*Christopher Cleveland v Paspaley Pearling P/L* [1999] NTSC 68

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| PARTIES: | CHRISTOPHER CLEVELAND |
| | v |
| | PASPALEY PEARLING PTY LTD |
| TITLE OF COURT: | SUPREME COURT OF THE NORTHERN TERRITORY |
| JURISDICTION: | SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION |
| FILE NO: | 9613369 (LA 17 of 1997) |
| DELIVERED: | 7 July 1999 |
| HEARING DATES: | 16 October 1998 |
| JUDGMENT OF: | KEARNEY J |

**CATCHWORDS:**

APPEAL AND NEW TRIAL – GENERAL PRINCIPLES

Appeal – Work Health Court – conflict between evidence of worker and employer – magistrate's comment during submissions after evidence that he believed the worker's evidence – no relevant submissions thereafter by worker as to witness credibility - significance of witness credit to matters in issue – evidence of worker subsequently rejected in judgment as unreliable in certain respects - whether worker thereby effectively prevented from making submissions on credibility - whether denial of natural justice.

*Stead v State Government Insurance Commission* (1986) 161 CLR 141, applied.
*Goktas v Government Insurance Office of New South Wales* (1993) 31 NSWLR 684, followed.
*Waldron v Comcare Australia* (1995) 37 ALD 471, distinguished.
*Marelic v Comcare* (1993) 121 ALR 114, referred to.

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

Whether worker partially incapacitated – requirements of ss64 and 65 of the *Work Health Act* - whether principle of 'mutuality' applies to the *Act* – significance of requirement in ss75A and 75B of the *Act* that employer "liable"

*Work Health Act* 1986 (NT), ss 3, 64, 65, 69, 71, 75A, 75B, 85(1)(c), 104
*Kelvinator v Jezior* (1988) 49 SASR 592, considered.
*Foresight Pty Ltd (t/as Bridgestone Tyre Service) v Maddick* (1991) 79 NTR 17, referred to.
*Arnotts Snack Products Pty Ltd v Yacob* (1984-85) 155 CLR 171, considered.
*Work Social Club – Katherine Inc v Rozycki* (1998) 120 NTR 9, considered.
*Comcare v Rawling* (1993) 42 FCR 421, considered.
*Workcover Corporation (Plas-Tec) Pty Ltd v Grigor* (1994) 62 SASR 283, considered.
*R J Brodie (Holdings) Pty Ltd v Pennell* (1968) 117 CLR 665, referred to.
*Electric Power Transmission Pty Ltd v D'Urso* (1970) 124 CLR 338, considered.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | J C A Tippett |
| Respondent: | S Walsh QC |

*Solicitors:*

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| Appellant: | Ward Keller |
| Respondent: | Cridlands |

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Kea99011

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

*Christopher Cleveland v Paspaley Pearling P/L* [1999] NTSC 68
No. 9613369 (LA 17 of 1997)

BETWEEN:

**CHRISTOPHER CLEVELAND**
Appellant

AND:

**PASPALEY PEARLING PTY LTD**
Respondent

CORAM: KEARNEY J

REASONS FOR JUDGMENT

(Delivered 7 July 1999)

**The appeal**

[1] This is an appeal from a decision of 29 August 1997 of the Work Health Court in Darwin. The learned Magistrate rejected a claim for workers' compensation by the appellant (herein "the worker"), holding that the worker did not suffer from an "incapacity" as defined in s3 of the *Work Health Act* (herein "the *Act*"), and accordingly was not entitled to compensation pursuant to ss64 or 65; see par [36].

[2] His Worship found that while the worker had suffered injury of a muscular ligamentous nature in the course of his employment with the respondent – see pars [15] and [35] - it was *not* such as to render him unable to perform,

or to continue to perform, his work with the respondent as general manager of pearling operations and Captain of the ship 'Paspaley III'; see par [35]. That is, the injury did not cause an "incapacity", as defined in s3. While the worker's injury prevented him from working the pearl shell (in the sense of that expression as used in par [35]), that work was not required of him as part of the duties for which he was then employed; see par [35]. His Worship made a declaration that the worker had suffered injury in the course of his employment with the respondent but declined to make a declaration as to resulting incapacity. He declined to make the consequential orders sought by the worker as to the determination of normal weekly earnings and payment of weekly benefits, which would have flowed from the declaration of incapacity sought; he made an order for payment of medical expenses.

[3] His Worship found that the worker had resigned from his employment with the respondent for reasons not connected with his injury, and not because of any "incapacity" as defined in s3; see pars [35] and [39]. Rather, he had resigned in order to pursue his own business interests; par [35]. His Worship found that instead of resigning, the worker could have continued in his employment with the respondent at his existing salary of $200,000.00 per year, and that he had rejected an offer by the respondent of work alternative to the duties for which he was then employed; see par [35].

The grounds of appeal are at par [42].

**The general background**

[4] The worker was born on 22 June 1947. He is now 52 years of age. He served in the Navy from age 20 for thirteen years, retiring on 31 March 1981 with the rank of Lieutenant Commander. The next day, 1 April 1981, at age 33, he commenced working for the respondent, which is engaged in the pearling industry. From 1981 to 1989 he was Captain of the FV 'Paspaley II'; from 1989 to 1996 he was Captain of the FV 'Paspaley III'. Both of these ships were "mother" ships, involved in harvesting, seeding and transporting the respondent's annual quota of pearl shell from Western Australian waters to various pearl farms.

[5] The worker was involved in the administration, planning and oversight of these operations, both on ship and on shore; he undertook certain manual labour in the course of this employment, 'working pearl shell' in terms of par [35], work which included the delicate task of opening the shells in a tank.

[6] On 7 June 1993 he consulted Dr Giblin due to increasing back, neck and shoulder pain; in the same year he began to visit physiotherapists and chiropractors in Broome and Darwin.

[7] In August 1995 he informed the respondent through its managing director Mr Nick Paspaley that he intended to resign from his employment with the respondent at the end of the current pearling season. The pearling season extends from March to early December each year.

[8] On 14 December 1995 the worker lodged the first of two claims for compensation, Exhibit 1; it related to the "development of chronic back, neck and shoulder pain over the last 3 years". On 28 December the respondent accepted liability for this claim for medical expenses. On 29 March 1996 the worker signed a second claim for compensation, Exhibit 3, in his solicitors' office; it related to the "development of chronic back, neck and shoulder pain over the last 3 years, now resulting in inability to carry out the physical demanding parts of my duties". His resignation from his employment took effect on that day, the expiration of a period of accrued leave. On the same day, 29 March, he authorised access to his medical records, by the respondent.

[9] On 30 May 1996 the second claim for compensation was served on the respondent, some 2 months after he had signed it; it sought payment of weekly and other benefits under the *Act*. On 12 June by a Form 5 notice the respondent disputed that it was liable for the compensation claimed in the worker's second claim, under s85(1)(c) of the *Act*, on 6 grounds. By a second Form 5 notice on that day the respondent purported to cancel its existing liability under the claim of 14 December 1995 to pay for the worker's medical expenses, under s69 of the *Act*; from 22 June the respondent paid no more of his medical expenses. On 20 June the worker applied to the Work Health Court under s104 of the *Act*, to recover compensation.

[10] On 1 July 1996 the worker commenced commercial operations of a business called 'Darwin Pearl Lugger Cruises'; this was his joint venture with Mr Nick Paspaley, the managing director of the respondent, a family-owned company.

[11] On 8 August 1996 the respondent filed an Answer under Rule 14 to the worker's application of 20 June. In the same month, the worker applied for compensation for permanent impairment under s71 of the *Act*, arising from his back, neck and shoulder pain. On 11 September he was medically examined by the Medical Panel of the Work Health Authority. On 16 September the Panel reported on the claim by the worker for compensation under s71. On 14 October the worker was paid $22,121.22 by the respondent, as compensation under s71 for his permanent impairment from the injury specified in his first compensation claim of 14 December 1995.

**The case in the Work Health Court**

[12] Although the respondent denied the injury as particularized in the worker's claim, I consider that it was never a particularly 'live' issue before the Court. Mr Walsh QC of senior counsel for the respondent spent considerable time cross-examining the worker on this issue, but ultimately the denial was not pressed with any force; as Mr Walsh eventually put it (p.256) the Court would "not be much troubled" by the issue. The extent of the injury was another matter. In the event, his Worship was satisfied that the worker had suffered the injury he described; see pars [15] and [35]. Mr

Walsh posed as the 2 real issues for determination whether the worker had been incapacitated by his injury from working, in the sense that he thereby had an inability or a limited ability to "undertake paid work", this being the determinant of "incapacity" in terms of s3 of the *Act*; and, if he had, what was the significance of his resignation, when considering his application for compensation, in light of the principle of 'mutuality'. "Incapacity" is defined in s3 of the *Act* as meaning:

> "an inability or limited ability to undertake paid work because of an injury".

[13] The worker's evidence was along the following lines. In a private meeting in August 1995 he told Mr Paspaley that he had decided to resign "before the '96 season commenced". The season commences about April each year. He told Mr Paspaley that he was "bored" and "that resulted from not being [physically] able to carry out the full range of what I'd previously done [at work]". That limited ability was because "it was too painful" to do the physical work of opening the pearl shells, in the tank. Also, since 1994 he had had it in mind that "it could be possible" for him to own his own business; he told the Court about a joint venture, 'Wildlife Discovery Tours', he had entered into with a Singaporean investor. At the time of testifying (February 1997) he hoped that this venture would commence in May 1997. It had involved his investing in building a ship in China, for $1.35 million; in the venture, he would share the Captain's function. In cross-examination he said that he had taken some steps in relation to that

venture prior to the August 1995 meeting with Mr Paspaley; he had first met the Singaporean investor in December 1994 and they had agreed on their joint venture in February 1995; as at August 1995, he had expected it to be under way in June 1996. (There were subsequent delays in the delivery of the ship). He expressed his reasons for his resignation as follows (p.78):

> "… there was a series of reasons building up to my resignation. Firstly, … my back, my shoulders, my arms wouldn't go another season. And I guess that was … the catalyst. But also I … had grown stale, I think, with what I was doing, because I couldn't do the work that I was previously doing. I think that the company was fundamentally changing and … always in the background of course was my own business enterprise. Now … the way I hoped it would work when I envisaged [it] would be at least that I would remain working with Paspaleys until at least my businesses got up and running. Obviously I was on a very generous remuneration package, I had a very generous employer. Yeah, so obviously that was always a desire option to me. And so I may have gone on for … five years, I may have gone on for 10 years extra. But at that point [that is, in August 1995] *I made the decision that these problems that I was having with my health would not be best served by … going another pearling season*." (emphasis added)

[14] The worker's evidence (p.74) was that after he had served his second claim for compensation (30 May 1996), he had not been offered any job by the respondent (which by then was his ex-employer). At first he said (p.77) that no other work had been offered to him when he communicated to Mr Paspaley in August 1995 his intention to resign; however, at p.89 he said that he had "a vague recollection" of being told that "you can work ashore", but it "didn't go beyond that".

[15] In his reasons for decision, his Worship accepted the worker's evidence that "his duties involved much more than merely captaining" the respondent's

ships. He had "assumed the role of Marine Superintendent" and "become general manager of pearling". His Worship accepted that in the early years of the worker's employment in the respondent's pearling enterprise from 1981 "there was much manual labour involved in carrying out his duties". I note that the size of the pearling enterprise grew greatly over the years; as to this factor, significant for present purposes in terms of the work required of the worker in 1995, see pars [16], [18] and [28]. His Worship was satisfied that as a result of the worker's manual labour while Captain of FV 'Paspaley II', and also later while Captain of FV 'Paspaley III' – though in the latter ship he had worked "in easier conditions" – the worker had "developed a chronic back injury"; see also par [35]. This had occurred from his work in the delicate task of opening the shells in the shell storage tanks; on the first ship this had entailed working "in a cramped and bent position", while on the latter ship "one could stand up", though "a certain amount of lifting, twisting and bending was required".

[16] His Worship noted that the worker described himself during his years on the FV 'Paspaley II', 1981-89, as in effect a "working foreman". As to the appropriate description of the duties required of the worker by the respondent in 1995, his Worship held (p.7):

> "[The worker's] work was involved with administration, planning, oversight of operations, both on ship and on shore. The operations of the [respondent] grew from a pearl shell quota of 100,000 shells to 450,000 shells. The fleet for which [the worker] was responsible grew in size relatively enormously. [The worker's evidence was that it grew from 2 ships with a crew of 5 to "something like 10 major and 50-odd minor vessels"; and see par [28]]. The size of the

> workforce also grew in the same proportion [see par [28]]. Aside from Mr Nick Paspaley himself [the worker] was responsible for all operational matters. It is not surprising that [his] remuneration also grew in line with his ever increasing managerial responsibilities. [The evidence was that his remuneration rose over the years from $35,000.00 per annum to a package amounting to $200,000.00 per annum]."

This work description reflects the effect of the great growth of the respondent's pearling enterprise from 1981 to 1995 and the worker's key role in the enterprise during that period (as to which see par [28]). His Worship expressed (p.8) in a crucial passage his conclusions on the nature of the worker's job in August 1995, when he indicated that he was resigning:-

> "I find that, whereas [the worker] may have been akin to a "working foreman" (the worker's analogy) on Paspaley II, with the advent of Paspaley III [in 1989] and certainly by the '94-'95 pearling season, he had joined the 'white collar' (my analogy) managerial ranks. His remuneration was by way of an executive salary package of $200,000.00 per annum. It is hardly necessary to say that this was not a foreman's wage. *I find that by the '94 and '95 pearling seasons, despite the worker still engaging in some manual labour on deck, he was not required to do so as part of his job. That is to say, such labour was not a necessary or required part of the job that he was employed to do in 1995. I make this finding based not only on the worker's evidence including his answers in cross-examination but more particularly on the evidence of Mr Nick Paspaley*" (emphasis added).

[17] The reference to "manual labour on deck" in par [16] is clearly largely a reference to working the pearl shell. It will be noted that his Worship based this finding that the worker was *not* required to engage in working pearl shell "as part of [his] job" in the later years of his employment, on *both* the

worker's evidence and "more particularly" that of Mr Paspaley, as to this crucial finding see later, par [52(c)].

[18] The worker had said (p.46) that he was "general manager, pearling" from 1993, and as such was responsible for the minute planning of detail regarding the catching, seeding, transporting and farming of the annual pearl shell quota. As Marine Superintendent, he said (p.46) that he was:

> "responsible for the competence of the personnel in the ships, their ability to carry out their various tasks, for their manning, and for the efficient running of the fleet in a purely maritime sense".

The worker agreed that from a physical point of view he could have continued as Captain of the 'Paspaley III' beyond 1995, if he did not do the 'heavy work' (p.114), in the sense of working the pearl shell. He said that he knew in August 1995 that if he had asked Mr Paspaley if he could continue as Captain of the 'Paspaley III', though not working the pearl shell, Mr Paspaley would probably have said 'yes' (p.115). At p.136 he said "I would've been offered [a job with the respondent], I'm sure, had I asked [for it on 29 March 1996]". However, he wanted to resign. At p.121 he said that counsel's suggestion - that he did not have to open the shell as well as carry out his duties as Captain, but had himself chosen to do so - was "incorrect"; later he said that "with the proviso that the ship was running well, it was quite proper for me to be in the tank [to open the shells]".

[19] His Worship in his judgment set out various parts of the worker's evidence as to what had been said in his crucial discussion (see par [13]) with Mr

Paspaley in August 1995. His Worship noted that the worker said (p.66) that he gave early notice of his resignation at that time, because –

> "I thought it was only fair to [Mr Paspaley], in order for him to be able to organise the management structure of the [respondent] to allow for my replacement".

As to that task of re-organization, the evidence was that the worker was the most senior person of the 600 or so persons then in the respondent's employ, after the Paspaley family members.

[20] The worker said (pp.77-8) that in August 1995 he did not discuss with Mr Paspaley "alternative duties [for him to carry out] in relation to [his] continued employment with the company". He said initially that he was not "offered shore work or anything of that nature at that time". Later (p.89) he said that he suspected "there may have" been such an offer, of which he had "a vague recollection"; see also pars [14] and [22].

[21] As to his own venture, referred to in par [13], which the worker said he had had in mind setting up as a principal since 1994, his Worship noted that in August 1995 the worker had expected his ship to be launched in June 1996, and that it would be ready to carry out charter work from that time. His Worship concluded at p.11 (and see par [35]):-

> "The evidence of what he was doing on the lugger [this was a reference to the worker's joint venture with Mr Paspaley in 'Darwin Pearl Lugger Cruises', taking tourists around Darwin Harbour, a venture planned from early April 1996 which commenced on 1 July 1996], and what he intended to do on the ship being built in China [for 'Wildlife Discovery Tours'], satisfies me that whatever the

> extent of the pain caused by the injury, it was not such as to render him incapable of continuing in his job with the [respondent] as General Manager Pearling/Captain Paspaley III with all attendant responsibilities, save the doing of heavy manual labour and more particularly labour to do with him working pearl shell on deck and in the tanks".

The worker had conceded this at p.114; see par [18].

[22] In cross-examination about his August 1995 meeting with Mr Paspaley, the worker agreed that he had made up his mind by that time to resign, and that (p.130) "there was some vague discussion about me remaining ashore [in the company's employ]"; see pars [14] and [20]. The worker could not clearly recall whether he had discussed with Mr Paspaley at the time various other matters put to him in cross-examination. I note that since he did not deny those matters, which Mr Paspaley said were discussed, no question of measuring his credibility against that of Mr Paspaley in relation to those matters, arises.

[23] His Worship set out part of this cross-examination at p.20, viz:-

> (p.141) "Now, you knew then … in August 1995, that if you wanted to, Nick Paspaley would probably allow you to continue working on the 'Paspaley III' but not doing any of the heavy work, plus doing your managerial duties, didn't you? … He would've allowed me to stay, yes.
>
> And he wouldn't [sic, would've] allowed you to do that and accommodated you with respect to your charter business, correct? … I suspect he would've but we don't know for – to what extent."

His Worship expressed his conclusions (p.20) on the last answer, viz:-

> "I have no doubt that [the worker] was being disingenuous to say the least in this answer. Formality was not the issue. The owner [of the respondent, Mr Paspaley] his close friend and schoolboy chum had offered him work. I am satisfied on all of the evidence that he knew that this offer was genuine and not qualified by notions of informality. I am satisfied on all of the evidence that he knew that Mr Paspaley had the authority to make such an offer."

The reference to "formality" and "informality" apparently stems from the fact that the worker had said (p.141) that "no formal offer was ever made" to him of alternatives, to induce him to stay with the respondent. See also the findings at pars [26] and [35].

[24] The worker said (p.142) that he would have refused the offer of a shore job, because "I'm a seaman". He agreed that he knew that he would "have a job for life [with the respondent] if [he] wanted it". He also agreed (p.142) that by August 1995 he "wanted to resign and pursue [his] own business", but said that this was because of his "deteriorating health"; as to this crucial contention his Worship concluded (p.21):-

> "I simply do not accept the worker's assertion that he resigned because of his deteriorating health; rather, the reasons for the resignation were related to him being a proud seaman who wanted, to use the words he used at his "going away" party [on 29 March 1996], to leave to pursue his ambition to own and operate his own boat. I am satisfied on all of the evidence that the worker simply did not want to remain (as he largely had become in 1995) the manager of a large "industrial" concern (to use Mr Paspaley's words)." [See par 28])

See also pars [32] and [35].

[25] His Worship proceeded to express (p.21) his conclusion as to the worker's evidence of what the respondent required him to carry out, by way of work:-

"I also do not accept [the worker's] assertion that his work as skipper required (in a mandatory or necessary sense) [his carrying out] the heavy work in relation to the shells. It is indicative of the quality of the worker's evidence in this regard that, whereas in his evidence-in-chief he says he was doing in the '94-'95 season about 50-60% of the heavy work that he had previously done, he says (p.148) of his cross-examination it was about 20%-40%. Just as it is indicative in an unfavourable way that he says in examination-in-chief that no job offers were made [to him] by the [respondent] and yet concedes in cross-examination the various job options that have been quoted in portions of his evidence."

See also par [35].

[26] His Worship said at p.22:-

"I find very significant his answer at the foot of p.149 of the transcript which to my mind is another crucial concession in relation to the mutuality argument, viz:

'MR WALSH: .... You knew that the ship could be well run and undertake its function in a proper and efficient manner, I suggest, even it you didn't do that heavy work [with the pearl shells]? ... Yes, but I would've been marginalised. And that, in fact, was happening.

You expected that whether you had any specific physical condition or not, that you wouldn't remain the captain of a ship such as 'Paspaley III" forever. Maybe age would take over one day? ... Of course.

Finally, the worker says [in cross-examination by Mr Walsh] at p.169:

"Mr Cleveland, because of your relationship with Mr Paspaley in the company, if you had continued to skipper the 'Paspaley III', without doing the heavy work [on the pearl shell] and done your 'General Manager of Production' duties, you knew that you would continue on your same salary? ... Yes, I agree to that.

> I also suggest to you that you knew, because of the position in the company, that if you took a shore position and you were then in the position of General Manager of Operations, that you would continue with the same salary? … I disagree with that.
>
> You didn't ask Mr Paspaley what would happen in that event, did you, in August of '95 or at any time? … Nothing was offered.'

> I find that the worker was simply wrong when he said "Nothing was offered". Work was offered in August 1995 by the employer [the respondent] through its owner Mr Nick Paspaley, who the worker well knew had the authority to so offer; and such work whether ship-based or shore-based would not likely have seen a diminution in remuneration. *I make this find [sic, finding] based not only on the worker's evidence but also on Mr Nick Paspaley's evidence which I shall outline shortly*." (emphasis added)

His Worship then discussed the medical evidence relating to the worker's "muscular ligamentous pain", which he clearly accepted, though he considered (p.12) "that the worker was tending to exaggerate somewhat the extent …" of the pain, in giving his evidence.

[27] His Worship noted the evidence of Mr Nicholas Maksimovic who had worked with the worker and who said, inter alia, that "all captains [of vessels in the respondent's pearling fleet] work inside the (shell) tanks". As to this, his Worship said at p.23:-

> "I do not accept this broad answer in so far as it conflicts with the evidence of Mr Nick Paspaley. Furthermore, it does not address the question of whether or not in 1995 such [work] was a necessary part of [the worker's] duties, and I hold that it was not."

He noted Mr Maksimovic's evidence to the effect that the worker's working of the pearl shell had reduced from 1993 onwards "to absolutely doing zero shell work".

[28] His Worship also noted at length Mr Paspaley's evidence to the following general effect: "his long personal friendship" with the worker; his recruitment of the worker in 1981; the growth of the respondent's business from one lugger and a small fibreglass diving vessel with a work force of 50/60 in 1981, to a fleet of 9 large vessels and 40/50 smaller vessels with a work force of about 600, which he agreed represented the growth of "a profitable small family concern to a multi-million dollar very successful business"; his characterization of the worker as his "right-hand man" in running that business, the respondent's most valued employee other than himself, "my biggest ally", a person who shared with him "an equal responsibility at sea and ashore"; and his description of the worker's job as one in which the management and supervisory role was paramount. As to this I also note the uncontradicted evidence of Mr Ford, the respondent's finance and administration manager, who said (p.196) that the worker was General Manager (Pearling Operations) and, as such, "responsible on a day-to-day basis for all the pearling operations, management of the pearl farms, management of the ships, the vessels". As to the question of the worker's working the shell, his Worship noted (p.25) Mr Paspaley's evidence at p.211:-

Q. "… was there any requirement in 1995 on the part of captains to actually take part in the physical work that was performed with respect to the pearling operations, in the period June to August? …

A. … it wasn't a requirement. The … skipper of the ship, as I said, has a lot of discretion, and so he has to ensure that the job is done in the way that it's supposed to be done. Part of his job, of course, will be supervision of crew and checking of crew … amongst all of the other things, host of other things, that he has to do. So it's not a requirement that the skipper does anything in particular, but as a skipper of a ship you'll do a bit of everything while you're at sea. You'll even cook sometimes if necessary or if you feel like it, you know."

He also noted Mr Paspaley's evidence at pp.214-5 that while a captain is "responsible for the shell opening process" it was not his duty to open the shells personally; there were other captains in the fleet who never opened shells, and Mr Paspaley had no complaint about that. At p.30 his Worship noted:-

> "[Mr Paspaley] went on to agree that during the season Paspaley III is a virtual floating factory. He states that the captain has the management of 'a major industrial undertaking at sea, co-ordinating several ships … it's a lot of work, and the captain has a lot of discretion as to [planning] his own day'. [Mr Paspaley] said that if the captain chose to do a bit of manual labour, that was his prerogative, part of his discretion".

[29] His Worship noted Mr Paspaley's evidence that he had arranged the August 1995 meeting with the worker, because he had heard that the worker was going to resign and was recruiting the respondent's staff.

[30] His Worship then set out Mr Paspaley's recollection of what had been said in their conversation in August 1995. That was, that the worker had

informed him about resigning, because he (the worker) wanted to run his new ship; that he did not want the worker to resign, and had put various options to him to that end, but the worker was determined to resign, because he wanted to own his own business, his own ship, before he was too old; and that there had been no mention by the worker that he was having physical problems with his back, neck or shoulder.

[31] Mr Paspaley's evidence was that the first time the worker had spoken to him about his back problems was in 1996, in a coffee shop, when the worker told him that he had lodged a claim for worker's compensation.

[32] At p.31 his Worship expressed his conclusions as to the credibility of the two key witnesses, the worker and Mr Paspaley:-

> "I found Mr Paspaley to be an intelligent, honest, reliable and objective witness. I accept all of his evidence and, *where parts of it conflict with the evidence of others and particularly with the evidence of the worker, I prefer Mr Paspaley's evidence. I reject the evidence of the worker that would lead to a finding that he resigned because of the injury* [see par [24]], *and I also reject the evidence of the worker that he was not offered alternative work by the [respondent]. I found his evidence unreliable in relation to these matters, otherwise in the main he appeared believable*. There appeared to be a certain amount of reconstruction and rationalisation by the worker. I do not think that the worker deliberately lied on oath, indeed, *I found him to be a man trying to tell the truth, however, his reliability and memory were suspect* in my opinion. Perhaps, they were clouded by stresses connected to the delay in commencing his charter boat business, I don't know. [In August 1995 the worker expected the venture to commence in June 1996; at the time of testifying in February 1997, he expected it to commence in May 1997. The delay was due to delay in China in launching his ship]. *I commented to Mr Tippett during his final submissions immediately after the evidence [on 28 February 1997] that I found his client believable; however, upon mature consideration, I find that whereas he was honest enough, his evidence was tainted by*

*subjectivity, hence allowing me to not accept these aspects of his evidence that I have mentioned*." (emphasis added)

[33] It will be noted in the first passage emphasized in par [32] that his Worship rejected the worker's evidence only in 2 respects, as "unreliable": at par [13], that he resigned because of his injury, and at par [20] that he was not offered alternative work by the respondent. I note that his Worship also held (at par [35]) that the worker was not required to work the pearl shell as part of his job, though it may be that the worker never contended that he was so 'required' – see par [47] and cf par [25].

It is desirable to explore a little further his Worship's 'comment' to Mr Tippett, referred to in the last sentence in par [32], as this assumed great importance in the appeal; see ground of appeal (1) in par [42], and pars [43]-[52], [68], [69], [75]-[80]. Mr Tippett addressed the Court on 28 February 1997, after Mr Walsh; his address is transcribed at pp.303-337. He dealt with the concept of "incapacity" in relation to s64 of the *Act*, and the significance of the worker's resignation in relation to the principle of 'mutuality', in light of the *Act* and the authorities. There was much interchange between Bench and Bar. At p.320 his Worship indicated that he considered that at the August 1995 discussion Mr Paspaley had offered the worker "employment that would accommodate his desires"; Mr Tippett said (possibly erroneously) that there was "no doubt about that", since the worker had "said he did"; cf par [32]. At p.324, Mr Tippett referred his Worship to *Medlin v The State Government Insurance Commission* (1994-

95) 182 CLR 1, on the significance of the worker's resignation. He referred to the claimed loss of intellectual energy in that case; then came the following exchange, at p.325:-

> "MR TIPPETT: But what has happened is that [the worker] has told your Worship about – you see, there's one real difference …
>
> HIS WORSHIP: Look, *I believe your client*. Don't - I mean, I have tried to suggest it during the day – *I find him believable and a man who has been honest with me,* and as I said to Mr Walsh [as to which see par [34]], what would his submissions be, your client's case [that is, the worker's case] taken at its highest. He [Mr Walsh] seemed to me to be really addressing me on the law, that being the case.
>
> Now, its not enough that I feel sorry for your client. It's not enough that I feel naive for him, that I felt that he's being naive. It's not enough that he deserves some applause for having the courage to do what he did, especially leaving a $200,000 a year job. Is he deserving under the Work Health Act of an award – *that's the only thing before me*." (emphasis added)

Clearly, this was the 'comment' during submissions which his Worship had in mind in his subsequent judgment, in the last sentence in par [32]. Thereafter the submissions of Mr Tippett and his discussions with his Worship had continued on the issue of incapacity, the significance of the respondent's denial of liability, and the concept of "normal weekly earnings" in ss64 and 65. Mr Walsh then addressed again, in reply. Before adjourning, his Worship gave leave to both parties to make further submissions, in writing.

[34] Some 4 pages of written submissions were made by the respondent on 10 March 1997, followed by some 14 pages by the worker on 18 March. This

was followed by some 2 + pages by the respondent in response, on 27 March; and this was followed by 5 pages by the worker in response, on 2 June. None of the written submissions touched in other than fleeting ways upon the issue of the credibility of witnesses.

As to his Worship's reference at p.325 (cited in par [33]) to what he had said to Mr Walsh during his address, the context was as follows. During Mr Walsh's submissions, his Worship noted that the respondent did not concede the extent of the worker's injury. Mr Walsh responded that this was not really an issue; his Worship then observed at p.266:-

> "HIS WORSHIP: It was my impression, subject to further thought but I don't say there is [quaere, isn't) an argument, that this man [the worker], I would probably find, has not gilded the lily in terms of his injuries and the extent of them, and it may be that I found it quite believable in his evidence here about his injuries and the extent of them and that despite some variation in his history to the medical experts, that that doesn't impinge on his credibility.
>
> MR WALSH: I will put an argument to you that is contrary to that finding, but it's not important to my case."

Here his Worship is clearly dealing with the worker's credibility as to his injuries and their extent. Later (p.291) Mr Walsh referred to the quite different topic of what was allegedly said at the August 1995 meeting between the worker and Mr Paspaley; his Worship said that he thought that the two men were "on all fours, basically" as to what was then said, except insofar as the worker's evidence was that he could not go on "for another pearling season, 'my back's crook', or words to that effect"; cf pars [13] and

[31]. His Worship referred to a distinction between credibility and reliability; that can be elusive. Then at pp.292-3 occurred the following exchange:

> "HIS WORSHIP: I would think that sooner or later, when I come to conclusions, that *I might find that both of them [Mr Paspaley and the worker] were credible, honest and honourable men*. Both of them weren't gilding a lily. As in everything in nature, when two people present their perceptions of what happened over some hours, there will be some differences; and *in terms of reliability, it may be that I might find – and you might ask me to find-that despite the worker being genuine and credible and believable and apparently honest, that he may have, in terms of his own perceptions, reconstructed that comment [about being unable to go on, because of his back] or it might be that I might be even prepared to find that, in fact, he did say it, and Mr Paspaley forgot it*." (emphasis added)

It can be seen here that his Worship is making it very clear in the presence of both counsel that a witness may be believable and yet ultimately be regarded as unreliable; compare his terminology at par [33]. The exchange continued:

> "MR WALSH: Yes, Your Worship ---
>
> HIS WORSHIP: What does it matter – you'd say it doesn't matter?
>
> MR WALSH: It doesn't matter.
>
> HIS WORSHIP: You see, what I'm going to say to you, what would you submit to me, taking the worker's evidence and storing it at its highest, taking the worker's – say I said to you, "I found that man, the worker, honest, credible, didn't gild the lily, impressive and reliable, and I believed every word he said." What would you say to me then? You'd make the same submissions, wouldn't you?
>
> MR WALSH: Absolutely, Your Worship".

It seems that "the same submissions" would be that the worker was not required personally to work the shell as part of his duties as Marine Superintendent/General Manager, Pearling/Captain of Paspaley III, and could (as he knew) continue to fulfill those duties without doing that 'heavy work'; see the worker's evidence at par [18]. The exchange continued on the same lines a little later:

> "HIS WORSHIP: His story at his highest, believing every word, doesn't get him anywhere. Is that how I understand what you say?
>
> MR WALSH: Yes, indeed, Your Worship, that's entirely our position. And we say it must be so because the fact is that – and I think really, with respect, what may well have happened is this; he may well have had that [that is, his back condition] in his mind, but …
>
> HIS WORSHIP: I don't think there's much doubt about that. It was preying on his mind.
>
> MR WALSH: That's right, and he's forgotten a lot of what was said in that conversation [in August 1995], he's admitted that.
>
> HIS WORSHIP: He remembered a lot and he's forgotten some.
>
> MR WALSH: Yes, and what he thought – he's saying, 'Well, look, in [my] mind that [that is, the condition of his back] was an important issue'. Mr Paspaley says [see par [30]], 'I don't think that was an issue; he might've mentioned something about getting old and so forth, but to me the main concern was …'
>
> HIS WORSHIP: Yes.
>
> MR WALSH: It really matters little at the end of the day who is right about that point [as to whether the worker said in August 1995 that he could not go on because of his back condition]. It matters little whether he thought it as opposed to said it, or actually said it.

> HIS WORSHIP: I can tell you now that I wouldn't be prepared to call – and I wouldn't call either of those men liars at all. Go on?"

[35] Returning now to his Worship's judgment at par [32], I note that after expressing those conclusions on credibility his Worship proceeded at pp31-2, to express certain vital factual conclusions:

> "In addition and by way of further clarification of some earlier findings … I am satisfied that the worker suffered injury ('the injury') during the course of his employment with the [respondent]. The injury was a muscular ligamentous injury to his shoulders, neck and back. I am satisfied the pain which was part of this injury was sufficient to render him by the'95 pearling season unable to work pearl shell on the ship that he captained, viz Paspaley III. I am satisfied that the worker's position with the [respondent] by the '95 pearling season had evolved into a sophisticated management role that did not require or make it necessary for him to work pearl shells. By 'working pearl shell' I mean the manual handling of the shell from the time it is brought on board until it is presented to technicians for insertion of nuclei.
>
> I am satisfied that the injury was not such to render him unable to perform or continue to perform his role as General Manager or pearling operations and Captain of Paspaley III. I am satisfied that the worker was offered work by the [respondent] in August 1995 that did not include manual work which the injury had rendered him incapable of doing. I am satisfied that this offer of work was without any diminution in wage. I am satisfied that this offer was still extant at the time of the worker leaving the [respondent] in March 1996. I am satisfied that thereafter within the [respondent's] business there remained management roles available for the worker (see Mr Ford's evidence). I am satisfied that the worker resigned and left the [respondent] for reasons unconnected with the injury. I find the injury was not the cause or a cause of the resignation and I reject the worker's evidence in this regard. I find that the worker made it clear to the [respondent] that he was leaving to pursue his own business interests and would not return and would not change his mind".

[36] Having then noted the importance to an award of compensation of the definition of "incapacity" in s3 of the *Act* (see par [12]), and considered the

provisions for compensation in ss64 and 65, his Worship expressed his conclusions on whether compensation under these 2 heads of compensation should be awarded, at pp32-3:

> "Section 64 – I am satisfied that the injury did not result in an inability or limited ability to undertake paid work. [That is, applying the definition of "incapacity" in s3, the worker was not "totally or partially incapacitated for work as the result of an injury", in terms of s64(1)]. What occurred because of the injury was not "productive of financial loss to the worker". [This quotation is from *Foresight Pty Ltd (t/a Bridgestone Tyre Services) v Maddick* (1991) 79 NTR 17 at 19, to which his Worship had been referred]. The worker was clearly still capable of undertaking paid work with his employer [the respondent] whether as the skipper of Paspaley III and Pearling Master or alternatively undertaking shore-based jobs. And the remuneration would have been the same as without the injury or its consequences. That is to say, I find that he was not 'incapacitated' in the way that term is used in [s.64(1) of] the *Act*.
>
> Section 65 – Again there has to be an incapacity for paid work. Section 65 introduces a new concept that is not found in section 64. It introduces – [via the concept of 'loss of earning capacity' in s65(2)] the concept of work that is notionally available in the general work force. On the other hand, Section 64 adopts the sole criteria (sic) of incapacity which is in the words of Justice Mildren [in *Foresight Pty Ltd (t/a Bridgestone Tyre Services) v Maddick* (supra)] 'productive of financial loss'. Here I find that the loss arose because of the decision by the worker to pursue his own business not because of any particular incapacity."

I note that the conclusion as to the claim under s65, particularly the last sentence, is not expressed in the clearest way; there was no compensable "loss", once his Worship found no incapacity, as he already had when dealing with s64(1). The finding in relation to s64, that the injury had not resulted in an "incapacity" as defined in s3, and hence compensation was not payable under s64, necessarily meant that compensation was not payable

under s65, which also requires "incapacity" as a prerequisite, as his Worship said. No "incapacity", ex hypothesi, means no loss of ability to undertake paid work, and hence no compensation payable. The 'new concept' in s65 to which his Worship referred, essentially the "loss of earning capacity" by reference to which the amount of any compensation under s65 is to be assessed, was not relevant in this case, on his Worship's approach, because no assessment of compensation fell to be made. His Worship in using the word "loss" in the last sentence quoted above, appears to be referring to the 'loss' by the worker of the income he would have earned had he continued to work for the respondent, and not resigned to pursue his own business; that is not compensable loss, for the reasons expressed by his Worship in that sentence.

[37] His Worship then proceeded at p.33 to spell out his reasons for finding that this 'loss' in par [36] was not attributable to "incapacity" as defined in s3 of the *Act*, but to the worker's own choice to resign 'to pursue his own business', viz:-

> "[The worker] could still be working with the [respondent] at $200,000 a year, but he chooses not to. The fact is that [the worker] remains committed to his own business. He said so in evidence. Further, Mr Paspaley was not cross-examined on the basis that there was no longer a position available for him [that is, for the worker]. Mr Paspaley said that as far as he is concerned [the worker] had a job for life.
>
> The worker had no inability to undertake paid employment. [That is, relevantly, no inability stemming from his injury]. He could have continued with his employment with Paspaley. He knew that he had a 'job for life' with the [respondent] if he chose to continue. He

> knew that Nick Paspaley would allow him to continue to work as skipper of Paspaley III even if he didn't do the physical work [that is, working the pearl shell]. He knew that Nick Paspaley would give him a shore-based job. But he would have declined it. If he says that it would have resulted in less remuneration, he never asked the [respondent]. Nick Paspaley says he would not have suffered any loss of remuneration. [The worker] conceded that he was fit to do the work of skipper of the Paspaley III, but for the heavy physical work.
>
> Thus he was capable of earning an income and he simply chose not to continue with his employment. He was bored with the job. He wished to have his own business. He was discontented. It is no answer for him to say that he believed that he needed [that is, was required] to do the harder physical work, if the [respondent] did not [in fact] require [him to do] it. He could have continued the employment. It is hardly reasonable for a worker to make such a determination [not to continue in his employment] and then visit upon the [respondent] an obligation to pay compensation under the *Act*. Viewed from 'the other side of the coin', can it be said as of 29 March 1996 [the date his resignation became effective] this worker had an inability to undertake paid work? Clearly, the answer to that question must be in the negative. He had an ability to earn exactly the same income as he had been earning since December of 1992. He concedes that it was his long-time ambition to have his own business. He did a lot of 'soul searching' before he reached a decision. He elected to resign. He rejected offers put by Nick Paspaley in August 1995 and proceeded to resign on 29 March 1996".

[38] His Worship's conclusion that the injured worker had no 'incapacity' in terms of s3, was sufficient to determine the application for compensation against the worker. However, the question of 'mutuality' had been argued, on the assumption of a finding of incapacity, and his Worship proceeded to deal with it. He referred to ss75A(a) and (b) and 75B of the *Act*, and considered that:-

> "… the *Act* provides, through its scheme, obligations on an employer and worker which necessarily assumes a relationship of mutuality between worker and employer."

[39] His Worship considered that the reasoning in *Kelvinator v Jezior* (1988) 49 SASR 592, was apposite in the Territory, even though it related to different legislation, and concluded at p.34 that:-

> "The scheme of the *Act* is such that compensation ought not to be payable under the *Act* where there is a breach of mutuality of employment by the worker."

Applying this approach to the case before him, his Worship concluded at p.35:-

> "In the present case the worker made a conscious and considered decision to resign. He concedes that Mr Nick Paspaley may well have made various suggestions as to how the employment should continue but that he told Mr Paspaley that he had 'made up his mind' that he was going to resign. The worker never changed or deviated from that course. He resigned on 29 March 1996 and he concedes that he has never told the [respondent] that he is prepared to reconsider that decision. The mutuality was broken by his decision to resign. He has not sought to restore that mutuality. That is his entitlement. It is not improper for him to pursue his own business, but he is not entitled to compensation".

[40] His Worship then observed generally that the question of where the burden of proof lay had not been "a significant issue in this case", but "assuming the burden lies with the [respondent] I have been satisfied that the worker did not suffer an incapacity".

[41] Against that background his Worship then made orders in relation to the relief sought by the worker, as set out in par [2].

I turn next to the appeal.

**The grounds of appeal**

[42] In his Amended Notice of Appeal the worker set out 10 grounds, but in the result argued only that his Worship had erred in law in the following 4 respects:

(1) in denying the worker natural justice, in that his Worship's comment at transcript p.325 – see pars [32]-[34] - to the worker's counsel during final submissions that he accepted the credibility of the worker, led the worker's counsel into making no further submissions on that issue; his Worship subsequently (par [32]) in his reasons for decision stated that he had changed his mind on this issue; the result of the comment and change of mind was that the worker in effect was deprived of the opportunity to address the Court upon the central issue of credibility before the decision was handed down, and this deprivation constituted a denial of natural justice;

(2) in finding that the worker was not partially incapacitated and entitled to compensation in accordance with ss64 and/or 65 of the *Act*;

(3) in finding that the principle of mutuality is recognised by the provisions of the *Act;* alternatively, if it is recognised, in finding that the principle applies in circumstances where the employer denies liability; alternatively, in finding that the principle applied to the facts of the case before the Court; and

(4) in finding that the worker had not suffered as a result of the injury any incapacity which permitted him to recover compensation pursuant to s64 of the *Act*.

It can be seen that grounds Nos. (2) and (4) are directed essentially to the same point - the question whether the worker suffered an "incapacity" from his injury. I deal with these grounds of appeal, seriatim.

**The worker's submissions**

***Ground (1): a denial of natural justice***

[43] Mr Tippett submitted that a critical issue before the Work Health Court was whether the worker's evidence on 3 matters - his injury, his resulting incapacity for work, and the reasons he had resigned from his employment - should have been accepted, instead of the evidence of Mr Paspaley. This related in particular to their respective accounts of what was said about these matters at their meeting in August 1995.

[44] As to the passage at transcript p.325 – see par [33] – Mr Tippett submitted that he was about to make submissions as to credit, when his Worship said "I believe your client". Consistently with that, his Worship then proceeded to observe (par [33]) that he had earlier invited submissions from the respondent's counsel on the basis that he approach the worker's case "taken at its highest". Mr Tippett submitted that his Worship was thus indicating at that point, during submissions, that he had determined the issue of credibility in favour of the worker, and that what remained thereafter for determination was whether, the worker's evidence being accepted, he had a good claim in law. Mr Tippett noted that thereafter he had not addressed on the issue of credit; I accept that.

His complaint in this ground of appeal was that in effect he had been denied an opportunity to address on credit, because he had accepted what his Worship said in par [33] as indicating that he did not have to do so, because

his Worship had already determined the issue in the worker's favour. He submitted that if the worker's evidence had in fact been preferred to that of Mr Paspaley, instead of vice versa as in par [32], the result of the case could not possibly have been the same, bearing in mind the conflict in evidence between them as to what was said at their August 1995 meeting.

[45] He submitted that his Worship's reasons showed that the question of credit was the most important issue in the case; I consider that this is best determined when considering Mr Tippett's examples in pars [47] and [52]. He also submitted that what his Worship had said in par [33] at the time of submissions did not accord with his later conclusion in his judgment at par [32] that he accepted Mr Paspaley where his evidence conflicted with that of the worker. That is so. No doubt what his Worship said in par [33] has to be read in its context in par [34], including the distinction his Worship drew in the presence of counsel between credibility and reliability as spelled out at pp.292-3 in par [34]; having reviewed that aspect carefully, it seems to me that not too much weight should be placed on alleged distinctions between words with very similar meanings. Whether a denial of natural justice is involved depends on how critical credit was to the determination of the issues, some of which are identified by Mr Tippett in pars [47] and [52].

[46] Mr Tippett noted that in his written outline of submissions, handed up prior to the exchange with his Worship in par [33], he had submitted that the worker's evidence should be accepted. He noted that in his two later written

submissions, after the final oral addresses, there was very limited reference to questions of credit. I accept that.

[47] He proceeded to give an example of the importance of determining credit. He submitted that if a worker's injury affected his ability to continue to do his job *as he saw what that job entailed*, that fact was relevant to whether he was thereby incapacitated by the injury. He submitted that the worker had never testified that he was *required* by the respondent to work the pearl shell, as part of his job; cf par [25]. However, he had testified that *in fact* he worked the pearl shell as part of his job, and that *he knew* that doing that work would be expected of him by the respondent. I note that this does not seem to square with his Worship's reference at par [25], as to what the worker was asserting; there is a fairly fine line in any event between what is 'required' of a worker and what is 'expected' of him. Mr Tippett submitted that the question of what 'would be expected of' the worker by the respondent, turned on whether the worker's evidence was accepted or Mr Paspaley's; if the worker's evidence were accepted, on that point, that would support his submission that the respondent was liable. Mr Tippett referred to the worker's evidence in par [26] that he "would've been marginalised" if he did not work the pearl shell, as supporting his contention that the respondent expected him to do so; the worker was in effect there saying that working the pearl shell was expected of him, and the fact he could no longer do that work because of his pain was leading to his marginalisation in the respondent's enterprise. I accept that, but note that the reference to being

'marginalised' emerged in an answer in cross-examination, and was never expanded upon. It does not carry much weight. I observe that the general thrust of the worker's evidence in pars [18] and [23], and in the quotation from p.169 in par [26], does not strongly support his contention that the respondent expected him to work the pearl shell; Mr Paspaley's evidence was clearly to the contrary – see the quotations from pp.211 and 214-5 in par [28]. I do not consider that acceptance of the worker's evidence would be likely to establish that working the pearl shell "would be expected of him" by the respondent. Further, it appears that his Worship probably considered the appellant's evidence on this topic was "believable" – see par [32] – but, clearly if so, it was not of sufficient quality to establish that working the pearl shell was expected of him.

[48] As to this ground of appeal, Mr Tippett relied on *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145-6. That was an action for damages for personal injury; the plaintiff claimed that the accident had caused him to suffer a neurotic condition which rendered him totally incapacitated for work. A psychiatrist testified, cogently, that the accident and the condition were not causally connected. In the course of addressing, the plaintiff's counsel submitted that the psychiatrist's evidence should not be accepted on the point of whether there was a causal connection. The learned trial Judge responded:-

> "I don't accept [the psychiatrist] on that. You needn't go on, as to that."

Counsel then did not pursue the matter further. In giving judgment, however, his Honour in fact accepted the psychiatrist's evidence on the point. Some parallels with the present case can be seen.

[49] The High Court noted at 145 that the applicable general principle was that a trial must be fair; however, this was subject to the qualification that a new trial would not be ordered "if it would *inevitably* result in the making of the same order as that made by the primary judge at the first trial". Their Honours continued at 145-6:-

> "Where … the denial of natural justice affects the entitlement of a party to make submissions on an issue of fact, *especially when the issue is whether the evidence of a particular witness should be accepted, it is more difficult for a court of appeal to conclude that compliance with the requirements of natural justice could have made no difference. … It is no easy task for a court of appeal to satisfy itself that what appears on its face to have been a denial of natural justice could have had no bearing on the outcome of the trial of an issue of fact. And this difficulty is magnified when the issue concerns the acceptance or rejection of the testimony of a witness at the trial.*
>
> This is just such a case. … We do not see how the Full Court, denied the important advantage of seeing and assessing the witnesses, could satisfactorily conclude that had the appellant's counsel been given a reasonable opportunity to present submissions on the issue, it could have made no possible difference to the result." (emphasis added).

Their Honours referred to comments by Bollen J in the Full Court and observed at 146-7:-

> "These statements do not suggest that his Honour considered that the primary judge was bound to find the issue of fact in favour of the respondent or that the finding of fact [made] was the only finding reasonably open on the evidence. Instead they imply that *the issue was rather finely balanced*, an assessment which accords with the

> primary judge's reaction. *Initially he had been disposed to reject [the psychiatrist], but on mature reflection he had come to the opposite conclusion*.
>
> It is natural that Bollen J. expressed himself as he did in the passages which we have quoted. He was conscious that, not having seen the witnesses, he could not evaluate their evidence in the way in which a trial judge can. It is for this very reason that, in our view, the Full Court was disabled in the circumstances of this case from reaching a sound conclusion that a new trial in which the applicant's counsel would have an adequate opportunity of presenting submissions on the issue of causation could make no difference to the result.
>
> Alternatively, if the Full Court is properly to be understood as saying no more than that a new trial would *probably* make no difference to the result, their Honours failed to apply the correct criterion. *All that the appellant needed to show was that the denial of natural justice deprived him of the possibility of a successful outcome. In order to negate that possibility, it was, as we have said, necessary for the Full Court to find that a properly conducted trial could not possibly have produced a different result*." (emphasis added)

I apply the law as stated in *Stead v State Government Insurance Commission* (supra). In that case, the denial of natural justice was clear; in the present case, it is by no means so clear.

[50] Mr Tippett also relied on *Goktas v Government Insurance Office of New South Wales* (1993) 31 NSWLR 684, in which *Stead v State Government Insurance Commission* (supra) was applied. That case involved an apprehension of bias on the part of trial Judge. However, in rejecting the plaintiffs' claims, his Honour had treated as vital, certain mutually contradictory evidence as to where the alleged accident had occurred. Counsel for the plaintiffs had earlier been told by his Honour that he need not pursue submissions on that aspect, because "nothing really turns on the

precise place" where the accident occurred. In the Court of Appeal, Cripps JA (with whom Kirby P and Meagher JA agreed) considered at 701 that his Honour had denied the plaintiffs natural justice –

> "… in encouraging [their counsel] in the belief that it was not necessary for him to address on matters which, as events turned out, were *central to the decision of the court*."

In the present case, whether the matters on which the credit of the worker is said to be significant were "central to the decision of the court" can best be assessed by examining the examples suggested by Mr Tippett at par [52]; I have already dealt with one matter he raised, at par [47].

[51] Mr Tippett also relied on *Waldron v Comcare Australia* (1995) 37 ALD 471 at 477-9. There an appeal from the termination of compensation payments was allowed on several grounds, one of which was that the Tribunal had not observed its obligation to put to a witness observations it had itself made of the appellant's behaviour "in and about the hearing room", on which it relied, so that a party had an opportunity to notice it, and answer or deal with it; this obligation was a rule of substance which went to the reality of fairness. I note that that case appears to involve a different breach of the rules of natural justice to that relied on here, which is of the *Stead* type; in that respect *Waldron* is similar to *Marelic v Comcare* (1993) 121 ALR 114 on which Mr Tippett also relied.

However, Mr Tippett relied on *Waldron* for its discussion of the situation where a Court does not refer to significant evidence placed before it. In this

case medical evidence from Mr Baddeley was before the Court. It was not mentioned by his Worship in his judgment. Mr Tippett submitted that Mr Baddeley's evidence went not only to significant medical incapacity of the worker, but also to the worker's credit, his Worship having considered at par [26] that in the witness box he was "tending to exaggerate somewhat" the extent of his pain. I see no merit in this submission. I note that his Worship was in any event satisfied that the worker had suffered the injury he described – see pars [15] and [35]; he had made a sufficient appreciation of its practical effect in pars [21] and [35], an appreciation with which the worker agreed; and in the course of submissions he had accepted the worker's account of his injuries, at par [34].

[52] As to credit being "a critical issue" in the case, as Mr Tippett asserted in par [43], or "the most important issue", as he asserted in par [45], he submitted that many of his Worship's reasons for his conclusions hinged on credit; he submitted that his Worship's remarks at par [33] had effectively deprived him of the opportunity of addressing on those matters. He cited the following 6 matters, (a)-(f), as examples of conclusions of his Worship based on credit –

(a) his Worship's conclusion in par [16] that the worker by 1995 had joined the "managerial ranks". Mr Tippett submitted that this conclusion was irrelevant; what was relevant was that the worker was still doing the work of working the pearl shell in the course of his employment. I note that Mr Tippett had in fact made a submission to

his Worship as to the significance of the work which the worker actually did; and see par [47].

I do not consider that his Worship's conclusion in par [16] turned on any question of credit, since the worker had agreed at transcript p.115 that he had "a very important managerial role" in the respondent's enterprise; see also pars [18] and [19]. The evidence otherwise on the point was quite overwhelming, and all one way. Mr Tippett rightly agreed (p.43) during the hearing of the appeal that the nature of the worker's work must have changed as the respondent's enterprise grew over the years; indeed, that is a common sense conclusion, important and inevitable. However, he stressed that the respondent's ethos always was, and is, "lead from the front"; and submitted that the worker was thus expected to continue to do the work in question, as he had said. I dealt with this last point at par [47].

(b) the reference by his Worship in par [16] to the worker's "executive salary package of $200,000 per annum" not being "a foreman's wage"; Mr Tippett submitted that this was irrelevant. I consider that it was a relevant fact, as illustrating in a realistic way how the nature of the worker's job must have changed over the years, with the growth of the respondent's enterprise. In any event, it is not a finding which involved any question of assessing credit, through the

belief that it was, is presumably why it was mentioned by Mr Tippett;

(c) his Worship's crucial finding in par [16] that the worker "was not required" to work the pearl shell, as part of his job: Mr Tippett submitted that, while this finding was irrelevant if the worker was in fact doing the manual labour – as he had been - it depended on an assessment of credit; this was because Mr Paspaley had affirmed that negative proposition – see par [28] - while the worker had denied it – see par [25]. I am not quite sure of the last matter, in light of Mr Tippett's submission at par [47]. In any event, it is clearly a vital finding, and it turns on credit.

See, however, pars [16] and [17] as to his Worship basing this finding in part on the worker's evidence. I note that as to the reference to the worker's "evidence in cross-examination" in par [16], there is an error at p.13 of his Worship's judgment. The question there reproduced from the transcript of the worker's cross-examination: "And what I suggest to you is that you didn't have to do that work as captain, but you chose to do it?", is correctly reproduced; but the answer to that question is expressed in the judgment as "That's correct", whereas in reality in the transcript the answer was "That's incorrect". As to that error in the judgment, I am satisfied that the word "correct" is a mere typing error, and does not reflect some misapprehension of the worker's true answer – "That's

incorrect" - by his Worship; the next question and answer set out in the judgment at p.13 make that very clear. There was no admission by the worker that he did not have to do the work, but had done it by his own choice.

Mr Tippett referred to the worker's description in his evidence-in-chief of the work he carried out, at transcript pp.48-59; I note that that related to his work in the years 1981-89, while Captain of the Paspaley II, and is not presently relevant. Mr Tippett referred to subsequent transcript pages, in which the worker described working the pearl shell on both Paspaley II and III; at p.55 Mr Tippett noted that his evidence went to his injury. Mr Tippett also noted the worker's explanation for his resignation in par [13], which his Worship had recounted in his judgment at pp.9-10. I note that none of this material appears to bear on the question whether the worker was "required" to work the pearl shell as part of his job. There was however his evidence at p.121 - see par [18] - and his Worship's judgment at p.13. This aspect was dealt with at par [47], where I did not consider that it involved an issue of credit. See also (f) below;

(d) Mr Tippett submitted generally that had it not been for his Worship's comment at p.325 (par [33]), he would have made submissions as to Mr Paspaley's credit in relation to his evidence about the offer of on-shore work to the worker; see pars [14], [20] and [22], from which it appears that there was no direct conflict between the worker's

evidence on the point – which was ultimately to the effect that there had been a "vague discussion" about it – and that of Mr Paspaley, and no weight of credit is involved;

(e) the worker's evidence at par [13], to the effect that he was resigning for health reasons. If the worker was accepted as believable on this point, it followed that his injury was one reason for his resigning; yet his Worship had rejected this as a reason, at pars [24] and [32]. This was one of two matters on which his Worship rejected the worker's evidence, at par [32], as "unreliable" for the reasons he there stated. I consider that his Worship's decision on this important point turned on credit;

(f) as to the subject matter in (c) above, Mr Tippett further submitted that the question whether working the pearl shell was or was not a matter of personal choice for the worker, had been found against the worker, as a matter of credit. He noted that s4(4) of the *Act* meant that this issue of whether the work was his personal choice or not, was irrelevant, since it deemed the worker's injury to arise out of or in the course of his employment, whether the work was his own choice or not. That is correct, but only as far as the injury is concerned. However, Mr Tippett submitted that the fact that the issue had been decided on credit, supported his submission at (c). I do not think that it carries the matter any further;

(g) in general, Mr Tippett submitted that many of his Worship's reasons for decision hinged on issues of credit, and that what his Worship said in his 'comment' in par [33] had, because he (Mr Tippett) had relied on it, in effect deprived him of fully addressing the issue of credit, and thereby possibly persuading his Worship that the worker's evidence should be believed, and that he should therefore succeed in his claim. I consider that this really re-states Mr Tippett's submissions from par [43] onwards, but carries them no further.

***Grounds (2) and (4): "incapacity", and ss64 and 65 compensation***

[53] As noted in par [12], s3 of the *Act* defines "incapacity" as "an inability or limited ability to undertake paid work because of an injury". In this case it is now clear that the worker had an "injury", as defined in s3. Compensation is payable where a worker's injury "results in or materially contributes to … incapacity"; see s53(c) of the *Act*. Section 64 then spells out the compensation payable during the first 26 weeks of incapacity, and s65 the compensation payable thereafter while the worker remains under an incapacity. The respondent had submitted and his Worship found, at par [35], that here the worker had shown *no* incapacity, as defined in s3. Accordingly, no compensation was payable under s64 or s65 – see par [36].

[54] Against this background, Mr Tippett submitted that the finding of 'no incapacity' involved an error in law; he relied on *Foresight Pty Ltd (t/a Bridgestone Tyre Service) v Maddick* (supra), *Arnotts Snack Products Pty*

*Ltd v Yacob* (1984-85) 155 CLR 171 at 233, and *Work Social Club – Katherine Inc v Rozycki* (1998) 120 NTR 9.

In *Work Social Club – Katherine Inc v Rozycki* (supra) the Work Health Court found injury and resulting partial incapacity, but no financial loss for the 26 weeks after injury; hence no compensation was payable under s64. As to s65 it held that no compensation was payable; this was either because the worker had failed to prove partial incapacity or, if she had, she had failed to prove financial loss. The Supreme Court allowed the worker's appeal, and awarded compensation under both ss64 and 65. The Court of Appeal allowed the employer's subsequent appeal in part: as to quantum only as to the award of s64 compensation, and against the award of s65 compensation.

[55] I note that the relevant law is as stated by Mildren J in *Work Social Club – Katherine Inc v Rozycki* (supra) at 17:-

> "… 'incapacity' means 'an inability or limited ability to undertake paid work because of the injury": see s 3(1). Thus, when ss64(1) and 65(1) use the expression 'partially incapacitated for work', this must mean 'have a limited ability to undertake paid work'. This is consistent with what was decided by the High Court in *Arnotts Snack Products Pty Ltd v Yacob* (1983)155 CLR 171; 57 ALR 229, which held that the concept of partial incapacity for work is that of a reduced physical capacity, by reason of physical disability, for actually doing work in the labour market in which the employee was working or might reasonably be expected to work. Except that the concept of incapacity is not limited to physical disability, and may include a mental disability (see the definition of "injury" in s3(1)), I agree."

Mr Tippett submitted that the worker was "partially incapacitated for work" in this sense, because working pearl shell (which caused his injury) was part of the work 'in the labour market in which [he] was working, or might reasonably be expected to work' in; that is, it was part of the work of a captain of a pearling boat. I note that his Worship found that working the pearl shell was *not* part of the work required of a captain such as the worker, in the employ of the respondent in 1995; see pars [16], [25], [27],[28] and [35]. This was despite the worker's evidence to the contrary, at par [18]. That is a finding of fact, based on evidence, and does not give rise to an error of law.

[56] Mr Tippett submitted that in making his findings set out in the first paragraph of par [37] his Worship did not apply the principles in *Arnotts Snack Products Pty Ltd v Yacob* (supra) as to incapacity – see par [35] - but principles applicable to 'mutuality'. I am unable to accept this; the findings were based on his Worship's assessment of the evidence, and state findings of fact which do not give rise to an error of law.

Mr Tippett referred to his Worship's finding at par [35] that the worker was physically "unable to work pearl shell" in the 1995 pearl season, and submitted that this was a finding of 'partial incapacity for work' in the sense set out in par [55]. However, this submission takes no account of his Worship's finding of fact that the working of pearl shell was *not* part of the work required of a captain employed by the respondent; it must be rejected; see pars [16], [25], [27] and [28].

[57] Mr Tippett submitted that s64(1) required only that the worker show a partial incapacity for work, in the sense of "partial incapacity" as described in *Arnotts Snack Products Pty Ltd v Yacob* (supra) in par [55]. I accept that the reference in s64(1) to "a worker who is … partially incapacitated for work as the result of an injury" is a reference, in terms of the definition of "incapacity" in s3 of the *Act*, to a worker with a "limited ability to undertake paid work because of an injury". Mr Tippett submitted that the respondent sought to meet the partially incapacitated worker's right to recover compensation by contending that because of the application of the principle of mutuality, the respondent should not be required to pay compensation in this case. Before 'mutuality' can arise for consideration, however, there must be a finding of partial incapacity for work. His Worship found – see par [36] – that there was no incapacity, partial or otherwise, for paid work, for the reasons spelled out in par [37]. This finding was based on his Worship's assessment of the evidence, and does not give rise to an error of law.

[58] Mr Tippett submitted that in dealing with ss64 and 65 in par [36], his Worship had failed to note the distinction between those provisions; that is, that s65 introduces the concept of 'loss of earning capacity', as defined in s65(2). He submitted that because of that failure his Worship had thereby erred, by applying his finding of 'no partial incapacity' to both ss64 and 65. I note that in fact his Worship correctly noted the distinction between ss64

and 65; see par [36], and my comments therein. I consider that no material error in his Worship's approach is disclosed.

[59] Mr Tippett submitted that his Worship erred in par [36] in relation to s64(1), by construing it as requiring, for compensation to be payable, that the incapacity for work be 'productive of financial loss'. I consider that s64(1) does require that. For example, if a partially incapacitated worker continued to earn in that 26-week period his normal weekly earnings, he would not recover any compensation under s64(1) for that period. I consider that his Worship was correct in his approach to s64(1), as set out in par [36]. If there was a "difference" of the type referred to in s64(1) in that 26-week period, on his Worship's finding of 'no incapacity' this was due not to the worker having a "limited ability to undertake paid work because of an injury", but simply to his resignation from his employment with the respondent as Captain of Paspaley III, a position which his Worship considered, on the evidence, the worker could have continued to hold, at the same salary, and without working the pearl shell as he previously had.

At the root of Mr Tippett's submission is his earlier submission – see par [55] - that the employment of the worker by the respondent required him to work the shell; that was either 'required' of him, or 'expected' of him. However, his Worship found as a fact that this was not the case – see pars [16], [25], [27], [28] and [35].

[60] As to s65, Mr Tippett submitted that as to "the most profitable employment … reasonably available" to the worker, referred to in s65(2)(b), and his Worship's conclusion at par [37] - that since the worker "could be still working with [the respondent] at $200,000.00 per annum, but he chooses not to", he suffers no loss - it had to be known what that work was. He submitted that the respondent had to show both what the 'reasonably available' work was, and that it had made an offer to the worker of that work. Further, after the worker applied for compensation in May 1996, Mr Tippett submitted that the respondent had failed to meet its obligation to approach the worker to return to work, or to advise him that work was available for him.

It may first be noted that, like s64(1), compensation is payable under s65(1) only to "a worker who is totally or partially incapacitated for work"; the result of his Worship's finding that the worker suffers no incapacity, is that neither s64(1) nor s65(1) compensation is payable to him. Turning however to Mr Tippett's submissions, I note that as to the significance of the fact that by May 1996 the worker had already resigned, Mr Tippett relied on *Comcare v Rawling* (1993) 42 FCR 421. This authority appears to be directed at the issue of 'mutuality' in ground (3); however, it may be noted here. In that case the worker was incapacitated for work from October 1989, resigned in November, received full weekly compensation until she was assessed late in 1990 as being able to work 2 days a week, and then had her compensation cut by 40%. The Tribunal set that reduction aside, holding

that the amount she was able to earn in suitable employment should be valued at nil. O'Loughlin J dismissed the employer's appeal. His Honour held that the resignation of the worker at a time when she had no ability to earn, and would justifiably have refused any offer of employment, meant that she could not be treated as having removed herself from available employment (a relevant matter), as the appellant alleged. When she was assessed as having a limited ability to earn, the evidence showed that her employer made no offer to employ her further, and there was no evidence of any other suitable employment. At pp.428-9 his Honour discussed the consequences of the worker's resignation on her claim:-

> "… Mr Cole submitted that it relieved her employer from thereafter having to supply her with suitable employment. In support of that proposition, Mr Cole relied upon (inter alia) the decision of the High Court in *R J Brodie (Holdings) Pty Ltd v Pennell* (1968) 177 CLR 665, a case that dealt with the provisions of s11(2) of the *Workers' Compensation Act* 1926 (NSW). That subsection required an employer to make provision of suitable employment for his injured worker during the worker's partial incapacity for his pre-injury employment. If the employer failed to do so then the worker's partial incapacity was deemed, for the purpose of calculating the amount of his compensatory payments, to be a total incapacity. In *R J Brodie's* case, the employer argued unsuccessfully that the provisions of s11(2) could not assist a partially incapacitated worker who had elected to engage in a business from which he derived a small profit. The High Court held that, *in order to deny him the benefits of the subsection, it must be shown that the worker was not ready, willing or able to enter the employ of the pre-injury employer*.
>
> In the course of explaining the effect of the provisions of s11(2), Kitto, Taylor, Windeyer and Owen JJ said (at 669):
>
> > 'A clue to the true solution [to the problems to which s11(2) gives rise] may, perhaps, be found in the somewhat loose language of the subsection itself *for the 'provision' of suitable*

> *employment involves an element of mutuality*. Employment is not a commodity which can be provided merely by an offer; it can in strictness be provided only by the employer and employee entering into and performing their obligation under a contract of service and this involves the co-operation of both employer and employee. *There can, of course, be no 'failure' on the part of an employer to provide suitable employment if the employee refuses, and continues to refuse, to enter his employment, or, if the facts show that the employee's conduct is inconsistent with the necessary degree of co-operation on his part*. Such would be the case where the employee has undertaken full-time employment with another employer so long as such employment continues, or, where the employee moves his residence to a place so remote from the employer's place of business as to be quite incompatible with employment by that employer. Likewise, it would seem, the position would be the same where after his partially incapacitating injury the worker suffers further injuries or sickness resulting in total incapacity for any form of work. It must be remembered that not only is the obligation [under s11(2)] to provide suitable employment a continuing one but there must also be a continuing failure to provide suitable employment in order to entitle a worker to continuing benefits pursuant to s11(2) and, in our view, *there cannot be a continuing failure where the circumstances are such that it can be seen that throughout any relevant period the employee is not ready, willing or able to enter the employ of the pre-injury employer*.'

*In my opinion, R J Brodie's case and the numerous other cases that deal with the subject of mutuality between employer and employee are of limited value in considering the provisions that are contained in s 19 of the Act. R J Brodie's case was dealing with legislation that imposed an obligation on an employer to provide suitable employment to his injured worker during a period of partial incapacity*. As to that obligation, the High Court said that an employer would be relieved of that statutory obligation if the worker was not ready, willing and able to enter the employment. *On the other hand, s19 of the Act contains no such obligation* as it is not primarily directed to a resumption of the employer-employee relationship. As I have earlier stated, *the primary purpose of the section*, as contained in subss(2) and (3), *is the ascertainment of the injured employee's ability to earn in suitable employment*. Mr Rawling's act of resignation could, perhaps, be evidence that she was not, in late 1989, ready or willing to work at Heidelberg (I put to one side the issue of her ability to work at the time) but it did not entitle the decision-maker to say: 'Your resignation, for personal reasons of

> moving to Adelaide was seen as an act of removing yourself from available employment'." (emphasis added)

The case may be considered in connection with Ground 3. It is sufficient to say as to s65(1) that I consider that the finding that the worker had no "incapacity" meant that the claim under s65(1) must fail like the claim under s64(1).

***Ground (3): mutuality***

[61] Mr Tippett referred to ss75A and 75B of the *Act*. I note that s75A obliges an employer "liable … to compensate an injured worker" to "take all reasonable steps to provide [him] with suitable employment …"; I note that the respondent thus far has no such obligation to the worker, since it has not been held liable. By way of contrast, I note that s11(2) of the *Workers' Compensation Act* 1926 (NSW), obliges an employer to "provide suitable employment for his injured [partially incapacitated] worker …"; that is a clear unconditional and unequivocal duty. Again, s19(4) of *the Commonwealth Employees' Rehabilitation and Compensation Act* 1988 (Cth) provides for matters to which regard is to be had, when determining the amount that an employee is able to earn in suitable employment; see generally the observations of O'Loughlin J in *Comcare v Rawling* (supra) in par [60].

[62] Mr Tippett submitted that in every case where the principle of mutuality has been applied, the employer has admitted liability for the worker's

incapacity. He referred to *Kelvinator v Jezior* (supra) at 593, *Workcover Corporation (Plas-Tec) Pty Ltd v Grigor* (1994) 62 SASR 283, *R J Brodie (Holdings) Pty Ltd v Pennell* (1968) 117 CLR 665 at 669, and *Electric Power Transmission Pty Ltd v D'Urso* (1970) 124 CLR 338.

[63] *Kelvinator* (supra) involved a provision in South Australia similar in effect to s11(2) of the *Workers' Compensation Act* 1926 (NSW): it deemed partial incapacity to be total incapacity for work, for a period, unless the employer established that suitable employment for which the worker was fit, was reasonably available to him for that period. In *Kelvinator* (supra) the worker received 1 week's notice of dismissal for misconduct on 9 October; he gave notice of injury on 15 October, before the dismissal came into effect. After dismissal, he did not work for the employer again. The Full Court held that the worker, by his behaviour and attitude, disqualified himself from carrying out any such 'suitable employment', and should not be compensated for the period in question on the basis of total incapacity. The Tribunal had held that the employer had not discharged its onus of establishing that suitable employment was available. In allowing the appeal, Cox J (with whom White and Prior JJ agreed) discussed the authorities at 594-7 and said at 594:-

> "There are reported decisions under workers' compensation legislation in this State and elsewhere, in which the courts have had to consider the application of an evidentiary provision of the s35 kind to the case of a worker who is unwilling or, for reasons unconnected with his work disability, unable to work or whose employer, for reasons particular to the worker and unrelated to his incapacity, is unwilling to employ him.

> The leading case is *R J Brodie (Holdings) Pty Ltd v Pennell* (1968) 117 CLR 665. Section 11(2) of a New South Wales Act required an employer to provide suitable employment for his injured worker during the worker's partial incapacity and stated that, upon any failure by the employer to provide such employment, the worker's incapacity for work should be deemed to be total. The employer in that case argued that the section did not apply in the case of a injured worker who went off and got another job. The joint judgment of Kitto, Taylor, Windeyer and Owen JJ saw that there were difficulties in applying this provision with complete literalness."

His Honour then set out the passage in *R J Brodie (holdings) Pty Ltd* (supra) cited in par [60] above, dealing with the concept of 'mutuality'. At 595 his Honour said:-

> "The same provision was considered again by the High Court in *Electric Power Transmission Pty Ltd v D'Urso* (1970) 124 CLR 338. The Workers' Compensation Commission had found that if suitable work had been offered by the employer to the worker he would not have accepted it, and that a request which the worker had made to the employer for work was not bona fide. In the opinion of the High Court this precluded the worker from relying upon s11(2). It followed *Pennell's* case. The majority judgment included the following passage (at 342):
>
> > 'if a worker is in hospital or in prison or has gone away so that he cannot be employed, his former employer could not be said to have failed to employ him, whether or not the employer knew of the circumstances which made further employment possible.
> >
> > *Exactly the same reasoning applies in the case of a worker who is simply not willing to work for his former employer*, even if the worker should pretend that he is willing to work, and the employer is not aware that a request by the worker for employment is a sham.
> >
> > …

> The finding of the Commission that the worker had not been genuinely available for suitable employment with the employer of itself properly led to the conclusion that the employer had not failed to provide him with suitable employment and to the refusal of compensation as for total incapacity." (emphasis added)

[64] In *Workcover Corporation (Plas-Tec) Pty Ltd v Grigor* (supra) the High Court considered the same provision as in *Kelvinator*. The partially incapacitated worker performed suitable work which his employer had made available. Then he resigned, undertook training, and obtained suitable work in another field. When he became unemployed, he told his original employer that he was ready to perform suitable work. By that time the employer had already engaged another worker to perform that work, and had no other suitable work available. The worker claimed that his partial incapacity should be treated as total incapacity. The employer contended that the partially incapacitated worker was estopped by his conduct (resigning from his employment) from maintaining that he was ready, willing and able to work for the employer. The worker was successful before a Tribunal. The employer appealed, contending that the worker had breached the mutuality required by s35(2), by resigning from employment which was then available and suitable.

[65] The Full Court held that it is settled law that the notion of unavailability to a worker of work for which he is fit, connotes that the worker is ready and willing to perform such work; this is the principle of mutuality, and it applies to s35(2) of the *Act*. The question was whether, by resigning, a

worker was precluded from asserting that work for which he was fit, was not reasonably available to him. It was held that the circumstances of the resignation could affect mutuality for the purpose of s35(2), but a mere decision to change employment, standing alone, could not deprive the worker of the benefit of s35(2).

King CJ (with whom Bollen and Mullighan JJ agreed) at 285-6 referred to certain authorities and said:

> "Those cases were decided upon statutory provisions which made the failure of the employer to provide suitable work the precondition or one of the preconditions of partial incapacity being treated as total. In *Kelvinator v Jezior* (1988) 49 SASR 592, the Full Court held that the principle of mutuality applied to s35(2) which contains no provision relating to the employer at the time of the occurrence of the disability. *I think, however, that the principle cannot apply in precisely the same way as it did under the previous legislation.*
>
> Section 67 of the previous legislation, the *Workmen's Compensation Act* 1971, provided the partial incapacity was to be treated as total except during any period in respect of which the employer made available work for which the worker was fit or such work was reasonably available elsewhere. If the employer made suitable work available to the worker, the effect was to deprive the partial incapacity of the potential to be treated as total, irrespective of whether the worker might be unable to avail himself of the work by reason of altered circumstances such as having moved from the locality. *With such a provision mutuality required a readiness on behalf of the worker to avail himself of the work made available by the employer with which he was employed at the time of incurring the disability.*
>
> *I do not think that that can be the position under the present Act.* The precondition under s35(2) does not have an aspect which is specific to a particular employer. The precondition is the non-availability of suitable work generally. …s35(2) [requires] that suitable work must be *reasonably* available. Work made available by the employer may not be *reasonably* available to a worker by reason

> of the changed circumstances of the worker in relation to his place of residence or otherwise. *The mutuality required by s35(2) is therefore a readiness and willingness to perform work which is reasonably available and is not necessarily negated by the worker's unavailability for work provided by the employer in whose employment the disability occurred.* … the question is … whether [the worker's resignation] precludes him from asserting that work for which he is fit is not reasonably available to him generally whether from his former employer or from some other source.
>
> I cannot find anything in the facts of the present case which would justify such a conclusion." (emphasis added)

[66] In *Electric Power Transmission Pty Ltd v D'Urso* (supra), another case involving the 'deemed total incapacity' provision in s11(2) of *the Workers' Compensation Act* 1926 (NSW), it was held that when a partially incapacitated worker was unwilling to accept suitable employment during his partial incapacity for work, his employer's refusal to employ him again did not amount to a failure on its part to provide suitable employment within s11(2), even if the employer was unaware of the worker's unwillingness. The High Court observed at 341 that "an employer does not fail to provide employment to a worker who *in fact* is not willing to work for him".

[67] Mr Tippett submitted that mutuality had to be shown to exist at the time compensation was sought. Accordingly, a general offer of employment made in August 1995, could not trigger mutuality in May 1996. In this case the respondent had merely denied liability – it did not then make work available to the worker – when the application for compensation was made to it in May 1996. Accordingly, mutuality did not then exist; and the fact that a

worker is not willing to work for his employer is irrelevant, if the employer denies liability.

**The respondent's submissions**

In light of the foregoing, I will deal with these submissions briefly.

***(a) Ground (1): a denial of natural justice***

[68] Mr Walsh submitted that his Worship was correct at p.325 – see par [33] - in that the respondent had thereafter proceeded to rest on the law in relation to 'incapacity' and 'mutuality'; see par [34]. He submitted that the Court had relied on the *worker's own* evidence to establish the fact of no incapacity, and that that evidence, including the many concessions made by the worker in cross-examination, led inescapably to that conclusion.

[69] As to *Stead* (supra) he submitted that the present case fell within the qualification mentioned by the Court; see par [49].

***(b) Grounds (2) and (4): incapacity***

[70] Mr Walsh submitted that the decision adverse to the worker could be made out, on his *own* evidence. It followed that credibility was not a relevant factor, in determining this question of fact.

[71] In support, Mr Walsh went through the evidence of the worker in considerable detail, including his concessions in cross-examination. I need not address that evidence again. He noted that the worker did not deny many

propositions put to him. Mr Walsh submitted that this evidence showed that the worker was *not* required by the respondent to work the shell, as a condition of his employment, and he knew that. The evidence showed that he liked to engage in that task. Further, his evidence showed that he could carry out the duties required of him as Captain of the Paspaley III and General Manager, Pearling Operations. The evidence also warranted all of his Worship's conclusions at par [35]; where his Worship there rejected part of the worker's evidence, Mr Walsh submitted that this was because the particular answer did not accord with other evidence the worker had given. The result was that that was one basis on which his Worship could determine that the worker had no inability for paid work; another basis was that his Worship could find on the evidence that the respondent would have employed the worker in another capacity.

[72] I note that I accept that a worker has no present incapacity from an injury, if he is still capable of carrying out the paid work which he was employed to do before he was injured.

[73] Mr Walsh stressed, rightly in my opinion, that for both ss64 and 65 an incapacity for paid work must be shown. He submitted that the worker had not done so in this case.

He relied on what was said in *Arnotts Snack Products Pty Ltd v Yacob* at pp176-7, and 179.

Further, if the worker had any incapacity, Mr Walsh submitted that it was not one which was shown to have been 'productive of financial loss'. Any 'loss' which the worker had incurred, had come about because he had chosen for his own purposes to resign.

### *(c) Ground (3): mutuality*

[74] Mr Walsh discussed the facts of *Kelvinator* (supra). He submitted that the scheme of the *Act* was such as to attract to it the principle of mutuality. That is to say, if the employer had an obligation under s75A of the *Act* to endeavour to find or assist an injured worker to find suitable employment, there was a corresponding duty on the worker to accept that employment.

## Conclusions

### *Ground (1): a denial of natural justice*

[75] This ground turns on the effect of what his Worship said to Mr Tippett during the course of his submissions; see par [33]. His Worship said that he 'believed' the worker, found him 'believable', and 'honest' with the Court.

[76] The topic is discussed at par [33] et seq. His Worship had made it clear to counsel during the submissions – see par [34] – that he distinguished between 'credibility' and 'reliability', a credible witness not necessarily being reliable.

[77] As to Mr Tippett's submission at par [44], I consider that the answer to the question whether there was a denial of natural justice in this case by what

occurred in par [33], is attended with considerable difficulty, on which my mind has fluctuated. Were it not for what his Worship said at par [33], the decision appears to accord with what on the surface is the weight of the evidence in the case. The effect of the worker's evidence, after taking into account the result of his cross-examination, appears to be far from convincing on matters which he is required to establish. The examples of findings made on credit, on which Mr Tippett relied at pars [47] and [52], when examined, generally involve far from weighty matters. However, some do.

[78] I note that his Worship adverted to the matter in his judgment - see par [32] in terms which appear to indicate a significant change of approach on his part to the credibility of the worker. In that connection I note that his Worship's change of mind may indicate to some degree that to the trier of fact the matter was "rather finely balanced", to use the terminology [par [49]) in *Stead v State Government Insurance Commission* (supra).

[79] There is much to be said for the submissions of Mr Walsh. In the end, however, the question must be determined in accordance with *Stead v State Government Insurance Commission* (supra). It seems clear enough, on balance, that a breach of natural justice is established, in terms of ground (1) of the grounds of appeal. The question then is: would a new trial inevitably result in the same decision as his Worship reached, bearing in mind that the live question is whether the evidence of the worker should be accepted? As their Honours said in *Stead v State Government Insurance Commission*

(supra) at 145, “it is no easy task” to say that his Worship’s misleading of Mr Tippett with the consequences on which he relies “could have had no bearing on the outcome of the trial”, when the live issue concerns whether the worker’s testimony is to be accepted or rejected. My mind has fluctuated, as I say, but in the end I cannot be satisfied that if Mr Tippett had been afforded the “reasonable opportunity to present submissions on the issue” which he was entitled to, “it could have made no possible difference” to the outcome. I very much doubt whether it would have, but the threshold in *Stead* (supra) at par [49] is very high.

[80] In the result, ground (1) of the grounds of appeal (par [42]) is allowed on the basis that the breach of natural justice relied on is established, and the worker was thereby deprived of the possibility of a successful outcome of his claim. It is unnecessary to go further in this appeal, but in deference to the submissions made, I deal very briefly with the other grounds relied on.

***Grounds (2) and (4): incapacity***

[81] There was ample evidence from the worker to warrant his Worship’s finding that the worker had resigned from his employment with the respondent, to pursue his own business venture; see pars [24] and [37]. This was a reason unconnected with the injury; see par [35].

[82] There was also ample evidence for his Worship to find that the worker’s duties had evolved into a ‘sophisticated management role’; see pars [15], [16], [18] and [35]. He was General Manager, Pearling/Marine

Superintendent and Captain of the Paspaley III. It was open to his Worship to find that these management duties of the worker had increased greatly over the years to 1995, as the respondent's pearling enterprise had greatly increased in size; see pars [16] and [19]. His Worship was therefore justified in finding that the worker had ceased to be the "working foreman" he had been in earlier years (par [16]).

[83] The worker had heavily qualified his evidence-in-chief, in the course of cross-examination; see, for example par [14] as to the alternative work offered. See also at pars [20], [22], [23] and [35]; cf [26].

[84] It was open, of course, for his Worship to find as he did on the evidence that the worker had developed a 'chronic back injury'; see pars [15] and [35], and that this made him unable to work shell in 1995 – see par [35].

[85] I note that his Worship did not accept the evidence of the worker in two respects: as to his assertion that he had resigned because of his "deteriorating health" – see par [32]; and that the respondent required him to work the shell – see pars [25] and [32].

[86] No compensation is payable under either ss64 or 65 unless the worker is "totally or partially incapacitated for work" as a result of his injury. His Worship has found that that is not the case here. These findings were supported by the evidence and no error of law is disclosed; these two grounds of appeal must therefore be dismissed.

### *Ground (3): mutuality*

[87] I have had some difficulty in considering the ambit of the submissions on this ground. The authorities to which I have been referred at pars [62]-[66] are concerned with specific provisions in various Compensation Acts, which have no close counterpart in the *Work Health Act*. I have some doubt as to whether the principle of mutuality is applicable to the *Act*, but the question would have to be considered in relation to specific provisions. As to s75A of the *Act*, I see no scope for the application of a principle of mutuality in this case, since the respondent is not currently liable to compensate the worker; see par [61]. Accordingly, s75A has no operation. I would allow the appeal on this ground, had the Court's decision turned on mutuality.

### Orders

[88] The appropriate orders would appear to be as follows: the appeal is allowed; the decision of the Work Health Court of 29 August 1997 is quashed and set aside; there must be a re-hearing before a differently constituted Work Health Court. However, I will hear the parties on the orders which should be made, including costs.

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