Kypreos v Nabalco Pty Ltd [1999] NTSC 60

PARTIES:	PEDROS (PETER) ANGELOS KYPREOS v NABALCO PTY LIMITED
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	LA2 of 1997 (9418158)
DELIVERED:	10 June 1999
HEARING DATES:	4 July 1997
JUDGMENT OF:	KEARNEY J

CATCHWORDS:

WORKERS' COMPENSATION – ENTITLEMENT TO AND LIABILITY FOR COMPENSATION –

Persons entitled to compensation – employer served worker with Form 5, prescribed by the Work Health Regulations (NT) – Form 5 serves purposes of both s 69(1)(b) and s 85(8) of the *Work Health Act* (NT) – dispute as to the proper construction of Form 5 served – principles applicable in appellate review of discretionary decision on matter of procedure –

Work Health Act (NT), s 69(1)(b), s 69(2)(a), s 85(1), s 85(8), s 87
Work Health Regulations (NT), reg 13, Form 5

Mobasa Pty Ltd v Nikic (1987) 47 NTR 48, distinguished
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, distinguished
Housing Commission of NSW v Tatmar Pastoral Co Pty Ltd [1983] 3 NSWLR 378, aff'd (1984) 54 ALR 155 (P.C), referred to
Capital and Suburban Properties Ltd v Swycher [1976] Ch. 319, approved
Australian Coal and Shale Employees' Federation v The Commonwealth (1953) 94 CLR 621, followed
House v The King (1936) 55 CLR 499, followed
Nationwide News Pty Ltd v Bradshaw (1986) 41 NTR1, followed
Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc (1981) 148 CLR 170, followed
Re Will of F.B. Gilbert (dec'd) (1946) 46 SR (NSW) 318, followed
Apps v Pilet (1987) 11 NSWLR 350, followed

WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION

Practice Direction that worker 'dux litis' – whether determination of who is to be 'dux litis' is a proper subject for a practice direction not according primacy to directions by the court of trial –

Work Health Act (NT), s 69, s 95(1)(a), s 95(4)
Supreme Court Rules (NT), r 49.01

Currie v Dempsey [1967] 2 NSWR 532, followed
June d' Rozario & Associates Pty Ltd v Makrylos (1993) 112 FLR 314, followed
Simpson Ltd v Arcipreste (1989) 53 SASR 9, approved
Harris v AGC (Insurances) Ltd (1984) 38 SASR 303, approved

REPRESENTATION:

Counsel:

Appellant:	M.J.McK. Grove
Respondent:	T.J. Riley QC; with him C.A. Osborne

Solicitors:

Appellant:	Ward Keller
Respondent:	Elston & Gilchrist

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

Kypreos v Nabalco Pty Ltd [1999] NTSC 60
No. LA2 of 1997 (9418158)

BETWEEN:

PEDROS (PETER) ANGELOS KYPREOS
Appellant

AND:

NABALCO PTY LTD
Respondent

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 10 June 1999)

The appeal

[1] By summons of 6 January 1997 the appellant (herein 'the worker') sought from the Work Health Court: -

(1) pursuant to a practice direction of the Court of 30 November 1996 (herein 'the Practice Direction'), a declaration that a decision of the respondent (herein 'the employer') contained in its Form 5 of 1 March 1994 was null and void and of no force or effect so as to dispute liability for the worker's claim; or

(2) alternatively, that the worker have summary judgment in his claim.

[2] On 11 February 1997 the Court refused to award summary judgment, and declined to deal with the issue raised in item (1) in par [1] as a "preliminary issue", as contemplated by the Practice Direction which is set out in par [10].

[3] By Notice of Appeal of 21 February 1997 the worker appealed from the decision of 11 February; ultimately, the appeal was limited to his Worship's decision to decline to deal with item (1) in par [1] as a preliminary issue. The appeal came on for hearing before me on 4 July 1997. After hearing submissions, I ordered that the appeal be dismissed, with costs. However, I did not record the reasons for that decision; I now do so.

The general background

[4] On or about 20 December 1991 the worker claimed workers' compensation from the employer, following an injury he had sustained in a motor cycle accident on 22 November 1991. The employer contends that the Territory Insurance Office notified acceptance of liability on behalf of the employer, on 31 December 1991, and subsequently paid compensation to the worker for periods for which he was incapacitated by the injury; see annexure "D" to the affidavit of 22 November 1996 of the employer's personnel manager, Mr MacLeod. The worker contends that the employer is deemed to have accepted liability under s 87 of the *Work Health Act* (herein 'the Act'), because it did not notify its decision to accept liability on the claim, within

the “10 working days after receiving the claim” specified by s 85(1). I observe that that is clearly an issue which cannot be resolved “on affidavits only”, as required by par 3 of the Practice Direction in par [10] if the issue is to be determined “as a preliminary issue”.

[5] Some 2½ years after the accident of 22 November 1991, on 1 March 1994 the employer served the worker with a Form 5, in relation to that accident. This eventually gave rise to the summons of 6 January 1997; it is the nature of this Form 5 which underlies item (1) in par [1]. A Form 5 is a form prescribed by Regulation 13 of the Work Health Regulations; it serves the purposes of *both* s 69(1)(b) and s 85(8) of the Act. These two provisions are directed to different subjects. Section 69 deals with the cancellation or reduction of compensation payable by an employer who is liable. The Form 5 which s 69(1)(b) requires to be sent to a worker under is required to contain, *inter alia*, a statement setting out the reasons for the proposed cancellation or reduction of compensation. Section 85 deals with a matter earlier in time than s 69, an employer’s decision whether or not to accept liability when it receives a claim for compensation. The Form 5 which s85(8) requires to be sent to a claimant, is to be sent when the employer decides to dispute liability; *inter alia*, it is required to set out the employer’s reasons for that decision.

[6] Since the same Form 5 is to be used in these very different situations, the form prescribed by the Regulations provides, as far as material, that:-

"… You are hereby advised that your employer … hereby:-

DELETE AS NECESSARY

Disputes liability for your claim pursuant to section 85 of the *Work Health Act*.

Cancels payment of weekly benefits to you pursuant to section 69 of the *Work Health Act*.

…

The reasons for this decision are:-

…."

It can be seen that the prescribed form contemplates that one or other of the provisions following the words "DELETE AS NECESSARY" will be deleted, according to whether the form is to be used for s 85 purposes, or for s 69 purposes. The employer essentially contends that in sending out the Form 5 on 1 March 1994 it erroneously deleted the provision dealing with s69 on which it relied. The Form 5 of 1 March 1994 was in the following form, as far as material:-

"You are hereby advised that your employer Nabalco Pty Ltd:-

———————————————————————————————

Disputes liability for your claim pursuant to Section 85 of the Work Health Act.

———————————————————————————————

The reasons for this decision are:-

> Specialist medical information indicates that you no longer suffer any incapacity or symptoms attributable to this injury".

A lack of accord between the advice that the employer "disputes liability… pursuant to s 85" and the "reasons for this decision" – that the worker "*no longer* suffer(s)…", words pointing to s 69 – is immediately evident.

[7] Early in 1996 the worker had discontinued his claim for compensation arising from the accident of 22 November 1991, but on 21 October 1996 he obtained leave to institute a similar claim. A statement of claim was filed on 4 November 1996, seeking compensation in respect of 3 separate accidents in 1990, 22 November 1991, and 1994. The claim having been reinstated, on 22 November 1996 his Worship heard an application by summons of 11 November 1996 for an interim determination of compensation under s 107(2)(c), to be paid from 11 November 1996. After hearing submissions his Worship refused this application. On 6 November the worker had filed an amended statement of claim in which his injuries of 1990 and 1991 were not separated out, but were incorporated with his 1994 injury as the basis of his current overall condition of partial incapacity. The next step taken by the worker was to lodge the application of 6 January 1997, referred to in par [1].

The case in the Work Health Court

[8] The worker treated the Form 5 of 1 March 1994 as notice under s 85 which it purported to be; see par [6]. The employer treated it as a s 69 notice in

which it had inaccurately advised that it was disputing liability under s 85, instead of cancelling payments under s 69; and as then setting out the reason for that cancellation of compensation. It also contended that no notice by way of a Form 5 was required to be sent, in any event, because the factual situation fell within s 69(2)(a). The dispute between the parties as to the proper construction of the Form 5 of 1 March 1994 lay at the root of the opposing submissions on the application of 6 January 1997.

[9] When the application came on for hearing, the employer took as a preliminary point that, on the facts, the application was not an "appropriate case" for the worker's contention - that the employer's decision disputing liability in the Form 5 of 1 March 1994 was "null and void" - to be determined as a "preliminary issue on affidavits only", pursuant to par 3 of the Practice Direction in par [10]. Mr Tippett of counsel for the employer submitted that his Worship should therefore decline to entertain and rule upon the application, as an issue preliminary to hearing the claim. Ultimately, this became the critical issue both before his Worship and on appeal.

[10] The Practice Direction provides:-

> "**Dux Litis**
>
> The following practice direction is issued pursuant to Section 95 of the **Work Health Act** and will apply from 1 January 1997.
>
> **Procedures**

1. In all cases involving an appeal by a worker against an employer's decision under Section 69 of the Act, the worker shall be dux litis on the evidence as a whole.

2. At the conclusion of the evidence the employer bears the onus of proving (on the balance of probabilities) the matters raised in its Form 5 and any additional matters properly raised in its Answer.

3. In cases where the worker asserts that the employer's decision was made without any basis then this issue may be determined (in an appropriate case) as a preliminary issue on affidavits only (with no cross-examination or oral evidence). In such cases the matter is to proceed on interlocutory application and will be listed in the Interlocutory List on a monthly basis.

I L Gray
Chief Magistrate

November 1996".

[11] It is convenient to examine some aspects of this Practice Direction at this point; see pars [11]-[14]. Par 1 of the Practice Direction is expressly directed *only* to appeal proceedings arising from an employer's decision under s 69; par 2 clearly also applies only to such proceedings; and par 3 also appears to apply only to proceedings of that type. If so, the Practice Direction applies only to such proceedings. It is not clear that the worker had instituted any such proceedings; his substantive amended claim of 6 November 1996 was for compensation for partial incapacity arising out of the 3 accidents, including that of 22 November 1991. However, as regards the accident of 22 November 1991, that claim may be construed as an appeal under s 69. The Practice Direction is clearly based on observations by Mr Trigg SM in *Edwards v Airpower Pty Ltd* (Work Health Court, 31 January

1996) at 8-10; that was an appeal against a reduction of payments, under s69.

[12] I note that there must be some doubt as to whether the matters dealt with in par [10] are appropriate to be dealt with by way of a practice direction. Under s95(1)(a) of the Act, practice directions cannot go beyond "regulating the practice and procedures of the Court". Matters of practice and procedure are to be distinguished from matters of substantive law. The question as to where the onus of proving a particular issue lies, is determined partly by substantive law and partly by the way the parties have pleaded their respective cases; see *Currie v Dempsey* [1967] 2 NSWR 532 at 539, per Walsh JA. A practice direction in terms of par 2 in par [10] may accordingly be *ultra vires* the power in s 95(1)(a), as purporting to alter the common law regarding the burden of proof.

[13] The Practice Direction is headed "Dux Litis". That Latinism seems to be peculiar to the legal language of South Australia and the Territory; it conveniently designates the order of adducing evidence, and addressing. Usually, for good practical reasons, these topics are left in wide terms to the discretionary decision of the court of trial, with any indicative general rules being subject to any directions given by that court; see for example, the structure of r 49.01 of the Supreme Court Rules (NT). However, s 95 of the Act appears to reverse this usual approach, by subjecting the exercise of the

discretionary power of the court of trial under s 95(4), to the provisions of a general practice direction under s 95(1)(a).

[14] The question of who should be 'dux litis' in an action, or in a particular issue in an action, is intimately linked with the identification of the central proposition in issue, and of the party on whom the legal burden of proving that proposition lies. See, for example, *June d' Rozario & Associates Pty Ltd v Makrylos* (1993) 112 FLR 314 at 315. Generally, but not always, the person against whom a verdict would be given if no evidence were called on either side, is entitled and bound to begin. To determine who is to be 'dux litis' the question should always be: what is the fairest and most effective method of resolving the issues in question? A court of trial needs to have a discretion in deciding this question. Various practices have developed in determining who is to be 'dux litis' in workers' compensation cases in other jurisdictions; see *Simpson Ltd v Arcipreste* (1989) 53 SASR 9 at 13, 22-23; and *Harris v AGC (Insurances) Ltd* (1984) 38 SASR 303 at 308. These cases show that there is no general rule that the worker must always be 'dux litis'; and that usually the party bearing the onus of proof of the central proposition has the right and duty to begin. I consider that it is doubtful whether the determination of who is to be 'dux litis' is a proper subject for a practice direction which does not accord primacy to directions by the court of trial. For purposes of this appeal, however, all of the provisions of the Practice Direction are treated as valid.

[15] In support of the employer's preliminary point in par [9], Mr Tippett submitted that the questions raised in the application of 6 January 1997 should be dealt with at the same time as other issues which the worker had raised in his claim for compensation, on the basis that they were inextricably linked. The worker had 2 current proceedings in the Court, had initially filed 2 statements of claim, and 3 injuries were involved, including that of 22 November 1991. The amended statement of claim of 6 November 1996 was based on all 3 injuries. Mr Tippett submitted that the case should go forward and the present matter resolved, during the hearing of that amended statement of claim.

[16] Mr Tippett further submitted that in this case the Form 5 was otiose, because the factual situation involved s 69, not s 85; the employer contended that the worker had received compensation for the injury of 22 November 1991 and had later returned to work; accordingly, s 69(2)(a) applied, and no notice in terms of s 69(1) by way of a Form 5 was required. He submitted that since the employer had expressly and voluntarily admitted liability for the 22 November 1991 accident and had paid compensation, neither s 85 nor s 87 (which provides for a deemed acceptance of liability where the time limit in s 85 is not complied with) applied. The employer had later stopped paying compensation for the 1991 accident, and had done so without a notice under s 69(1), because the worker had returned to work from time to time; see s69(2)(a). Mr Tippett submitted that although in those circumstances no Form 5 under s 69(1) was *required* to be given, the employer had later sent

the Form 5 of 1 March 1994 to explain why the compensation payments had ceased.

[17] While arguing the application of 6 January 1997 on its merits, Mr Grove of counsel for the worker also addressed the employer's preliminary point in par [9]. He observed that if the issue raised in item (1) in par [1], a discrete issue, were now resolved in favour of the worker, he would have certain entitlements under the Act, since there would have been no proper cessation of compensation under s 69(1); there would be no reason for the worker to have to litigate this claim. He agreed that the worker was currently claiming compensation arising out of 3 injuries – on 25 February 1990, 22 November 1991 and 7 October 1994, respectively – but noted that the application of 6 January 1997 related only to the injury of 22 November 1991.

[18] Mr Grove referred to some of the contents of the worker's affidavit of 2 October 1996. In par 18 the worker deposed that he had never been paid compensation for his reduced earnings, flowing from his being placed on light duties after the accident of 22 November 1991; and that he had had no response from the employer to his claim for compensation of 20 December 1991. Cf. the employer's contention in par [4].

[19] Mr Grove submitted that the employer had relied on s 85, in giving the Form 5 of 1 March 1994. It had not responded to the worker's claim of 20 December 1991 within the time allowed by s 85, the"10 day period", as Mr Grove put it. I observe that s 85(1) refers to "10 *working* days". He

submitted that since the employer had not responded within the statutory time limit it was deemed to have accepted liability, under s 87. I note that these matters are in issue, on the affidavits; see par [4]. He submitted that thereafter the only right of the employer was to cancel or reduce compensation in accordance with s 69.

[20] In that connection he submitted that the Form 5 of 1 March 1994 could not be treated as a Form 5 under s 69, because on its face – see par [6] - it purported to be made under s 85, disputing liability. I noted in par [6] the internal inconsistency in that Form 5 between its reference to "disputes liability", and the stated "reasons for this decision"; the latter clearly point to the Form having been given pursuant to s 69(1)(b). He submitted that the Form 5 was well out of time for the giving of a s 85 notice, and therefore ineffective in terms of s 85; and no notice had been given under s 69.

[21] Mr Grove conceded that his Worship had a discretion whether or not to entertain the application of 6 January 1997, pursuant to par 3 of the Practice Direction. I consider that that was a significant concession, clearly correctly made; it accepts that a decision on the question involves a value judgment in respect of which there is no room for reasonable differences of opinion, no particular opinion being uniquely right. He submitted that this was "an appropriate case" in which to adopt the procedure in par 3 of the Practice Direction, because the issues on the application of 6 January 1997 were distinct from the issues in the worker's claim. Those issues were: was the Form 5 a s 69 notice, or a s 85 notice; and was it valid, or not.

[22] In ruling that he would not deal with item (1) in par [1] as a "preliminary issue" pursuant to par 3 of the Practice Direction, his Worship observed that it amounted in effect to a further attempt to secure the payment of interim compensation payments which he had rejected on 22 November 1996.

[23] His Worship noted the worker's submissions in pars [18] and [19], and that on its face the Form 5 appeared to relate to s 85, although the employer intended that it relate to s 69. He also noted that the worker had two pending applications for compensation: the first related to the motor cycle accident of 22 November 1991 and to an earlier accident of 25 February 1990, and the second to a later accident on 7 October 1994.

[24] His Worship then discussed the rules applicable to an application for summary judgment. He noted that if the application in item (1) in par [1] succeeded it could lead to "more interlocutory steps and thus delay the orderly procedure [of hearing the claim] before the Work Health Court". He referred to par 3 of the Practice Direction, and observed that he considered that the application of 6 January 1997 was "inappropriate" in terms of that Practice Direction, and that the matters it raised "should be left to a substantive hearing". He said that it was not "clear to me" why the hearing of the substantive claim and of the application of 6 January 1997 "should be split". On that basis his Worship declined to make the declaration sought in item (1) of par [1], or to give summary judgment. The appeal eventually

was limited to his refusal to make the declaration sought in item (1) of par [1].

The grounds of appeal

[25] The worker ultimately contended, in essence, in his grounds of appeal, that his Worship had erred in law –

(1) in not deciding to make the order sought in item (1) in par [1];

(2) in failing to provide proper reasons for his decision declining to make that order; and

(3) in not properly interpreting and applying the Practice Direction.

The case on appeal

[26] Mr Grove accepted that the worker bore the onus of establishing before his Worship that this was an "appropriate case" to have the issue raised in item (1) of par [1] determined as a preliminary issue. He submitted that it could be determined merely by looking at the Form 5 of 1 March 1994; that document unambiguously on its face disputed liability under s 85. I do not accept that the document is necessarily unambiguous, looking at it as a whole; its context has to be considered to determine how it should be construed, and that is a matter of evidence.

[27] As to his Worship's duty to give sufficient reasons for his decision in par [24], Mr Grove submitted that it was insufficient for his Worship merely to

quote the Practice Direction, and then to hold that it was an "inappropriate case" in which to determine the issue in item (1) of par [1] as a preliminary issue on the affidavits only. He relied on *Mobasa Pty Ltd v Nikic* (1987) 47 NTR 48, which involved a decision after a lengthy trial. In that case the Court of Appeal noted at 49 that "neither written nor *ex tempore* reasons" for decision had been given, and referred to "[t]he difficulties created by the absence of reasons" on the hearing of the appeal. Neither of those matters applies in this case, which involves a discretionary decision on a matter of procedure.

[28] Mr Grove also relied on *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247. In that case the majority in the Court of Appeal held that it was sufficient for a judicial officer to state the grounds on which he made his findings of fact; he was not required to set out the detailed reasoning which had lead him to those findings. That case also involved a trial in which evidence had been adduced by both sides. I do not consider that it assists Mr Grove's submission.

[29] I note that in *Housing Commission of NSW v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, a decision affirmed by the Privy Council at (1984) 54 ALR 155, Mahoney JA observed at 386 that in certain procedural applications, reasons need not ordinarily be given. I also note that in *Capital and Suburban Properties Ltd v Swycher* [1976] Ch. 319 at 325-6, Buckley LJ observed that:

> "There are some sorts of interlocutory applications, mainly of a purely procedural kind, upon which a judge exercising his discretion on some such question as whether a matter should be expedited or adjourned or extra time should be allowed for a party to take some procedural step, or possibly whether relief by way of injunction should be granted or refused, can properly make an order without giving reasons".

I respectfully agree. The application of 6 January 1997 is not quite in that category.

[30] Mr Grove submitted that the worker had not been paid compensation in respect of the accident of 22 November 1991. I note that that is clearly a matter in issue between the parties, and could not be resolved on the affidavit material provided to his Worship. Mr Grove also put in issue the meaning of "returns to work" in s 69(2)(a), relied on by Mr Riley QC of senior counsel for the employer in his submissions in par [34].

[31] Mr Grove relied on a passage in the decision in *Day v Collins Radio Constructors Inc* (Work Health Court, Ms Deland SM, 25 September 1996) to the effect that it is imperative that s 69 be "strictly complied with", before an employer cancels payments. He also relied on observations by Mr McGregor SM in *Horne v Sedco Forex Australia Pty Ltd* (Work Health Court, 20 May 1991), pointing out in relation to s 69 that it is continuing incapacity which is in issue, not the fact of return to work. He further relied on observations by Mr Trigg SM in *Edwards v Airpower Pty Ltd* (supra) to the effect that payments of compensation should continue until there is a valid reason for them to cease, and so a Form 5 under s 69 should be given

on proper grounds. I respectfully agree with what their Worships said in these cases; however, they are not determinative of whether this was a proper case to decide as a preliminary issue on affidavits only, that the employer's decision in its Form 5 of 1 March 1994 was made without any basis.

[32] I note that in *Edwards v Airpower Pty Ltd* (supra) Mr Trigg SM said (at 10):-

> "In some cases *it is argued that the validity of the Form 5 is a discrete preliminary issue which is capable of being resolved separate to the final hearing. In my view, such arguments are rarely accurate. The Court should be slow to accede to these arguments except in the clearest of cases,* and then (in my view) should not allow the calling of any oral evidence but should only proceed on affidavit evidence (without allowing any cross-examination on the affidavits). If the parties say that this cannot be done and evidence needs to be gone into then that is good reason why the matter should await the substantive hearing, so that a decision can be given after hearing all of the evidence. To embark on a 'mini-hearing' may invite findings of fact and on credibility which may create difficulties in the final hearing". (emphasis added)

I respectfully agree with this general approach; his Worship's observations are clearly the genesis of par 3 of the Practice Direction in par [10]. In Mr Trigg's terminology, this is not "the clearest of cases", evidence needs to be gone into, and this points to the matter awaiting "the substantive hearing".

[33] Mr Riley submitted that the appeal should be dismissed, for 4 reasons: the application of 6 January 1997 was misconceived; his Worship's discretionary decision in par [24] had not been shown to be plainly wrong; that decision was in fact correct; and his Worship had identified his concern

as to whether the Form 5 was effective, had referred to counsel's submissions, and had given sufficient reasons for his decision.

[34] He submitted that the application of 6 January 1997 was misconceived because it assumed that a Form 5 under s 69 *had* to be served, before payments of compensation could cease. Annex B to the affidavit of Mr McLeod of 22 November 1996 showed that as at 1 March 1994, the date of the Form 5, the worker had been back at work for many months, and compensation was not then being paid. He submitted that since there were at that time no payments to "cancel or reduce", the situation fell within s69(2)(a) of the Act, and no notice was required.

[35] He submitted that his Worship had made a discretionary decision on a matter of procedure. Accordingly, as the decision was discretionary, there was "a strong presumption in favour of the correctness of the decision appealed from, and that … decision should therefore be affirmed unless the court of appeal is satisfied that it [was] clearly wrong" – see *Australian Coal and Shale Employees' Federation v The Commonwealth* (1953) 94 CLR 621 at 627. In *House v The King* (1936) 55 CLR 499 at 504-5, three members of the High Court referred to the established principles which govern the determination of an appeal against an exercise of discretion, observing at 505:-

> "It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material

> consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance".

Mr Riley submitted that none of these matters had been established. Further, where the appeal is against the exercise of a discretion in a matter of practice and procedure, the approach of an appellate court is even more stringent; see *Nationwide News Pty Ltd v Bradshaw* (1986) 41 NTR 1 at 4-5, per O'Leary CJ. I accept all of these propositions.

[36] He submitted that his Worship correctly considered that the issues raised in item (1) in par [1] should be determined at the substantive hearing of the claim, in light of the misconception referred to in par [34]. Further, if in the circumstances a s69 notice were required, it was a question of fact as to whether the reference to s 85 in the Form 5 of 1 March 1994 invalidated that notice, in light of the factual circumstances for which the employer contended in Mr McLeod's affidavit of 22 November 1996. In any event, if the declaration sought in item (1) in par [1] were made, there would still have to be a hearing to determine the level of compensation payable, and this would require consideration of the employer's case as pleaded in its Answer to the claim.

Conclusions

[37] As appears from my observations during the course of this judgment, I consider that this appeal is without merit. The application of 6 January 1997 was an application pursuant to the terms of a practice direction. The decision on such an application is discretionary. The *principles* applicable to the review of a discretionary decision are the same, whether that decision determines substantive rights or deals with a matter of practice and procedure; see *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 176-7. But an appellate court exercises even greater restraint, where the discretionary decision deals with a matter of practice and procedure; see *Re Will of F.B. Gilbert (dec'd)* (1946) 46 SR (NSW) 318 at 323, where the need to keep a "tight rein" on appeals against such decisions is emphasized, to prevent results "disastrous to the proper administration of justice". In this case I do not consider that any reasonable danger of injustice arises from his Worship's decision.

[38] The application raises issues which are not capable of being resolved on affidavit evidence.

[39] It is true that a failure to state reasons for a decision on a matter of practice and procedure which has the effect of determining substantive issues in a case, may justify the setting aside of that decision; see *Apps v Pilet* (1987) 11 NSWLR 350. That is not the case here. In any event I consider that his Worship's reasons were adequate, bearing in mind the function they served,

the importance of the issue with which they dealt, and the likely effect of the decision on the rights of the parties.

[40] These are the reasons for dismissing the appeal with costs, on 4 July 1997.

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