ALICE SPRINGS ABATTOIRS (NT) PTY LTD (IN LIQUIDATION) v LANGDON

Court of Appeal of the Northern Territory of Australia

Asche CJ., Rice and Martin JJ.

21, 22 February, 25 May 1990

APPEAL - Question of fact - No appeal available - Decision as to preferred evidence does not give rise to question of law

APPEAL - Grounds not put at trial - Judgment on whether to permit new issue on appeal is discretionary - Exceptional circumstances needed to raise new point

APPEAL - New grounds of appeal not raised below - Subject to discretion

Cases followed:

Coulton v Holcombe (1986) 162 CLR 1
Mcphee v S Bennett Ltd (1934) 52 WN (NSW) 8
R W Miller & Co v Shortland County Council (1988) 83 ALR 225
Victorian Police v Accident Compensation Commission [1988] 2 Vic ACR 184

Cases referred:

Azzopardi v Tasman UEB Industrial Ltd (1985) 4 NSWLR 139
Brown v Dunne (1894) The Reports 67
Haines v Leves (1987) 8 NSWLR 442

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Solicitor for the respondent	:	Buckley & Stone

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. AP12 of 1989

ON APPEAL FROM THE JUDGMENT
OF A JUDGE OF THE SUPREME COURT
SITTING ON APPEAL FROM THE
WORKERS COMPENSATION COURT
PURSUANT TO S. 26 OF THE
WORKERS' COMPENSATION ACT
PROCEEDING NO. 214 of 1989

BETWEEN:

ALICE SPRINGS ABATTOIRS (NT)
PTY LTD (IN LIQUIDATION)
Appellant

AND:

THOMAS LANGDON
Respondent

CORAM: ASCHE CJ., RICE AND MARTIN JJ.

REASONS FOR JUDGMENT
(Delivered 25 May 1990)

ASCHE C.J.

I agree with the judgment of Martin J. and the orders proposed by him.

RICE J.

I too agree with the reasons for judgment and conclusions of Martin J. and the orders he proposes.

MARTIN J.

By s. 26(1) of the Workers' Compensation Act, an appeal lies from the determination of the Workers' Compensation Court (which Court is constituted by a Magistrate - see s. 6A) to the Supreme Court on a question of law. In this case, such an appeal was duly heard and dismissed by Nader J. of this Court. This is an appeal from the decision of Nader J.

On Thursday 8 December 1988, Mr Hannan SM., sitting as the Workers Compensation Court ("the Court"), at Alice Springs, was hearing evidence in a claim by the respondent against the appellant for workers compensation under the Workers' Compensation Act ("the Act") . A Mr Siletto was giving evidence on behalf of the appellant relating to the respondent's work history after the injury upon which the respondent's claim was based. Mr Siletto said that he had interests in a company which was involved in the boning and packing of meat. He knew the respondent and identified him in Court. He said that the respondent was employed by the company, "I think April to May or June 1983", but on being shown an employers copy of a group certificate he identified his signature on it and affirmed that Thomas Langdon, the respondent, was employed from 29 April 1984 to 26 May 1984 (not 1983). He recalled that the respondent had two brothers, Peter and another, whose name he did not recall,

but who it seems from the evidence was called Trevor. Both of them had also been employed by the company. It also appears that Thomas and Trevor had the same initials "T.J."

The dates between which the respondent was said to have been employed by the Siletto company was not the major issue on this point, it was whether he had been employed by the company as a boner at all after the injury. The injury was claimed to have arisen from the occupation of boning, and that it had precluded the respondent from further engaging in that occupation.

Mr Siletto swore that the respondent worked as a boner of beef, and that during that period in 1984 he saw the respondent daily - "I am in from the office to the production area several times during the day, yes, no problems ... Thomas was a competent efficient worker, he certainly did his job to our satisfaction". Mr Siletto was able to distinguish between the three Langdon brothers on the basis of the jobs which they were severally employed to perform. He was not cross-examined on that evidence, and the appellant, relying on Brown v Dunne (1894) The Reports 67, argues that the respondent is taken to have accepted his evidence. That is not so. The appellant at the hearing had full notice before Mr Siletto gave his evidence that there was an intention to impeach his credibility. The respondent had already given evidence denying that he had worked for

Mr Siletto's company as a boner during the relevant period. The appellant called Mr Siletto and tried to produce evidence to show that the respondent had so worked for it. There was no good reason why counsel for the respondent should have cross-examined Mr Siletto, and thus run the risk of his being able to bolster the appellant's case.

The question of whether the respondent had been employed by the Siletto company after the injury went to a number of issues, for example:

(a) whether he had so worked at all;

(b) if he had so worked, the nature of the work performed, whether as a boner or labourer or otherwise;

(c) the respondent's credibility.

Those issues were relevant to the determination of the respondent's entitlements under the Act, including that based upon his claim for compensation for inability to engage in some suitable employment or business.

The transcript of what was then said before the Court reads:

[MR LITTLE]: "... Did you keep a wages book in relation to your employees in May 1984? --- Yes, we still do.

Would you look at this document? Is the wages book, in fact the original of it still with the business, in the premises in Victoria? --- Yes, it is.

What's that facsimile document that you have before you, are you able to say? --- Well this is a photocopy of the Zions wage book for that time period and it shows the ---

(Objection)

MR LITTLE: Well don't say what it shows but did you see anything written on the original of that document which you can now identify? --- Yes, the final time we paid Thomas off on 30 ---

(Objection)

MR LITTLE: Perhaps if my friend could have a look at the document and then I'll tell him what I am seeking to lead evidence about.

MR REEVES: I have just observed Your Worship that it was a 3 month period between the last hearing and now and my learned friend has come in here with a document that he is going to rely upon without the original and he hasn't discovered it to us. May I have an adjournment to discuss this with my client, it will be only short.

HIS WORSHIP" Yes.

MR LITTLE: What is the normal practise in your company when somebody resigns from their employment? --- We pay them up with the due wages they are entitled to and they sign off in the wages book.

Can you say whether Mr Langdon signed off in the wages book?

(Objection)

HIS WORSHIP: If you can undertake to get that original wages book Mr Little, with that undertaking I allow you to continue with your line of questioning with that facsimile.

MR LITTLE: Well perhaps I would ask Mr Siletto while he is in the witness box if he can do that. Would you be able to arrange for the book to be delivered here by tomorrow morning? --- I could phone the officer certainly.

HIS WORSHIP: I can see we would have problems getting it here tomorrow. Well I'm afraid Mr Little, without that - although you may undertake, I am quite satisfied that perhaps tomorrow might be extremely difficult, Monday possible more, there is the question of further adjournments. I will have to uphold Mr Reeves objection.

MR LITTLE: As Your Worship pleases. Finally Mr Siletto, just if you would refer again to exhibit "B". Do you say that group certificate which bears your signature, refers to this man that you have identified in court? --- Yes, it does, that's the original group certificate with his retained copy, dated 1984 for that period of time, I mean that's the ---"

The precise objections and arguments thereon are not recorded. It is clear however that His Worship was prepared to permit Mr Siletto to answer questions with reference to the facsimile copy document, provided the original was produced. But, when it seemed that production of the original, presumably from Melbourne to Alice Springs, would take a few days, His Worship reversed his ruling. Counsel for the appellant took no objection to that and did not seek an adjournment to enable the original to be produced. Since His Worship declined to permit examination of the witness to proceed on the copy document, it is not possible to say what use may have been sought to be made of its contents had that procedure been allowed, or if there had been an adjournment to enable the original to be

produced. Some indications of the evidence sought to be adduced can be gleaned from reading the transcript, but there may well have been other uses to which the record might have been put by either side.

Dealing with this issue, (and there are a number of others), His Worship in his reasons said:

> "I almost omitted to deal with the problem that had been raised quite squarely in the evidence, and that was the exhibit B in the respondent's case was the group certificate. Sorry to interrupt that other consideration. It was there produced by Thomas Langdon in answer to discovery of documents and that was one of the discovery of documents was the discovery of a group certificate which indicated that Thomas Langdon had worked for M and T Siletto, a meat packing and a meat works in Victoria on 29 April 1984 to 26 May 1984, during a period when he was getting sickness benefits and/or workers compensation.
>
> If I am to accept that as an indication that he was working then or what in fact does that require me to duly consider whether or not he was in fact incapacitated. Mr Siletto himself was called after a 3 month adjournment of this case as I recall and he gave evidence that he had seen, after being shown this particular group certificate, he in turn recognised his signature, knew that Thomas Langdon, Trevor Langdon and another Langdon had worked at his meat packing and meat works at the time.
>
> He recalls Thomas being there. He recalls that he was a boner and he recalls what jobs that Trevor Langdon did and the other brother. One was on a meat weighing machine and the other was driving a forklift. He was of the opinion that Thomas had worked as a boner but upholding an objection as to a wages book which was - a facsimile of a wages book which was proferred (sic) as some form of possibly memory refreshment as to what in fact Thomas Langdon was doing there, that evidence was not received and the evidence of Langdon himself is hazy as to a period between 29 April 1984 and 26 May 1984 and saying that if he had worked there,

and he can't remember working there, that he would have worked as a labourer in any case.

His strongest rememberance (sic) of that was that he didn't work there and that the Thomas Langdon there referred to, with the address of Keith Street, was not and should not have been Thomas Langdon, it could have been Trevor Langdon. In any case, his memory of that period in his life and that particular incident there is not the strongest. But then of course there may have been many reasons as Mr Reeves put forward in his cross-examination and in his submissions, why a wages book could not have been produced in 1988, a wages book which was apparently continually in use and had been so for 4 years was not produced and it was sought to attempt to produce a facsimile of it, didn't assist me in coming to a conclusion that the evidence of Mr Siletto who said he saw Thomas Langdon there working as a boner was based on anything more than perhaps the fact that Thomas, Trevor and the other brother, three brothers who all had from time to time worked at the meat works and that without a signature or some other kind of more cogent evidence than just a mere rememberance (sic) from a group certificate, I was not inclined to accept Mr Siletto's evidence that in fact Thomas Langdon did work as a boner at M and T Siletto during the period 29 April 1984 and 26 May 1984".

His Worship's rejection of the copy of the wages book constituted a ground of the appellant's appeal to the Supreme Court. That ground was:

"The Court erred in declining to allow the witness Siletto to refer to a facsimile copy of the wages book of the witness' company in giving evidence about the employment of the worker, subsequent to his injury."

His Honour, dealing with this aspect of the matter and rejecting that ground of appeal, observed:

"Ground 1 complains that the Workers Compensation Court erred in declining to allow the witness, Siletto, to refer to a facsimile copy of the wages book of the witness company in giving evidence about the employment of the worker subsequent to his injury.

The use that can be made of a document, as far as I can think at the moment, is potentially two-fold. First of all it may be used by tendering it in the hope that it will be admitted as an exhibit. A witness may be asked to refer to a document for that purpose as part of the laying of a foundation to tender the document. It appears to me, from the evidence and the argument in this case, that that was not what was done before the magistrate. It wasn't the intention to tender the document and so I'll set that matter to one side.

The other use that may be made of a document is: it may be used to - or another use - it may be used in an appropriate case by a witness to refresh his or her memory of something that has occurred in the past and about which the witness has exhausted his or her recollection.

I don't think that was the position in the present case, either. The document in question was a photocopy or a facsimile of one page of a book, described as a wages book, but there is no evidence, of course, about what it was because it never got into evidence.

It was described by counsel as a wages book and has been referred to in these proceedings as a wages book, but I think that all I can say is that it was paper with some written copied material on it.

As far as I can see, no attempt was made to lay a foundation to enable the witness to use that as a basis for refreshing his recollection. Indeed, it's not clear from reading the transcript that that is what the witness was being asked to do.

But even if it were, the other matters were not attempted. The other matters relating to laying a proper foundation were not attempted and there was no basis from which I could say that the witness should have been allowed to look at that document in order to refresh his or her recollection.

I don't propose to venture further into that matter. There are all sorts of arguments that could be put, both sides, as to whether or not the

> wages book, if it were in fact a wages book, should have been allowed to be brought to the court.
>
> I say on both sides because it appears that this matter was possibly raised late by the appellant and the magistrate had a right to consider the duration of the case and bringing the litigation to finality in considering those matters.
>
> Having regard to the strict terms of the ground of appeal, I can't see that His Worship committed any error in terms of the ground. There doesn't seem to me to be any basis upon which Siletto was entitled to refer to that document in giving his oral evidence, and I dismiss the ground."

The ground of appeal is directed at the Magistrate's refusal to permit the witness to refer to a copy of a document. What use may have been sought to be made of the copy document by either side had the witness been permitted to refer to it is not fully disclosed on the material before this Court. It may or may not have been sought to be tendered. The original was available, albeit at some distance, but there was no explanation as to why it had not been produced. The issue of whether or not that copy document or its original, was to play any part in the proceedings was finally decided by His Worship's decision that no time would be allowed to permit production of the original. He decided, without awaiting any response from counsel for the appellant, that there would be problems in getting the book to the Court by the following morning. Clearly what His Worship had in mind was the possibility at least of there being a further adjournment, but it is most unclear to me as to the period it was anticipated such an

adjournment might be or what cost or inconvenience might be occasioned if time was allowed.

I think I can safely infer from what is known that neither counsel was a local Alice Springs practitioner, hence each would have travelled a considerable distance at significant expense. The remainder of the evidence and addresses were concluded on that day. It was not a ground of appeal that His Worship failed to adjourn to allow the appellant to produce the original of the document or even find out how long it would take to procure it.

The appeal to this Court on this point is that His Honour erred in holding:

(a) That there was no basis from which he could say that the witness Siletto should have been allowed to look at the document (referred to in the Appeal as a wages book) to refresh his recollection.

(b) That the learned Magistrate had a right to consider the duration of the case and bringing the litigation to finality as a basis for rejecting the use of the copy document.

His Honour did not hold in accordance with paragraph (a) at all. What he held was that there was no

basis upon which Mr Siletto was entitled to refer to a facsimile copy. That ground, as cast in the Amended Notice of Appeal, is dismissed. Looking at the matter more broadly I consider that there was no proper foundation laid to permit the witness to refer to a facsimile copy of a document for any purpose. It was not the best evidence; the explanation for the absence of the original was not such as to allow a copy to be used in the face of objection. The original had not been prepared by the witness. No application was made to make the document admissible as evidence pursuant to the Evidence (Business Records) Interim Arrangements Act.

As mentioned above it was not a ground of appeal to His Honour that the Magistrate erred in failing to allow an adjournment. How His Honour's remarks in respect of a matter which was not really before him can be taken up as a ground of appeal to this Court is beyond me. It smacks of being an attempt to raise here, at two steps removed, what should have been raised before the Magistrate at the time.

The next ground of appeal pressed in the Supreme Court was:

> "The Court erred in declining to accept the evidence of the witness Siletto regarding the worker's employment with the witness' company after the alleged injuries suffered by the applicant respondent when employed by the respondent appellant."

His Honour rejected this ground saying it is a question for a tribunal of fact to decide whether to accept or reject a witness' evidence. He clearly had in mind that the Magistrate had the opportunity of observing the witness and others who might have given competing evidence, of assessing their credibility and thus deciding who was to be believed. His Honour concluded his brief reasons on this matter by saying "To say that it was an error not to accept a witness' evidence doesn't seem to me to state a proper ground of appeal". The ground of appeal to this Court is:

> "That His Honour Mr Justice Nader in rejecting this ground of appeal erred in holding in effect that he could not entertain this ground of appeal".

His Honour dismissed the ground of appeal on the basis that it was for the Workers Compensation Court to decide whether to accept or reject the evidence of a witness. That is correct. To succeed on the appeal to the Supreme Court it must be shown that the Magistrate erred in law (s. 26). His Honour said that it was a question for the Court below to decide whether to accept or reject the evidence of a witness. He did not expressly determine whether the ground raised a question of law, or a question of fact from which no appeal was available. In my opinion a decision by a tribunal of fact as to what evidence it prefers does not of itself give rise to a question of law. See Victorian Police v Accident Compensation Commission

[1988] 2 Vic ACR 184. His Worship was simply concerned to find whether the respondent had worked as a boner for Mr Siletto's company during the period 29 April 1984 to 26 May 1984. He found he was not satisfied on the evidence before him.

The onus was on the appellant to show that the respondent had worked as a boner during the relevant period. Mr Siletto said that he did, the respondent effectively denied it, although conceding that he may have worked for Siletto during that period but only as a labourer. His Worship chose between the evidence on the two sides. There was evidence that the respondent worked at Siletto's as a boner and evidence that he did not. It is a question of fact as to whether evidence should be accepted in whole or in part or as sufficient to establish a fact. (Mcphee v S Bennett Ltd (1934) 52 WN (NSW) 8 at 9 and generally Azzopardi v Tasman UEB Industrial Ltd (1985) 4 NSWLR 139; see also Haines v Leves (1987) 8 NSWLR 442). In the last case Kirby P., who was in the minority on the point in Azzopardi said, at p. 469:

> "It is important to note again that the jurisdiction of this Court is limited to hearing appeals "on a question of law": see the Act, s. 118. It is not for us to substitute our views on the interpretation of the facts. That is a function reposed by Parliament in the Tribunal. Law operating on fact, there is no gulf between them. They interact in the process of decision making. But the stringency of the limitation in the entitlement of this Court to examine factual

> determinations was recently stressed by the Court in an appeal from another specialist tribunal, the Compensation Court of New South Wales. Appeals from that Court are, relevantly, also limited to questions of law. In Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139 the majority (Glass JA, with whom Samuels JA agreed) stressed that in appeals such as the present, the legislation does not allow the Court to correct errors of fact. It does not permit the Court to review even a finding of fact which is said to be perverse or contrary to the overwhelming weight of evidence or even against the evidence and the weight of the evidence. Nor may the Court review findings on the facts which are alleged to ignore the probative force of the evidence which is all one way, even if no reasonable person could have reached the decision made and even if the reasoning by which the Court arrived at its finding was demonstrably unsound. In all such circumstances the Court concluded, no error of law would be shown to attract the jurisdiction of this Court. The findings and interpretation of the facts are matters reserved to the Tribunal below. Only if there is no evidence to support a finding, or if the ultimate finding of fact necessarily demonstrates a misdirection on the applicable statute may this Court offer relief, within its remit on questions of law. In Azzopardi I suggested that perversity and illogical reasoning could attract the jurisdiction of the Court. But this was a minority view. The majority opinion is the binding rule. It must be observed in this case. It provides the basis for the consideration of the appeal by this Court."

It will be noted that His Honour stressed the statutory limitations relating to appeals to the Court in which he was then sitting. It may be that other considerations apply and different conclusions reached if a Superior Court was entertaining an application for the exercise of a broader supervisory jurisdiction.

His Honour was not wrong in deciding that ground of appeal as he did; no error of law was shown before His Honour and he had no jurisdiction to entertain an appeal on the facts.

Next the appellant seeks leave to add a further ground of appeal, in these terms:

> "His Worship erred in refusing to permit the witness Siletto to answer the question, namely:
>
> "Can you say whether Mr Langdon signed off in the wages book?"."

I repeat, this is not an appeal from the Workers Compensation Court, it is an appeal from a decision of the Supreme Court on determination of such an appeal. The appellant seeks to raise a new ground of appeal which should have been raised before His Honour. It seeks to raise here for the first time a complaint concerning His Worship's conduct of the proceedings before him which should have been a ground of appeal to the Supreme Court. I see no reason for giving leave to amend. An appeal from an inferior tribunal to the Supreme Court is not to be treated as a preliminary skirmish or just a step on a ladder to this Court. I expect that the issues between the parties to be further refined the higher up the appellate process the litigants proceed, not to expand. Put shortly, (and I will return to the principles), the general rule is that an

appellant is not at liberty to raise a point not argued in the courts below, unless there are exceptional circumstances (per Mason C.J. R W Miller & Co v Shortland County Council (1988) 83 ALR 225 at p. 230). I see no exceptional circumstances in this matter. Indeed, none were advanced by counsel for the appellant. The proposed additional ground of appeal was an afterthought and that is no reason to grant leave to raise it. (The same counsel did not appear in this Court as below).

Grounds 4, 5 and 6 of the appeal from the Workers Compensation Court to the Supreme Court were:

"4. The Court erred in the formulation of the correct principle to be applied in finding the worker's normal weekly earnings for the purposes of the Act.

5. The Court erred in that it failed to make any calculation of "the worker's normal weekly earnings" other than to find that such was equal to the average pertaining to the 6 weeks work with the respondent appellant rather than ascertaining the normal hours of ordinary time worked per week and multiplying those hours by the ordinary rate of pay for those hours as required by the Act or by following the alternative requirement that the average weekly earnings be ascertained over the previous twelve monthly period.

6. The Court erred in that it failed to apply the appropriate calculation in the second schedule to the Act for partial incapacity by failing to:

(a) ascertain the amount which the applicant worker was earning or was able to earn after injury in some suitable employment or business, and

(b) apply the proviso to paragraph 1B(b)(ii) of the Schedule to limit the amount of weekly payments for partial incapacity to a

proportion of the amount that would have been payable for total incapacity."

The provisions relating to compensation for a worker partially incapacitated for work by an injury are found in Schedule 2 to the Act.

Paragraph 1B of the schedule reads:

"(1B) Where the worker is partially incapacitated for work by the injury, the amount of compensation is -

(a) in respect of a week, being one of the first 26 weeks of the period of incapacity, or of the aggregate of the periods of incapacity - the amount, if any, by which the amount that he is earning, or is able to earn in some suitable employment or business, is less than the worker's normal weekly earnings; and

(b) in respect of a period, being a period after the expiration of the 26 weeks referred to in sub-paragraph (a) -

(i) the amount, if any, per week by which the weekly amount that he is earning, or is able to earn in some suitable employment or business is less than the amount per week that would be payable to him under paragraph (1A)(b)(i) if he had been totally incapacitated; or

(ii) the amount, if any, per week by which the weekly amount that he is earning, or is able to earn in some suitable employment or business, is less than the worker's normal weekly earnings.

whichever is the lesser, but so that the amount payable does not exceed the proportion of the amount that would have been payable to the worker under paragraph (1A)(b)(i) had he been totally

incapacitated for work that his loss of capacity to work bears to what would have been his full capacity to work had he not been injured."

Paragraph 1A(b)(i) reads

"in respect of a period, being a period after the expiration of the 26 weeks referred to in sub-paragraph (a) -

(i) the sum of -

A $197.00 per week during his incapacity;

B if at the date of the injury the worker has a spouse who is wholly or mainly dependent on the worker's earnings during the period of incapacity - $50.00 per week;

C if at any time during his incapacity he has no wife, but there is a woman or girl who has attained the age of 16 years and was at the date of the injury a member of his family or caring for a prescribed child - $50.00 per week while she is wholly or mainly dependent on his earnings during his incapacity."

Paragraph (4) provides a series of definitions to be applied to the formulae in paragraph 1B -

"(4) Subject to paragraph (4A), for the purposes of this Schedule -

"normal weekly earnings" means -

(a) subject to sub-paragraphs (b), (c) and (d), remuneration for the worker's normal weekly number of hours of work calculated at his ordinary time rate of pay;

(b) in the case of a worker who had entered into concurrent contracts of service with 2 or more employers under which he worked full-time at one time for one employer and part-time at another time for one or more other employers - remuneration for the worker's normal weekly number of hours of work calculated at his ordinary time rate of pay in respect of his full-time employment;

(c) in the case of a worker who had entered into concurrent contracts of service with 2 or more employers under which he worked part-time at one time for one employer and part-time at another time for one or more other employers -

(i) remuneration for the worker's normal weekly number of hours of work calculated at his ordinary time rate of pay in respect of both or all of his part-time employments; or

(ii) the remuneration that would have been payable to the worker if he had been engaged full-time in the part-time employment that he usually was engaged with for the more or most number of hours of employment per week at the date of the injury,

whichever is the lesser; or

(d) where, by reason of the shortness of time during which the worker has been in the employment of his employer, or the terms of the employment, it is impracticable at the date of the injury to calculate the rate of remuneration in accordance with sub-paragraph (a), (b) or (c) - the average weekly remuneration which, during the 12 months previous to the injury, was earned by the worker during the weeks that he was engaged in paid employment;

"normal weekly number of hours of work" means -

(a) in the case of a worker who is required by the terms of his employment to work a fixed number of hours, not being hours of overtime, in each week - the number of hours so fixed; or

(b) in the case of a worker who is not required by the terms of his employment to work a fixed number of hours in each week - the average weekly number of hours, not being hours of overtime, worked by him during the period actually worked by him in the service of his employer during the 12 months immediately preceding the date of the injury;

"ordinary time rate of pay" means -

(a) in the case of a worker who is remunerated in relation to an ordinary time rate of pay fixed by the terms of his employment - the time rate of pay so fixed; or

(b) in the case of a worker -

(i) who is remunerated otherwise than in relation to an ordinary time rate of pay so fixed, or partly in relation to an ordinary time rate of pay so fixed and partly in relation to any other manner; or

(ii) where no ordinary time rate of pay is so fixed for a worker's work under the terms of his employment,

the average time rate of pay earned by him during the period actually worked by him in the service of his employer during the period of 12 months immediately preceding the date of the injury."

Broadly, the circumstances in this case were that the respondent deposed to his earning from the appellant during a period of approximately 6 weeks prior to the date of the injury. He said he was otherwise unable to precisely recall for what period, with whom, and for what remuneration he was employed during the previous 46 weeks. He admitted that the weekly amount earned during the period of 6 weeks

was higher than that which he had earned per week during the earlier period. After the date of injury he was paid an amount per week by way of workers compensation but eventually the employer ceased making those payments, whereupon the respondent applied to the Court for an award. In the Statement of Claim he alleged that he sustained personal injury arising out of, or in the course of, his employment with the appellant in September 1983. There is now no dispute about that. He also alleged that he had received part payment of compensation and detailed the periods during which he was paid and the amount; he claimed his "normal weekly wage" during the first 26 weeks of incapacity, and for the period thereafter such amount as he might be entitled to pursuant to Schedule 2 of the Act, and for a lump sum disability payment. The appellant, by its defence, simply put all that in issue by blanket denials.

During his opening before the Court counsel for the respondent handed up particulars of the quantum of his client's claim. It was for $999.70 per week for 26 weeks from 16 September 1983 and for weekly amounts thereafter calculated in accordance with the abovementioned provisions. Credit was given for amounts received from the appellant on account. Calculations were also put forward as to the lump sum disability claim and for redemption of the weekly payments.

In his address at the close of the evidence counsel for the appellant concentrated his efforts on the evidence relating to the respondent's claim for compensation after the cessation of the payments on account of compensation made by the appellant. He surveyed the evidence as to the respondent's post accident history, including work history, medical history and prognosis. Indeed, he commenced his address "This application claims compensation from after the cessation of payment", overlooking the particularised claim that the amount paid by way of weekly compensation prior to the cessation of payment was not in accordance with Schedule 2. He did not address the question of the proper weekly compensation payable to the respondent prior to the cessation of payment by the appellant, he concentrated on refuting the respondent's claim for weekly compensation entitlement after that time.

Counsel for the respondent then addressed the Court. He handed up a chronology and a "restructured particulars of claim", taking into account the evidence relied upon by the respondent. Those particulars were detailed as to application of the formulae for calculating weekly entitlements and cross-referenced to the evidence. He addressed the Court at length on the evidence to support the particulars and especially clearly submitted that for the first 26 weeks of disability the respondent's entitlement was to be assessed by dividing the amount earned

during the 6 weeks prior to the date of the injury by 6 to arrive at the figure of $999.70 already mentioned. Counsel for the appellant did not seek to address in reply.

The Court awarded compensation on the basis of the particularised claim handed up in the closing address.

His Honour in the Supreme Court declined to deal with the fourth, fifth and sixth grounds of appeal, upon the basis that counsel for the appellant had had the opportunity to put his argument as to the relevant facts and the application of the formulae to the Court but failed to do so. His Honour expressed himself to be exercising a discretion in so deciding.

The appeal to this Court from the Supreme Court on these points is that that Court erred in declining to deal with the grounds of appeal in that His Honour erred in holding that the right to entertain those grounds was subject to a discretion, or, alternatively, that if His Honour had a discretion to entertain those grounds, he erred in law in the exercise of the discretion.

The starting point is His Honour's finding that the appellant did not raise the basic legal issue as to the application of the scheduled formulae to the evidence before the Court. Having read the submissions of counsel for the

appellant before the Court and His Honour's reasons, I could not disturb his conclusion that counsel failed to adequately raise and make clear to the Court the issues which it then sought to raise before His Honour.

If an appellant wishes to raise a new argument on appeal, which he failed to put during the hearing when he had an opportunity to do so, the principles governing the decision as to whether he will be permitted to do so are the same whether as between the trial court and intermediate court of appeal or that court and an ultimate court of appeal. The judgment on whether to permit the new issue to be opened up is discretionary. In Coulton v Holcombe (1986) 162 CLR 1, Gibbs CJ., Wilson, Brennan and Dawson JJ. at pp 7 - 8 reviewed the authorities, thus:

> "It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. If it were not so the main arena for the settlement of disputes would move from the court of first instance to the appellate court, tending to reduce the proceedings in the former court to little more than a preliminary skirmish. The powers of an appellate court with respect to amendment are ordinarily to be exercised within the general framework of the issues so determined and not otherwise. In a case where, had the issue been raised in the court below, evidence could have been given which by any possibility could have prevented the point from succeeding, this Court has firmly maintained the principle that the point cannot be taken afterwards: see Suttor v Gundowda Pty Ltd (20); Bloemen v The Commonwealth (21). In O'Brien v Komesaroff (22), Mason J., in a judgment in which the other members of the Court concurred, said:

> "In some cases when a question of law is raised for the first time in an ultimate court of appeal, as for example upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is expedient in the interests of justice that the question should be argued and decided (Connecticut Fire Insurance Co v Kavanagh (23); Suttor v Gundowda Pty Ltd (20); Green v Sommerville (24). However, this is not such a case. The facts are not admitted nor are they beyond controversy.
>
> The consequence is that the appellants' case fails at the threshold. They cannot argue this point on appeal; it was not pleaded by them nor was it made an issue by the conduct of the parties at the trial."

In our opinion, no distinction is to be drawn in the application of these principles between an intermediate court of appeal and an ultimate court of appeal. Finally, in a recent decision of six justices of this Court (University of Wollongong v Metwally [No. 2](25)) the Court said:

> "It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.""

The quantum of the respondent's entitlement for the first 26 weeks after the date of the injury was arguably in issue, in general terms, on the pleadings, but there is no evidence that the respondent had precisely quantified that component of his claim, nor that he had been requested to provide particulars of it, until his counsel handed up the calculations relied upon during his opening. From reading the transcript of evidence included in the Appeal Book it

appears that counsel for the appellant paid little regard to the respondent's pre-injury earnings in cross-examination. As indicated above, his major interest was as to the respondent's post-injury employment going to the issue of continuing weekly compensation for partial incapacity and redemption. Liability was the predominant issue so far as the appellant was concerned, not quantum. The claim for compensation for the first 26 weeks after the accident was but a small part of the overall claim made by the respondent amounting to only $26,000.20 of the total gross award of $310,000. I also note that the Act has been long since repealed and a decision as to the meaning of Schedule 2 in circumstance such as this case is likely to be of little more than academic interest. It will be of no general public importance.

Furthermore, it would not be possible for His Honour or this Court to finally deal with these grounds of appeal if it found the Court erred. The facts, such as might enable it to apply the formulae in Schedule 2 which it found to be applicable in the circumstances of this case have not been established. All that is known is the remuneration of the respondent during the 6 weeks prior to the injury, that he did not work regular hours and that his remuneration was fixed by reference to the number of cattle he boned out. The appellant did not, prior to trial, seek to elicit from the respondent whether by way of particulars,

interrogatories or otherwise, information which might assist the appellant in considering its position or securing evidence upon which it might seek to rely.

His Honour had a discretion and he has not been shown to have erred in the exercise of it.

I would dismiss the appeal. The appellant must pay the costs of the appeal.