Quality Plumbing & Building Contractors Pty Ltd v Schloss
[2015] NTSC 56

PARTIES:	QUALITY PLUMBING & BUILDING CONTRACTORS PTY LTD (ABN 112 203 102) v SCHLOSS, Rodney William
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA6 of 2015 (21354573)
DELIVERED:	9 SEPTEMBER 2015
HEARING DATES:	21 AUGUST 2015
JUDGMENT OF:	KELLY J
APPEAL FROM:	J NEILL SM

CATCHWORDS:

APPEALS – Natural Justice – Pleadings – Worker departed from pleadings at first instance in oral submissions after the close of the Employer's case – Employer denied leave to reopen its case or obtain adjournment to adduce additional evidence in reply – Parties did not agree to conduct the case beyond the pleadings – Employer denied natural justice – Appeal allowed

STATUTORY INTERPRETATION – *Workers Rehabilitation and Compensation Act* s 65(2)(b) – Method of assessing loss of earning capacity – Loss of earning capacity to be assessed with reference to the amount

capable of being earned in “a week” – parties agreed that “the most profitable employment that could be undertaken” by the Worker was only available for 20 hours per week – Assessment conducted on the basis of the hours available for work each week in “the most profitable employment that could be undertaken” – Matter remitted to Work Health Court for reassessment of loss of earning capacity

STATUTORY INTERPRETATION – *Workers Rehabilitation and Compensation Act* s 65(2)(b)(ii) – Meaning of “whether or not such employment is available to him or her” – Proviso should not be read so as to limit it to a lack of availability in the labour market – Each case to be assessed having regard to all of the circumstances – Unnecessary to determine whether proviso applies where the nature of the employment means that work is unavailable at certain times of the year

Workers Rehabilitation and Compensation Act ss 65(1B); 65(2); 65(2)(b)(ii); 68; 69; 86; 116(1)

Ju Ju Nominees v Carmichael (1999) 9 NTLR 1, applied

Millar v ABC Marketing and Sales Pty Ltd [2012] NTSC 21, followed

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27; *Dare v Pulham* (1982) 148 CLR 658; *Dickin v NT TAB Pty Ltd* [2003] NTSC 119, referred to

REPRESENTATION:

Counsel:

Appellant:	W Roper
Respondent:	B O’Loughlin

Solicitors:

Appellant:	Hunt & Hunt
Respondent:	Priestleys

Judgment category classification:	B
Judgment ID Number:	KEL15013
Number of pages:	31

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

Quality Plumbing & Building Contractors Pty Ltd v Schloss
[2015] NTSC 56
No. LA6 of 2015 (21354573)

BETWEEN:

QUALITY PLUMBING & BUILDING CONTRACTORS PTY LTD (ABN 112 203 102)
Appellant

AND:

RODNEY WILLIAM SCHLOSS
Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 9 September 2015)

[1] The Worker (the respondent in these proceedings) suffered a compensable injury on 26 June 2010. (The injury was to his lower back: an L5/S1 disc protrusion causing impingement on the S1 nerve root.) He made a claim in respect of the injury under the *Workers Rehabilitation and Compensation Act* ("the Act")[1] and the Employer (the appellant in these proceedings) accepted the claim and commenced making payments of benefits (including weekly benefits) under the Act.

[1] The Act has now been replaced by the *Return to Work Act* but the transitional provisions in s 189 of the *Return to Work Act* provide (in summary) that a claim made before the commencement of that Act continues under the provisions of the previous Act.

[2] It is common ground between the parties that the Worker has been partially incapacitated for work because of the ongoing effects of the injury from the date of the injury to the present.

[3] On 17 October 2013 the Employer issued a notice of decision pursuant to s 69 of the Act reducing the amount of weekly benefits payable to the Worker on the basis that he was capable of working 22 hours each week as a limousine driver/chauffeur earning $660 per week.

The Proceedings

[4] The Worker challenged the notice of decision and issued proceedings in the Work Health Court.

[5] On 14 August 2014 the Worker obtained employment as a casual school bus driver and in September 2014 the Worker amended his defence to the counterclaim to plead this partial capacity to work.

[6] The hearing of the Work Health proceeding commenced on 23 February 2015 at which time the pleadings consisted of:

(a) the Worker's further amended statement of claim filed on 11 December 2014,

(b) the Employer's notice of defence and counterclaim filed on 2 February 2015, and

(c) the Worker's defence to counterclaim filed on 9 February 2015.

[7] At the beginning of the hearing the Employer sought and was granted leave to file an amended defence and counterclaim which deleted other previously pleaded suitable employments, including that of a limousine driver, and pleaded only that the Worker was capable of working 22 hours each week as a bus driver at $25.25 per hour, a total of $555.50 per week.

[8] The Worker's defence to that amended counterclaim admitted he could work as a school bus driver (rather than as a bus driver generally) but only to the extent of his present employment since 14 August 2014 as a casual school bus driver for 20 hours a week at $25.25 per hour, a total of $505 per week ("the current employment"). He pleaded that the current employment accommodated his work injury limitations (specified in the defence to counterclaim).

[9] The Worker went on to plead that the current employment employed him for only 40 weeks each year, there being no work for school bus drivers during the 12 weeks per year which are school holidays. He pleaded that his earning capacity in the current employment was therefore $505 per week divided by 52 weeks and multiplied by 40 weeks, an amount of only $388.46 per week.[2]

[10] The Worker subsequently agreed that he had the capacity to work 22 hours per week as a casual school bus driver from the date of the notice of decision (rather than the 20 hours initially pleaded) but submitted that had

[2] defence to counterclaim para 5

no effect on the calculation of his loss of earning capacity under s 65, because it was agreed both that his most profitable employment was his current employment, and that his current employment was for 20 hours a week only.[3] He also admitted that his hourly rate of remuneration had increased by $10.30 per hour and that the calculation of his loss of earning capacity should be adjusted accordingly.

[11] At the start of the hearing the parties handed up a document entitled "Statement of Agreed Facts and Issues in Dispute" signed by both counsel. That document provides as follows:

> The parties agree the following facts:
>
> 1. The most profitable employment that could be undertaken by the Worker for the purposes of s 65(2)(b)(ii) of the Act is his current employment as a casual School Bus Driver.
>
> 2. For the weeks in which the Worker is employed in his current employment, the Worker is paid $25.25 per hour for a 20 hour week, providing a gross wage of $505.00.
>
> 3. The Worker was capable of undertaking his current employment from the date of the Employer's Notice of Decision.
>
> The parties agree that the only issues in dispute between them in these proceedings are:
>
> 4. Whether the Notice of Decision was valid.
>
> 5. Whether the Worker's earning capacity is to be:

[3] Statement of Agreed Facts and Issues in Dispute paras 1 and 2 (See [11] below.)

a. calculated by reference to the ability to work in his current employment for:

i. 20 hours per week; or

ii. 22 hours per week; and

b. averaged out and/or annualised over a twelve month period so as to reflect the fact that such employment is not available to the Worker 52 weeks a year; or

c. calculated in some other manner.

6. Whether the Worker is entitled to interest under s109(1) and/ or (2). *[punctuation in original]*

[12] As the onus was on the Employer to prove that the Worker had the capacity to earn as alleged in the notice of decision and the counterclaim,[4] the Employer was *dux litus*.

[13] The hearing transcript reveals that Mr Roper for the Employer conducted his case on the basis of the Worker's pleaded case set out at [9] above – namely that, as the Worker's most profitable employment (as a school bus driver) was only available for 40 weeks of the year, his weekly earning capacity should be averaged over 52 weeks. On that basis, Mr Roper put the Employer's position to the learned magistrate in the following terms:

> … if I can distil the argument from the Employer's perspective in a nutshell it's simply this. The exercise that the Worker wants to undertake in relation to an annualising of his weekly earning capacity basis puts a construction on that provision *[ie s 65(2)(b) of the Act]*

[4] *Ju Ju Nominees v Carmichael* (1999) 9 NTLR 1; *Millar v ABC Marketing and Sales Pty Ltd* [2012] NTSC 21 at [50]

> which flies in the face of the assumption that's deemed in favour of the Employer about the availability of the work. In other words, our argument is, he has a demonstrated earning capacity of X whether the job was available or not, and to require the Employer to allow him to annualise it for periods of time when the work actually isn't available is an inappropriate way to proceed given the matter of construction.[5]
>
> …
>
> Our view, and what we will be putting to you, is that that's an inappropriate construction of s 65(2)(b)(ii) because it necessarily involves depriving the Employer of the benefit of the fact that earning capacity is available even in those periods for which the work is not available. We're allowed to deem that it is.[6]

[14] The following day, in arguing the case for the Worker, Mr O'Loughlin abandoned the pleaded case. He said:

> That analysis, I agree with my friend, needs to be done on a week by week basis.[7]

Mr O'Loughlin referred to three school calendars and continued:

> … consistent with s 65, we do a week by week analysis and your Honour, knowing that the Worker has his most profitable earnings as a casual school bus driver, then needs to determine [in the] week beginning, say Monday 16 December 2013, what is the most profitable earning capacity of this man in this week and what is the evidence. All you have is evidence [of] earning capacity in his statement and the agreed facts. It's the evidence of a school bus driver. What else could he earn or what could he earn in that week as a casual school bus driver?[8]

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5 Transcript 23 February 2015 p 14

6 Transcript 23 February 2015 p 15

7 Transcript 24 February 2015 p 17

8 Transcript 24 February 2015 p 18

…

There should be no averaging, we say. It should be done on a week by week basis considering the most profitable employment that the person's able to work, whether or not the employment is available.[9]

…

… and there's nothing unfair about that. The Employer can say, here we are, we're now approaching December. We say you can do this job. We're reducing – we're recalculating your benefits for one of those blocks in the calendar, the [one] shaded orange, accordingly because we now say for these weeks you can do that. And it's a week by week calculation which is clearly envisaged by [sections] 64 and 65. And it compensates the worker fairly for his apparent earning capacity for all weeks of the year.[10]

…

HIS HONOUR: … in those weeks when there's no bus driving work available because of holidays, you'd say he'd be entitled to 75% of indexed weekly earnings...

MR O'LOUGHLIN: Yes.

HIS HONOUR: … rather than the amortising approach.

MR O'LOUGHLIN: And that is not because of some extraordinary interpretation of the Act, it's because your Honour has no evidence from the employer as to those 12 weeks.[11]

…

HIS HONOUR: I'm struggling to see the proper basis for amortising.

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9 Transcript 24 February 2015 p 21

10 Transcript 24 February 2015 p 29

11 Transcript 24 February 2015 pp 34 –35

> MR O'LOUGHLIN: I do not hereby attempt to persuade you to do that. I don't think that's the correct way and I think it might still be in my pleading somewhere that – I'd better take instructions but (inaudible) this is what we should do – abandon amortisation.[12]

[15] In substance, the Worker's argument was this:

(1) It was an agreed fact that the most profitable employment available to the Worker was as a casual school bus driver.

(2) The onus of proof was on the Employer. The Employer elected not to call evidence and was stuck with the Agreed Facts.

(3) One then looks at the situation on a week by week basis and asks, "What could a casual school bus driver earn this week?"

(4) During school terms, the answer would be, "$505".

(5) During school holidays, the answer would be, "Nothing".

[16] Mr Roper for the Employer objected to this change of approach by the Worker. He pointed out that the Worker had pleaded in his defence to counterclaim that he had an earning capacity of $388 per week, based on averaging or amortising the amount he earned in the 40 weeks work available as a school bus driver over 52 weeks.[13] Mr Roper indicated that if his Honour did not intend holding the Worker to his pleadings, the Employer

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12 Transcript 24 February 2015 p 35

13 Transcript 25 February 2015 p 10

would require an adjournment to produce further evidence in relation to the Worker's capacity to earn during the 12 week holiday period.[14]

[17] On 25 February 2015, the Employer filed an affidavit by the solicitor with carriage of the matter, Ms Peggy Cheong, deposing that:

> 3. … at all times on and from 19 December 2014, until after the Employer had closed its case and proceeded to submissions, the Worker's position in relation to the issue of his earning capacity is that same was $388 per week, which amount results from an averaging of the Worker's earnings as a Bus Driver for 40 weeks in the year, and averaged over a 52 weeks period, namely $505 x 40 weeks divided by 52, giving rise to a weekly rate of $388.46.
>
> 4. At no time until submissions before the Court on the morning of 24 February, had the Worker put the Employer on any notice that the Worker was seeking to resile from the admission inherent in his pleadings that the Worker's earning capacity in any given week was $388.
>
> 5. The first notice the Employer had that the Worker now seeks to assert that instead of the method of calculation in paragraph 3 above, the Worker presses for an alternative means of assessing the value of his earning capacity, one to take into account an earning capacity valued at $555.50 gross per week for 40 weeks of the year, and that for the remaining 12 weeks of the year, the value of the worker's earning capacity be nil (ostensibly on the basis the Employer has failed to adduce evidence as the Worker's capacity in those periods), was during the course of closing submissions by the Worker's Counsel on the morning of 24 February 2015.
>
> 6. But for the execution of Exhibit "E1" (the Statement of Agreed Facts and Issues in Dispute), the Employer would have and was in a position to call evidence from:

[14] Transcript 25 February 2015 p 21 (Both counsel agreed that the relevant part of the transcript should read: "MR ROPER: … we'd seek a vacation if we [don't] succeed in holding the worker to his pleadings." The word "don't" has been accidentally omitted.)

a. Dr. Hwang;

b. Dr. Nyunt;

c. a lay witness as to employment opportunities available to the Worker;

d. a bus driver as to employment opportunities available to the Worker in the field of enterprise; and

e. the author of the APM Report, a copy of which appears as annexure "RS1" to the Schloss Affidavit sworn 24 February 2015.

7. Moreover, the Employer would:

a. have required the Worker's medical expert, Dr. Cuneen, be available for cross-examination; and

b. not have acquiesced in the filing of the Schloss Affidavit, rather would have required that the Worker give evidence so that it could put questions to the Worker as to his capacity for employment.

…

[18] In the course of argument on this issue, the learned trial magistrate spoke of "the plain language of the Agreed Facts" referring to that part of the "Statement of Agreed Facts and Issues in Dispute" in which the parties agreed that the only issues between them were:

5. Whether the Worker's earning capacity is to be:

a. calculated by reference to the ability to work in his current employment for:

i. 20 hours per week; or

ii. 22 hours per week; and

b. averaged out and/or annualised over a twelve month period so as to reflect the fact that such employment is not available to the Worker 52 weeks a year; or

c. calculated in some other manner." [emphasis added]

[19] His Honour took the view that paragraph 5.c. (underlined) was sufficiently wide to encompass the alternative contention now being put forward by the Worker.

[20] Mr Roper's response on behalf of the Employer was that the "Statement of Agreed Facts and Issues in Dispute" had to be understood in light of the pleadings as they existed at the time the document was created[15] (and as they still were at the time of the trial). He said he had not been put on notice that any such alternative argument would be advanced by the Worker and that, in effect, the understanding between the parties which led to the handing up of the "Statement of Agreed Facts and Issues in Dispute" had been that the relevant issue was whether the Worker's earning capacity should be calculated in the manner pleaded by the Employer or in the manner pleaded by the Worker. He complained that:

> Now, for the first time after the employer, relying upon that understanding, albeit subjective reliance - we would submit that it was reliance on the basis of representations in the pleadings as well but irrespective of that - the employer relying upon the understanding

[15] Transcript 25 February 2015 p 13

> of the argument, agreed to the Statement of Facts, forewent the opportunity to call medical evidence and is now being criticised, only after closing its case, [for] a failure to call medical evidence in respect of a matter or argument that it was not on notice of at the time it closed its case.[16]

[21] His Honour said to Mr Roper:

> I understand that you feel that you've been put in a detrimental position, but falling in with that, we have to look at whether that's something which would concern me or not.[17]

His Honour proceeded to construe that document as though it were a statute or (perhaps more charitably) a pleading, insisting that paragraph 5(c) must have 'work to do'.[18]

[22] In response, Mr Roper enunciated his objection to the Worker's change of tack in terms of a denial of natural justice.

> The documents that existed at the relevant time are the pleadings. There was no articulation of any argument, quite apart from admissions – leaving the admissions question to one side – there was no articulation of any argument that the employer had failed to demonstrate that there was an earning capacity, or was required to demonstrate that there was an earning capacity in respect to that 12 week period. … [I]f my friend puts this submission that the Employer has failed to demonstrate that the worker has an earning capacity in respect of that 12 week period, that is a new argument which, if we had been appraised of [it] prior to closing our case – well even prior to that – prior to executing the Agreed Facts and Statement of Issues, we wouldn't have executed them, we would have called evidence … to fill that 12 week gap. But we weren't on notice until after we closed our case of the necessity to do that, and we say that more damning than any of the pleadings issues is that requiring us to answer something we're not on notice of is by its very

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16 Transcript 25 February 2015 p 4

17 Transcript 25 February 2015 p 12

18 Transcript 25 February 2015 p 12

> definition manifestly unjust and denies the employer ... natural justice.[19]

[23] Counsel for the Worker did not take issue with Mr Roper's assertion that the understanding between the parties which led to the "Statement of Agreed Facts and Issues in Dispute" had been that the relevant issue was whether the Worker's earning capacity should be calculated in the manner pleaded by the Employer or in the manner pleaded by the Worker. Nor did he require Ms Cheong for cross examination on her affidavit. He submitted that he did not need to plead an "argument", and that he was not obliged to inform his opponent of gaps in his opponent's evidence.[20]

[24] His Honour took the view that paragraph 5.c. of the "Statement of Agreed Facts and Issues in Dispute" was sufficiently wide to encompass the alternative contention being put forward by the Worker[21] and that, therefore, the Employer "was plainly on notice" that "how to interpret the scenario where the Worker has 40 weeks on, 12 weeks off", and "how that's to be dealt with by the Act" had to be dealt with "one way or another".[22]

[25] In his reasons for decision, his Honour had this to say on the issue:

> 21. In *Dare v Pulham* [1982] 148 CLR 658 at 664 a majority of five Justices of the High Court of Australia said the following:

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19 Transcript 25 February 2015 p 13

20 Transcript 25 February 2015 p 15

21 Transcript 25 February 2015 p 12

22 Transcript 25 February 2015 p 13

> "Pleadings and particulars have a number of functions: they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it …; they define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at the trial …; and they give a defendant an understanding of a plaintiff's claim in aid of the defendant's right to make a payment into court. **Apart from cases where the parties choose to disregard the pleadings and to fight the case on issues chosen at the trial** *[emphasis added by his Honour]*, the relief which may be granted to a party must be founded on the pleadings …".
>
> 22. In the Northern Territory in an appeal to the Supreme Court from the Work Health Court, Angel J adopted the same approach in *Dickin v NT TAB Pty Ltd* [2003] NTSC 119. He said at paragraph [14]:
>
> "The Work Health Court is a court of record bound by the pleadings, subject, of course, to the way the parties conduct their case. **It is elementary that the parties on appeal where they have conducted a case beyond the pleadings cannot thereafter treat the pleadings as governing the area of contest** *[emphasis added by his Honour]*".
>
> 23. I am satisfied that the parties in the present proceedings did choose to conduct the case beyond the pleadings, specifically on the issues identified in exhibit E1 and as enlarged by both counsels' preliminary remarks as I have discussed above.

[26] The hearing therefore continued on the basis that the Worker was entitled to run the alternative case first put in submissions after the Employer had closed its case. His Honour did not give leave to the Employer to reopen its case or adjourn the proceeding to enable the Employer to adduce the evidence referred to in Ms Cheong's affidavit.

[27] His Honour determined the issue first raised by the Worker after the Employer had closed its case in favour of the Worker in the following terms.

75. Accordingly I find that Mr Schloss is entitled during those 12 weeks or so of the Queensland school holidays each year to receive varying weekly payments under the Act, calculated on the basis of his actual earnings in each such week in the current employment when those earnings are affected by those holidays. Mr Schloss will need to apply to the Employer pursuant to section 86 of the Act for any appropriate increase in the level of a weekly payment each time his earning capacity in a week in the current employment is reduced as a consequence of Queensland school holidays.

[28] He ordered that:

1. the Employer pay arrears of weekly benefits to the Worker calculated from the date of the reduction in weekly benefits pursuant to the Notice dated 7 October 2013 to and including 13 August 2014 on the basis the Worker had no earning capacity over that period;

2. the Employer pay arrears of weekly benefits to the Worker calculated from and including 14 August 2014 to and including the date of these Reasons on the basis of the Worker's actual earnings in each week over that period;

3. the Employer pay weekly benefits to the Worker from the date of these Reasons in accordance with the Act;

4. the parties have liberty to apply in default of agreement in respect of any calculations arising from Orders 1, 2 and/or 3;

5. the Employer pay the Worker's costs of and incidental to these proceedings and to the dispute giving rise to these proceedings to be taxed in default of agreement at 100% of the Supreme Court scale certified fit for counsel.

The Notice of Appeal

[29] The Employer has appealed against the decision on four grounds.[23] These can be summarised as follows.

(a) **Ground 1:** The trial magistrate erred in his interpretation of s 65(2)(b)(ii). He should have determined that that the Worker was reasonably capable of earning an amount calculated at the hourly rate for a casual bus driver throughout the period in question, including the 12 weeks school holidays. Section 65(2)(b) provides that a Worker's loss of earning capacity (after the first 104 weeks of incapacity) is the difference between his normal weekly earnings and the amount, if any, he is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if he were to engage in the most profitable employment that could be undertaken by him, <u>whether or not such employment is available to him</u>. The learned magistrate was wrong to construe the underlined words as referring only to unavailability due to lack of vacancies in the labour market.

(b) **Ground 2:** Because of the error in construction of s 65(2)(b)(ii), the learned magistrate wrongly calculated the Worker's earning capacity by reference to the 20 hours per week for which he was paid, rather than the 22 hours per week he admitted he was capable of working.

[23] Ground 5 was abandoned.

(c) **Ground 3:** The learned magistrate erred in ordering that the Employer pay arrears of benefits on the basis that the Worker had no earning capacity from the date of the notice of determination to 14 August (the date when he became employed as a school bus driver). It was an agreed fact (set out in the "Statement of Facts and Issues in Dispute") that the Worker was capable of undertaking such employment from the date of the Employer's notice of decision.

(d) **Ground 4:** The learned magistrate erred in permitting the Worker to depart from his pleaded case without requiring the worker to amend his pleadings and allowing the Employer to reopen its case to call further evidence to meet the fresh case being advanced by the Worker.

(e) **Ground 5:** was abandoned.

Ground 3: Date of commencement of increased earning capacity

[30] The Worker conceded that Ground 3 should be allowed and that whatever is found to be the Worker's earning capacity in the most profitable employment should apply from the date of the notice of decision (7 October 2013).

Ground 4: Denial of natural justice

[31] In my view, the appeal should be allowed on Ground 4 and I will deal with that ground first. His Honour's decision to permit the Worker to depart from his pleaded case without permitting the Employer to reopen its case

was based, essentially, on two factors. His Honour took the view that the Worker's pleading that he had an earning capacity of $388.46 per week was not "an admission". Second, his Honour held that paragraph 5.c. of the Statement of Agreed Facts and Issues in Dispute constituted an agreement between the parties to conduct the case in a way which departed from the pleadings.

[32] The Worker's pleading in relation to earning capacity was as follows.

> 5. The Worker denies paragraph 10 *[ie the employer's pleading of earning capacity]* and says:
>
> a. He is only required to work 20 hours per week;
>
> b. At $25.25 per hour this equates to earnings of $505 per week for the weeks he works;
>
> c. Being a School Bus Driver he is only employed for 40 weeks per year;
>
> d. <u>His earning capacity is therefore $388.46 (40 x $505/52)</u>. *[emphasis added]*

[33] It does not seem to me to matter whether the pleading in paragraph 5.d. of the Defence to Counterclaim (underlined) is characterised as an admission or not. The case pleaded in paragraph 5 was plainly a different case from that advanced at trial. In light of the state of the pleadings, Ms Cheong's uncontested affidavit evidence, and the submissions put by Mr Roper on the issue, it seems to me that it is simply not correct to say (as his Honour did) that the parties <u>agreed</u> to conduct the case beyond the pleadings. Mr Roper

expressed his disagreement in forceful terms and pointed out precisely how the course of action proposed was unfair to the Employer. The argument advanced by the Worker at the hearing was inconsistent with the basis of the Worker's case in relation to the appropriate method of calculating his earning capacity set out in his pleadings, and the Employer had no warning of the new case being put by the Worker until after it had closed its own case. The case as pleaded by the Worker was one which did not require further evidence to be called by the Employer. It would have been a matter of differing statutory interpretations only based on the agreed facts set out in the "Statement of Agreed Facts and Issues in Dispute".[24] The learned trial magistrate ought not to have allowed the Worker to fundamentally change the basis of his case except on conditions that would accord natural justice to the Employer.[25] That would have necessitated giving leave to the Employer to reopen its case and granting an adjournment to allow the Employer sufficient time to gather the necessary evidence in response.

[34] Under s 116(1) of the Act, an appeal lies from the Work Health Court to the Supreme Court on questions of law only. A denial of natural justice is an error of law. I would allow the appeal on Ground 4.

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[24] That document is not one provided for under the relevant rules of court, but it seems plain that its purpose was to record the parties' agreement to limit the issues, not to open the door to the presentation by the Worker of a different case of which the Employer had no notice.

[25] I should add that I am not implying any criticism of counsel for the Worker who had formed the view that the case as pleaded was legally untenable and put forward an alternative, arguable case. It was up to the learned magistrate to ensure that fairness was accorded to both parties in the process.

[35] Counsel for the Worker submitted that if the appeal were to be allowed on this ground, the appropriate order would be that the matter be remitted to the Work Health Court to hear an application by the Employer to reopen its case to adduce further evidence, and for the Worker to have the opportunity to cross-examine Ms Cheong to test her assertion that the Employer was in a position to call the evidence set out in paragraph 6 of her affidavit. I do not agree. The Worker could have required Ms Cheong for cross-examination at the hearing at first instance and did not do so. More fundamentally, I do not think it would matter if the Employer had not been in a position to call that evidence at the date of the hearing. It seems to me very plain that the Worker ought not to have been permitted to fundamentally change the basis of its defence to the Employer's counterclaim except on condition that the Employer be permitted to reopen, to call evidence about the Worker's capacity during the 12 weeks school holiday, and to cross-examine the Worker. If that required an adjournment to obtain the necessary evidence, then an adjournment should have been granted.

Grounds 1 and 2: Construction of s 65(2)(b)

[36] Ground 1 of the appeal is (in summary) that the learned trial magistrate erred in his construction of s 65(2)(b)(ii) of the Act.

[37] Section 65(1B) provides (relevantly) that a worker with long term incapacity[26] shall be paid 75% of the worker's loss of earning capacity.

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[26] that is to say one whose incapacity extends beyond 26 weeks: s 65(1C)

[38] Section 65(2) provides:

> (2) For the purposes of this section, loss of earning capacity in relation to a worker is the difference between:
>
> (a) his or her normal weekly earnings indexed in accordance with subsection (3); and
>
> (b) the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking if:
>
> (i) in respect of the period to the end of the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment (including self-employment), if any, reasonably available to him or her; and
>
> (ii) in respect of the period after the first 104 weeks of total or partial incapacity – he or she were to engage in the most profitable employment that could be undertaken by that worker, whether or not such employment is available to him or her,
>
> and having regard to the matters referred to in section 68.

[39] Section 68 provides:

> In assessing what is the most profitable employment available to a worker for the purposes of section 65 or reasonably possible for a worker for the purposes of section 75B(3), regard shall be had to:
>
> (a) his or her age;
>
> (b) his or her experience, training and other existing skills;
>
> (c) his or her potential for rehabilitation training;
>
> (d) his or her language skills;

(e) in respect of the period referred to in section 65(2)(b)(i) – the potential availability of such employment;

(f) the impairments suffered by the worker; and

(g) any other relevant factor.

[40] At issue was the construction of s 65(2)(b)(ii). It was an agreed fact that the most profitable employment that could be undertaken by the Worker for the purposes of s 65(2)(b)(ii) of the Act was his current employment as a casual school bus driver for which he was paid for 20 hours a week at a rate of $25.25 per hour, providing a gross wage of $505. The Worker's (then uncontested) evidence was that such employment was only available for 40 weeks of the year, the other 12 weeks being school holidays during which, as a casual school bus driver, he was given no work and received no remuneration.

[41] The Employer contended that the fact that, as a school bus driver, the Worker received no work and no pay during the school holidays was not relevant because, after the first 104 weeks, the Worker's loss of earning capacity is to be calculated by reference to the amount that could be earned by the Worker if he were to engage in the most profitable employment that could be undertaken by him, whether or not such employment is available to him. What is being assessed is the loss of earning capacity as a result of the Worker's injury and that is not affected by whether work of the relevant kind is available to the Worker or not. The Worker is not more or less disabled in the weeks when work in the particular occupation is not

available. In written submissions counsel for the Employer contended that the only obligation on the Employer is to demonstrate that the Worker has the physical capacity to undertake what the Employer asserts is the most profitable employment. At the hearing he conceded (properly) that the Employer would also have to prove that the Worker had the mental and psychological ability to perform the work and the relevant qualifications.

[42] The Worker contended that the proviso in s 65(2)(b)(ii) "whether or not such employment is available to him or her" should be construed narrowly. The trial magistrate agreed. His Honour referred to a number of authorities and to the second reading speech for the bill which introduced the relevant amendment into s 65, and concluded that "the exclusionary effect of the s 65(2)(b)(ii) proviso was limited to the market availability of any particular work". As such, he concluded, it did not apply to the present case where the "unavailability" of work as a school bus driver was not due to there being no vacancies for school bus drivers, but rather to there being no work required of school bus drivers in the school holidays.

[43] A great deal of time and space in submissions was directed to this construction question. Counsel for the Employer contended that the learned magistrate had not applied the principles of construction from the latest High Court authorities and had, moreover, misstated the mischief the amendment was intended to correct. Both parties referred to the following passage from the second reading speech.

> The bill will provide for a stronger ability to deem injured workers to have an earning capacity after 104 weeks of incapacity. This will have the potential to reduce future long term scheme costs by enabling the possible reduction or cancellation of benefits in accordance with the claimant's reasonable capacity to earn. Currently, a long term partially incapacitated worker can remain on total incapacity benefits if, because of the condition of the labour market, suitable employment is not readily available. [emphasis added]

[44] Both his Honour and counsel for the Worker placed emphasis on the phrase "because of the condition of the labour market" and characterised the mischief which the amendment was intended to remedy accordingly. According to his Honour the intended remedy was, "… to exclude consideration of the labour market and market forces generally and the availability of actual or potential job vacancies specifically, when identifying a 'most profitable employment' after the first 104 weeks of incapacity." Counsel for the Employer contended that the relevant intended remedy was, rather, the "potential to reduce future long term scheme costs by enabling the possible reduction or cancellation of benefits in accordance with the claimant's reasonable capacity to earn" by deeming the Worker to have the capacity to earn the amount he is reasonably capable of earning in a week whether or not such employment is available.

[45] I do not think it is profitable to choose between competing constructions of the section by cherry picking parts of the second reading speech. The starting point in construing a statute is "the ordinary and grammatical sense of the statutory words to be interpreted having regard to their context and

the legislative purpose."[27] "Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text"[28] and it seems to me that there is nothing in the Act (in either the wording of the particular section or the context in which the section occurs) which would warrant reading down the section as the learned magistrate has done.

[46] In any event, although there was much attention devoted to this aspect of the appeal, for practical purposes little scope remained for this ground of appeal at the end of the hearing since both parties agreed on the following – in my view rightly so.

(a) For the "deeming" provisions of s 65 to apply, the Employer must be able to identify "a real job" that could be undertaken by the Worker – that is to say one that actually exists, whether or not there are vacancies for employment in that job at the time.

(b) The Act requires the calculation of loss of earning capacity to be done by reference to the amount that can reasonably be earned in a week – not over some other period.

(c) Once the Employer (or the court) makes a determination of the amount the Worker could reasonably earn in a week, the Employer is obliged to keep paying that amount into the future until either the Employer gives notice under s 69 of an intention to cancel or reduce benefits, or

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[27] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, per French CJ at [4]

[28] *ibid* at [47] per Hayne, Heydon, Crennan and Kiefel JJ

the Worker makes application under s 86 to vary the level of weekly benefits.

(d) If the Worker were to make application under s 86 for a variation of weekly benefits on the basis that the amount he could reasonably earn during the school holidays was zero, the Employer would be entitled to have the Worker assessed to determine what other employment (if any) he could reasonably undertake and for what remuneration.

(e) On the other hand, in considering the period from the date of the notice of decision to the date of judgment, the learned magistrate was obliged to make an assessment on a week by week basis of the amount the Worker could reasonably have earned if he had engaged in the most profitable employment that could be undertaken by him.

[47] In support of his contention that the proviso in s 65(2)(b)(ii) – "whether or not such employment is available to him or her" – should be construed to refer only to unavailability due to lack of vacancies in the labour market, counsel for the Worker posited an extreme example, that of a mango picker able to earn (say) $1,800 a week for perhaps one week of the year when the mangos needed picking, and asked rhetorically whether the Act was intended to operate such that the Employer was entitled to "deem" that to be the earnings from the Worker's most profitable employment into the indefinite future. Counsel for the Employer responded (and counsel for the Worker ultimately agreed) that it could hardly be said in those circumstances that

the Worker was "reasonably capable" of earning $1,800 in a week, especially if one were to take into account the words in s 65(2)(b)) "the amount, if any, he or she is from time to time reasonably capable of earning in a week".

[48] Having said that, it seems to me that the Employer cannot succeed on Ground 2, for reasons that do not depend upon the meaning of the phrase "whether or not such employment is available to him or her". The scheme of the Act is based on the amount that can be reasonably earned in a week. In the "Statement of Agreed Facts and Issues in Dispute", the parties agreed that:

(a) the most profitable employment that could be undertaken by the Worker was his current employment as a casual school bus driver; and

(b) for the weeks in which the Worker was employed in his current employment the worker was paid $25.25 for a 20 hour week, providing a gross wage of $505 per week. (It was later agreed that this had increased by $10.30 providing a gross wage of $515.30 per week.)

[49] It follows from these agreed facts that it is an intrinsic requirement of the job identified as "the most profitable employment" that it requires the Worker to work for only 20 hours a week. Accordingly, it cannot be said that the Worker was "reasonably capable of earning in a week" more than the hourly rate multiplied by 20. This does not require any reference to the words "whether or not such employment is available to him or her" in

s 65(2)(b)(ii): it is a function of the scheme of the Act which requires the loss of earning capacity to be calculated by reference to the amount the Worker is reasonably capable of earning "in a week" not in an hour (or for that matter a year or any other unit of time). One could not be said to be reasonably able to earn income based on a 22 hour week (or a 40 hour week) for employment that, by its intrinsic nature, was only available for 20 hours in any given week.

[50] The same analysis cannot be applied to the 12 weeks during which casual school bus drivers are not required to do any work and so are not capable of earning income as casual school bus drivers.

[51] I have already said that I do not think there is anything in the Act which permits a reading down of the proviso "whether or not such employment is available to him or her" to limit it to lack of availability due to conditions in the labour market. On the other hand I do not think it is appropriate to say that, as a matter of principle, the proviso will necessarily apply even where the lack of "availability" of the employment is a function of the intrinsic nature of the job other than as calculated during a week (as was asserted to be the case here in respect of the 12 weeks school holidays). In my view, each case needs to be determined on its merits, taking into account all of the circumstances of the case, and full weight needs to be given to all of the words in s 65, including the words in the stem of s 65(2)(b) "the amount, if any, he or she is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking" as well as the proviso "whether

or not such employment is available to him or her". A case may arise in which it is necessary to determine whether the proviso applies where the intrinsic nature of the job means that employment in that job is "unavailable" during certain periods other than within a week. In view of the matters set out at [46] above, this is not such a case.

[52] In respect of the period from the date of service of the notice of decision (7 October 2013) to the date when judgment is finally delivered, the matter will be remitted back to (a differently constituted) Work Health Court to be determined according to law with the directions set out at [55](2)(b) below. (It will be a matter for the Work Health Court to fix a timetable for the hearing which will enable these steps to be taken and to make any other consequential directions.)

[53] Under the relevant provisions of the Act, for the period from the date of judgment in the Work Health Court, the Employer will be obliged to pay to the Worker benefits calculated in accordance with the principles in that judgment until either the Worker makes application under s 86 for a variation of those benefits or the Employer decides to issue a notice under s 69 cancelling or reducing the benefits.

[54] Neither of these two processes (the remitted Work Health Court proceeding or the statutory scheme for payment of benefits) as yet depends upon or requires a decision of this Court as to the construction of the proviso in s 65(2)(b)(ii): both exercises require a consideration of the relevant

evidence in relation to "the amount, if any, the Worker is from time to time reasonably capable of earning in a week in work he or she is capable of undertaking". The law cannot be applied until the facts have been determined by the fact finding tribunal. Depending on the state of that evidence, it seems to me that that issue of construction may well never arise in this case and it would be undesirable to make a pronouncement on the construction of the proviso in s 65(2)(b)(ii) in a case in which it is not necessary to decide the point. (If it does arise in the remitted proceeding, it can always be referred to this Court on a case stated under s 115 of the Act, should the trial magistrate so wish.)

[55] Orders:

(1) The appeal is allowed.

(2) The matter is remitted to a differently constituted Work Health Court for determination with the following directions:

(a) The Worker is to have leave to amend his defence to counterclaim to plead the case ultimately argued before the Work Health Court on 25 February 2015.

(b) The Employer is to have leave to adduce the further evidence referred to in the affidavit of Ms Peggy Cheong sworn on 25 February 2015 including requiring the Worker for cross-

examination as a precondition for admission of the Worker's affidavit.

(c) The Worker is to have leave to adduce further evidence limited to evidence in reply to the evidence referred to in (b).

(3) When the amount of the Worker's loss of earning capacity has been determined by the Work Health Court, the arrears of benefits payable are to be calculated on the basis that the amended benefits are to apply from the date of the notice of decision (9 October 2013).