a third quarterly payment of the sum of $3,530, and it is treated as being an extra premium. Mrs Wilkinson says that that document was not received and thus the amount claimed was not paid. Nor was there paid a further $883

claimed by AMP as an Extra Premium for a period from 1 February 1993 to 1 May 1993 for which it says it printed the advice on 8 September 1992. There is no indication on that document, nor any other emanating from the defendant, that previous advices calling for payment of $883 had not been taken up and that there were arrears of the quarterly payments.

It is necessary to pause in the course of the narrative of the transaction, as disclosed on the documents. A dispute arises as to whether the last two Extra Premium advices for $883 were received by the plaintiffs. In the end result it may not matter much, but it was an issue much agitated at trial and therefore should be dealt with. Mrs Wilkinson simply says that those documents were not received and her husband says he has no knowledge of them. They were addressed to him at the post office box which they used at the Alice Springs Post Office and to which all previous correspondence from AMP had been sent. I am satisfied on the evidence of the Postmaster that had the documents been posted by AMP then the probabilities are that they would have been received at Alice Springs and placed into the correct post box. The question is, were they posted?. Mr David Varley's evidence was that from 1986 to September 1995 he had been employed by the defendant, and during the years 1991 to 1993 was stationed in Adelaide. Included in his duties was the administration of workers' compensation matters for the Northern Territory during the period May 1990 to September 1993. He said he was familiar with the plaintiffs' account. As to the sum of $3,530.34, he said that the writing on

the documents whereby that amount was calculated was partly his, that that amount was an amount payable by the plaintiffs and that he recalled it was to be paid by quarterly instalments. Having noted the amount payable after adjustment and the arrangements for quarterly payments, he said he then produced the accounts, as he called them, for the instalments of $1,766, $883 and $883 respectively. The documents show the date they were all printed as 8 September 1992 and Mr Varley said that he did that. He went on to say that he placed each document in an envelope and put it into the office system for the purpose of going into the postal system. As to the first of the documents, that is, that for the sum of $1,766, he says he performed that task on 8 September. There were two copies, one being put in an internal bag mail, with other documents, to go to Mr Tubbenhauer, and he says he put it into the bag himself. He also retained a copy of the document for his own records. As to the later documents, each seeking $883, he says that he had two copies of them and filed them in a system to be retrieved in the future and forwarded to the client and Mr Tubbenhauer. The normal practice was to forward such documents four weeks before commencement of the period referred to, and in each case he said he did the same as he had done for the claim for $1,766. He was unable to recollect when he would have forwarded them specifically, but said that in accordance with his office routine procedure, it would have been within a period between two to four weeks prior to the commencement of each of the periods of insurance referred to. He had no specific personal recollection of having undertaken that task. In accordance with his usual

practice, he said that on the day he arranged to post each of those documents to the plaintiffs he would have put the agent's copy in Mr Tubbenhauer's pigeon hole to be forwarded to him, and retained one for himself. On a copy of the Extra Premium Advice for the period 1 February 1993 to 1 May 1993 there is written "sent to Tubby to F/U" followed by initials and a date 11/3. Mr Varley said that handwriting was his and that F/U stood for "follow-up" and that the date was 11 March 1993.

His evidence was to the same effect in relation to the Renewal Application Advice for the period 1 May 1993 to 1 May 1994 which was printed on 20 February 1993 and which sought payment of $6,452. That document stated:

> "The cover under your policy expires on the "from" date shown in the period of insurance box below and we welcome renewal. To continue cover, please forward the total amount due, with the payment advice section before the "from" date shown, together with the completed attached declaration to enable us to calculate any adjustment required to the amount payable".

The plaintiffs were thereby being advised that cover under the policy expired on 1 May 1993, and the amount of $6,452 was described on it as being a "Deposit Premium", being the same as the amount advised as the Renewal Premium for the period 1 May 1992 to 1 May 1993. What is clear from this document at least is that the policy had not expired prior to 1 May 1993. Mrs Wilkinson says she did not receive that document either. Mr Varley's

evidence was that when he received that document from the printer it was placed in the file with others and retrieved by him on or about 10 or 11 March 1993, the original was attached to a wages payment declaration and proforma letter to the plaintiffs, the lot folded into an envelope and put into the tray containing envelopes for posting. He said he sent a copy of that together with copies of the two previous documents claiming $883 each to Mr Tubbenhauer through the mailbag system together with a memo to him to follow them up. He said that none of the documents that he arranged to be posted in the manner he described had been returned, although the envelopes bore a return to sender address. Mr Varley's job in relation to workers' compensation in the Northern Territory involved about 500 clients, about 20 percent of whom were making quarterly payments. Advices in respect of those payments were prepared in advance and placed in a concertina folder by month, and during the course of each month, usually two to four weeks prior to the commencement of the rest, he would go through the file and send out the advices to the clients with copies to the agents. He said that he removed the spare copy from his system when he was advised that the instalment had been paid, such that he was aware by looking at the files whether action needed to be taken to "follow-up" and when that position occurred to him he did it by a reminder to the agent. It was, he said, the agent who got the commission and it was in the agent's interest to follow through where a client had not paid a premium or an instalment. There is no other evidence as to the posting of mail out of the AMP system nor of any record of mail being posted. The evidence of Mr Varley stops with him

placing documents in envelopes and putting the envelopes into the postage tray. It is presumed that one or more persons was charged with the responsibility of taking them out of the tray, seeing that the appropriate postage was paid, and putting them into the official postal service system. Beaumont J. said in *Australian Trade Commission v Solarex Pty Ltd* (1988) 78 ALR 439 at 443:

> "It is trite law that there is a prima facie presumption of fact that an envelope addressed and posted and not afterwards returned reached its destination in the ordinary course of post".

However, assuming such a presumption, it does not avail the defendant here in that there was no proof that the letters in question had been posted. Evidence of the primary facts needed to be established, from which the inference may reasonably be drawn, are lacking. Here the evidence, which I accept, tells of the general course of conduct adopted by Mr Varley in the office as a preliminary to having the documents in his charge despatched through the post by others. There is nothing improbable about the system he adopted to achieve that end, and I am prepared to infer that on each of the occasions here in question he probably followed that course of conduct, but, that does not go far enough. There is no evidence as to the number of links in the chain from when Mr Varley put the envelopes in the internal post tray to when they would ordinarily be posted. The plaintiffs deny that the documents were received, and even allowing for the fact that in the events which happened they might have been casting around for an excuse for not having

paid monies claimed by AMP, I am not prepared to reject their evidence and act instead upon an inference which does not have the required foundation of fact. I accept that the plaintiffs' business was not returning sufficient income during the relevant period to enable them to pay their debts as they fell due. Their evidence was that they had fallen on difficult times as a result of builders who owed them money going broke. They may have had to defer some creditors to pay others, they claim to have been in a position to obtain further funds on loan from Mr Wilkinson's aunt and to negotiate with their bank to extend their overdraft. They knew that the opportunity was open for them to come to arrangements with AMP to pay premiums on a quarterly basis, and they had the statutory right under s131. I do not accept the suggestions made by counsel on behalf of the defendant that the plaintiffs denied receiving the advices to which they had not responded because they were financially unable to respond to them. I think that they were confused as to how they stood with the defendant and that Mrs Wilkinson made mistakes as to what was owing and for what period. That may well have arisen from the defendant's documents received by them and their course of dealing.

There is nothing in the terms of the policy or in the Act which dictates that a failure to pay an Extra Premium has any affect beyond creating a debt for that Extra Premium owed by the employer to the insurer. I find that the Renewal Application Advice printed on 20 February 1993 in respect of the period of insurance from 1 May 1993 to 1 May 1994 was not received by the

plaintiffs. But it shows that so far as the defendant was concerned the policy was current until 1 May 1993, notwithstanding any default in payment of Extra Premiums that might have been due in respect of the period 1 May 1992 to 1 May 1993. Section 138A of the Act, mentioned in more detail above, (p4), requires that there be notification in writing to the employer not later than 28 days before the day on which the policy of insurance or indemnity against liability under the Act is to expire. I put aside notification to the agent of the employer. Part of the required notice goes to a premium, as agreed by the insurer and the employer. The Renewal Application Advice is not based upon the proposition that the premium will be agreed, it is rather in the nature of a demand for a premium unilaterally set by the defendant. It makes no reference to the possibility of an agreement to pay being entered into rather than payment being made by the due date. The Renewal Application Advice did not comply with the statute. There is no evidence that the employer obtained another policy of insurance under the Act prior to Mr Bird's accident, therefore there existed between the defendant and plaintiffs a policy of insurance against liability under the Act providing for the same cover as provided for in the expired policy, commencing on the date of the expiration of that policy, 1 May 1993 (s183A(2)). There is no evidence of any other notification to the plaintiffs in regard to renewal after 1 May 1993 prior to the risk under the policy coming to fruition by reason of the injury to Mr Bird on 21 September 1993. It was not contended on behalf of the defendant that any other notice had been sent. It apparently relied upon the Renewal Application

Advice printed on 20 February 1993 as having the effect that if it were not complied with then the policy expired and its liability thereunder was at an end. For reasons already given that was not the case and the statutory cover was in force. That is sufficient to dispose of the case, but other issues require to be considered should I be wrong about that.

I find that Mr Tubbenhauer had received copies of the Extra Premium Advices relating to the quarterly payments and of the Renewal Application Advice printed on 20 February 1993. Although I do not find that documents to be posted to the plaintiffs found their way into the postal system, relying upon evidence of receipt of some of the documents by Mr Tubbenhauer through the bag system, I find that he had received those documents at some stage, and probably at about the time that Mr Varley said he despatched them. However he did not receive them as agent for the plaintiffs.

Immediately after the accident Mr Tubbenhauer was advised by one of the plaintiffs of its occurrence, and whether he then knew that there were any arrears of premium or merely suspected it, or only found that out when he phoned an officer of AMP in Darwin and was told that it was the case, does not matter. The cover under the policy had either expired or not, but certainly within a short time Mr Tubbenhauer informed the plaintiffs that they were not covered, and arrangements were made whereby the appropriate formal notice pursuant to the *Workers' Compensation Act* was completed and delivered to

the Work Health Authority upon an assumption that there was no cover. It does not appear that any formal notice was given to AMP, but undoubtedly that was because the defendant, through its employee at the time, had made it known to Mr Tubbenhauer or confirmed that the policy had expired. Given the statutory compulsion that there be in force a workers' compensation insurance policy, the plaintiffs completed a new proposal on 23 September 1993 for a period of 12 months. That proposal contained an estimate of wages for the period and expressly disclosed the accident injuring Mr Bird. It seems that Mr Tubbenhauer made a calculation of one quarter of the estimated deposit premium under the new proposal amounting to $2,398.90, and sent the proposal and a cheque for $900 to the defendant.

Having sought cover by way of a separate insurance policy for the ensuing period, Mr Tubbenhauer tried to have the defendant reverse its decision not to accept a claim under the policy said to have expired. He did that by letter of 27 September 1993. It is not clear whether that was sent on the instructions of the plaintiffs or that Mr Tubbenhauer was otherwise acting as their agent in writing it. As the letter shows, he had his own interests to protect. He recited that the defendant maintained that it sent a renewal notice so that the policy could be renewed to 1 May 1993, but added that the plaintiffs maintained that they had not received it, and suggested that they were "like most of us who rely on receiving their renewal notices". There is no evidence of a reply. The evidence from officers of the defendant shows that mail concerning an insured was directed in the usual course by post to the

insured. Copies were sent to the agent who had been responsible for putting forward the proposal. In Mr Tubbenhauer's case those documents were usually sent to him by overnight bag, not through the post, no doubt because of the volume of documents to be sent which included not only copies of the notices going to various insured, but other matters as between himself and the defendant. Mr Tubbenhauer's evidence concerning his office system and whether or not he received copies of particular documents was not satisfactory. His recollection was not clear on most occasions, and it did not seem that he had in place an efficient office system whereby he was kept informed or provided the means to inform himself of the contents of all documents that he received from the defendant. He did concede having received some of the documents sent to him by the defendant, and in particular that printed on 20 February 1993 being the Renewal Application Advice for the period from 1 May 1993. He was unable to say when he got that, but conceded, I think, that it was probably in March 1993. There was a great deal of questioning of Mr Tubbenhauer and other evidence directed to showing what his knowledge was as to the state of the original policy and the relationship between him and the plaintiffs. It is not possible to make firm determinations as to just what documents were received by Mr Tubbenhauer from the defendant. Mr Varley's evidence as to the means of dispatch of those documents in the overnight bag was no more satisfactory in leading to an inference that all such documents were received by Mr Tubbenhauer than was Mr Varley's evidence regarding the posting of originals to the plaintiffs. However, I do not consider that findings one way or the other in relation to Mr Tubbenhauer's knowledge of the status of the policy or the AMP view of

the status of the policy would be of any consequence. For reasons already given he was not the agent of the plaintiffs, and thus whatever documents he did receive were not received on their behalf and whatever knowledge he had can not be attributed to them. Similarly, the conversation over the telephone between Mr Tubbenhauer and Mr Thompson of the defendant's office in Darwin when Mr Tubbenhauer had been informed of the accident does not provide any material relevant to the outcome of this case. The dispute between Mr Tubbenhauer and Mr Thompson revolves around whether Mr Tubbenhauer told Mr Thompson of the accident and that he knew the policy had lapsed or whether he told him of the accident and enquired as to the status of the policy and was told by Mr Thompson that it had lapsed. Assuming against Mr Tubbenhauer that he knew that the policy had lapsed, and I think that is probably the case, his knowledge could not be attributed to the plaintiffs. I think it more likely than not that Mr Tubbenhauer told Mr Thompson that he had the documents on his desk, meaning that whatever was required to bring the policy into good standing was with him and that he did so as a means of inducing the defendant to accept liability under the policy. But simply because he said he had the documents on his desk does not mean that he in fact had them on his desk. He had been a personal friend of the plaintiffs for many years as well as the person who was responsible for putting forward a number of proposals for insurance on their behalf to the defendant. If he had the documents on his desk one might have thought he would have referred to that fact in his letter to the defendant written shortly afterwards, and perhaps enclosed them, but he did not. Again, I do not think

the resolution of that particular issue has any bearing on the outcome of the case.

On 24 November 1993, the defendant responded to a facsimile transmission from the solicitors for the plaintiffs and enclosed a copy of the renewal notice "that was sent to Mr Wilkinson straight after printing in comply (sic) with Section 138A of the Work Health Act". The receipt by the defendant of the proposal for the new policy was followed by a "Renewal Premium Advice", printed on 31 December 1993, for the policy said to have expired. It commences with the following words:

> "Thank you for forwarding your wages declaration. Your renewal premium has been adjusted for the previous period of insurance and any deposit premium deducted. As this is the first and final account we would appreciate receiving your payment within seven days. Many thanks."

It referred to the original policy number and stated that the period of insurance was from 1 May 1993 to 1 May 1994, during which time Mr Bird had suffered his injury. (A fact which had been further disclosed in the proposal for the new policy). That Renewal Premium Advice was not an invitation to renew such as the "Renewal Application Advice" previously referred to. It referred to a "wages declaration" although there is no evidence of such a declaration for the relevant periods except in so far as wages information had been supplied with the proposal for the new policy. The advice is premised upon the policy for 1 May 1993 to 1 May 1994 having been renewed and seeks the premiums as a debt. I have been unable to reconcile the various amounts shown as "adjustment 92/93 - $2,947.07", "renewal 93/94 -

$8,903.17" with any other figures in evidence. No credit is given for payment of any "deposit premium" and there is no evidence of any having been paid for that year. The total payable is shown as $11,850.24. The plaintiffs half jumped at the opportunity presented to them, and by cheque dated 13 January 1994, paid $9,451.34 to the defendant, such payment being identified with that Renewal Premium Advice and the original policy. That amount was accepted by the AMP and deposited to its bank account. The sum tendered was arrived at by deducting from the total amount shown as payable the amount of $2,398, being $900 paid when forwarding the proposal for the new policy and a further $1,498 paid on Mr Tubbenhauer's advice in relation to that policy conveyed to the plaintiffs on or about 18 November 1993. That total of $2,398 constituted a quarter of the estimated annual premium for the new policy.

On the same day that the defendant printed the "Renewal Premium Advice" for the original policy it also printed a "Renewal Premium Advice" for a quarterly premium for the new policy from 23 December 1993 to 23 March 1994 of $2,398.90. The Writ in these proceedings was issued on 14 January 1994 and forwarded by post by way of service to the defendant on the same day.

By early February 1994 the defendant had reviewed its position and a letter was written to the plaintiffs acknowledging receipt of the payment of $9,451.34 on 18 January 1994. The letter asserted that the original policy had lapsed on 1 May 1993. It claimed "premium arrears" of $1,766 (the two quarterly payments of $833 for which the plaintiffs say they had not received

any advice or account) and a "declaration premium adjustment" of $2,947.07 (see above "Renewal Premium Advice"). The total of those two sums of $4,713.07 the defendant said it had applied to the arrears on the original policy, and purportedly applied the balance of $4,738.27 to the premium for the new policy for a period it calculated to expire on 16 June 1994. In my opinion the defendant was not entitled to do that. The plaintiffs made clear their intention that the money paid by them was in respect of premiums under the original policy, and the defendant received it as such (as to appropriation generally see *Re Walsh; Ex parte Deputy Commissioner of Taxation* (NSW) (1982) 42 ALR 727 at 729 per Lockhart J. propositions not questioned on appeal to the Full Court of the Federal Court, *Walsh v Deputy Commissioner of Taxation* (1983) 47 ALR 616 nor in the High Court *Walsh v The Deputy Commissioner of Taxation of the Cth of Australia* (1984) 156 CLR 337). In the result the defendant is to be treated as having received that payment from the plaintiffs on account of the debt for the premium claimed in the Renewal Premium Advice in respect of the original policy. The Renewal Premium Advice printed on 31 December 1993, after the date upon which Mr Bird was injured, with knowledge of the injury, was a clear intimation to the plaintiffs by the defendant that it was willing to renew the policy from 1 May 1993 and that it agreed to accept the amount payable as stated in that notice for that renewal. The course of conduct between the parties show that credit would be available for payment. There is nothing in that Renewal Premium Advice to indicate that failure to pay the whole of the amount claimed to be payable would lead to the cancellation or lapsing of the renewed policy.

The renewal of the policy and claim for premium was done at the option of the defendant with knowledge of the accident. Rather than confirming the original policy as having lapsed as at 1 May 1993, it elected to treat information as to wages contained in the proposal for the new policy as a declaration for the purposes of adjusting premium on the original policy and to renew it. Whatever may have occurred within the workings of the defendant to bring about this state of affairs is irrelevant. The plaintiffs were entitled to rely upon the Renewal Premium Advice for all that it conveyed, they did, and they paid an amount on account of the amount claimed. The defendant did not reject the part payment on account of the original policy, it chose instead a course which was not open to it.

In my view the action of the defendant in issuing the Renewal Premium Advice printed on 31 December 1993 operated as a waiver of such rights as it may have had prior to that time. On an assumption that the Renewal Application Advice printed on 20 February 1993 complied with s138A (and in my opinion it did not) then the policy had not been renewed as at 1 May 1993, and the defendant was not liable under it for the accident some months later. But the later Renewal Premium Advice constituted an election on the part of the defendant to treat the policy as having been renewed as at 1 May 1993 in full knowledge of the fact of the accident. The issue of that later notice was inconsistent with the continued existence of the right to maintain that the policy had expired (*Craine v The Colonial Mutual Fire Insurance Company Ltd & Another* (1920) 28 CLR 305 at pp326-327). The waiver was not as to a condition or provision of the policy.

Having originally said that the policy lapsed at 1 May 1993, and the plaintiffs having acted on that basis by complying with the provisions of the law as if they were uninsured in relation to their liability to Mr Bird, the defendant says in these proceedings that the plaintiffs breached the terms of the policy because they made a payment, settlement or admission of liability in respect of the claim made by Mr Bird without the written authority of the defendant, an authority which would only be available if the policy was current. It goes further and makes a claim against the plaintiffs for damages for breach of the terms of the policy because they accepted liability to pay compensation to Mr Bird for a claim which was a result of his own fault or omission, and if the claim should properly have been disputed, the plaintiffs had failed to take steps to contest the claim. Having left the plaintiffs to their own devices to act as they saw fit, because the defendant said the policy had lapsed, the defendant now says it ought to be relieved of its obligations to indemnify them because the policy was still on foot and they did just that. It "renewed" the policy much later and knowing of the accident involving Mr Bird. It does not plead that Mr Bird was not entitled to be compensated under the provisions of the Act, and it did not raise any evidence designed to show that Mr Bird had not complied with the statutory procedures giving rise to a right to compensation. There is evidence before the Court of the circumstances of the accident involving Mr Bird and there is nothing to indicate that he was not entitled to be compensated by the plaintiffs in accordance with the provisions of the *Work Health Act*. The defendant's counterclaim is dismissed.

Whether the original policy had been cancelled so as to attract the provisions of Condition No 13 of the policy requiring that a policy may only be cancelled with the prior consent of the authority was in issue. The question does not arise since, leaving aside that it was continued by the statute, in its ordinary meaning to "cancel" something means to put an end to a state of affairs. The defendant never purported to do that, it maintained that the period of insurance had expired and thus come to an end without any action on its part. It was probably a recognition that a policy may expire by a effluxion of time, that is, lapse at the expiry of the period of insurance because not renewed that led to the amendment to Condition 13 in 1991.

Orders

The plaintiffs are entitled to a declaration that the defendant is liable to indemnify the plaintiffs in respect of their liability arising from the accident involving Mr Bird in accordance with policy number TW 002168G.

The defendant must pay the plaintiffs costs. I will hear counsel as to any further or consequent relief.
