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Case Note

Leighton Contractors Pty Ltd v Fox, Calliden Insurance Limited v Fox [2009] HCA 35

Synopsis

The High Court decision in *Leighton Contractors Pty Ltd v Fox, Calliden Insurance Limited v Fox* (**Leighton**) was handed down on 2 September 2009.

The decision is important in clarifying both the role and responsibility of a principal/head-contractor on a building site.

More importantly, the court also confirmed the existing law surrounding the engagement of an independent contractor, and the principle that someone engaging an independent contractor will not generally be vicariously liable for the contractor's negligence.

The Existing Law

The principles relating to the engagement of qualified independent contractors have been considered by the courts in a number of decisions, most recently by the High Court in *Sweeney v Boylan Nominees Pty Ltd t/as Quirks Refrigeration* [2006] HCA 19 and *Leichhardt Municipal Council v Montgomery* [2007] HCA 6.

In Boylan, the owners of a service station were not held vicariously liable for a mechanic's negligence. The High Court concluded that the mechanic was an independent contractor and therefore the claim against Boylan must fail. The mechanic was not a Boylan employee and he conducted his own business, invoicing Boylan for each job and supplying his own tools.

In Boylan, the majority of the High Court held:

> *"The mechanic or, if it were the case, his company, was engaged from time to time as a contractor to perform maintenance work for the respondent. Unlike the principal in Hollis, the respondent did not control the way in which the mechanic worked. The mechanic supplied his own tools and equipment, as well as bringing his skills to bear upon the work that was to be done. And unlike the case in Hollis, the mechanic was not presented to the public as an emanation of the respondent…*
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> *…The mechanic was an independent contractor. He did what he did for the benefit of the respondent and in attempted discharge of its contractual obligations. But he did what he did not as an employee of the respondent, but as a principal pursuing his own business or as an employee of his own company pursuing its business."*

Similarly, in *Leichhardt*, the court held:

> *"Ordinarily, a person is not liable in law for the wrongs done by that person's independent contractors, as distinct from employees. This principle has been repeatedly upheld by this Court, including in a case where the independent contractor was, on one view, a "representative agent" or part of the "organisation" of the principal. Clearly, to render one person liable in law for wrongs done by another (or to impose direct and personal liability upon that other) something exceptional is required, either as a matter of established legal authority or on the basis of demonstrated legal principle or policy".*

Facts in Leighton

Leighton Contractors Pty Ltd was the principal contractor for the Hilton hotel construction project in Sydney. Leighton had contracted with Downview Pty Ltd to carry out the concreting for certain works on the construction site. Downview in turn subcontracted the concrete pumping to Quentin Still and Jason Cook, who in turn engaged Brian Fox and Warren Stewart in connection with the pumping for a concrete pour on 7 March 2003.

Once the concrete pour had been completed, Mr Still, Mr Stewart and Mr Fox started to clean the concrete delivery pipes. This involved blowing an object through the pipes with compressed air. They moved the end pipe into position over a waste bin but did not secure it to the bin. The pipe whiplashed away from the waste bin, striking Mr Fox and significantly injuring him.

In the primary decision, District Court Judge Gibb found that the accident was caused by the negligent conduct of Mr Still and Mr Stewart, but that there had been no relevant breach of duty by either Leighton or Downview. She gave judgment against Warren Stewart Pty Ltd, and ordered the company to pay damages of $472,561.95 to Mr Fox.

The NSW Court of Appeal allowed Mr Fox's appeal against the dismissal of his claims against Leighton and Downview, holding that Leighton and Downview were each subject to a common law duty of care for the benefit of Mr Fox and that each was in breach of that duty, and ordered each of them to pay damages to Mr Fox of $472,562.

Both Leighton and Downview appealed from that decision.

The High Court Decision

In a unanimous decision, the High Court held that Leighton was not subject to a duty of care requiring that it provide training to subcontractors in the safe methods of carrying out the subcontractor's specialised work.

It found that Downview had engaged a competent independent contractor to do the concrete pumping and that it was not subject to a duty of care requiring that it provide safety training to that contractor.

The High Court stated:

> *"In particular, and as was emphasised in Sweeney, the authorities in this Court do not support any principle that "A is vicariously liable for the conduct of B if B 'represents' A (in the sense of B acting for the benefit or advantage of A)."*

The High Court were of the view that the Court of Appeal was erroneous in placing an obligation upon Leighton to ensure that the plaintiff was properly trained and supervised in the tasks he was performing on the building site.

Whilst the court accepted that as a principal contractor there were certain obligations to ensure the overall safety of the site, this did not extend to ensuring that qualified independent contractors were trained and supervised in the specialised duties for which they were engaged to perform.

They stated that *"The relationship between principal and independent contractor is not one which, of itself, gives rise to a common law duty of care, much less to the special duty resting on employers to ensure that care is taken…a duty to provide training in the safe method of carrying out the contractor's specialised task is inconsistent with maintenance of the distinction that the common law draws between the obligations of employers to their employees and of principals to independent contractors"*.

Similarly, with the case against Downview, the High Court held that a head contractor should not be held responsible for ensuring the proper training of those staff employed by a properly qualified independent contractor. The court stated:

> *"…provided that the contractor was competent, and provided that the activity of concrete pumping was placed in the contractor's hands, Downview was not subject to an ongoing general law obligation with respect to the safety of the work methods employed by the contractor or those with whom the contractor subcontracted".*

Summary

The High Court decision in *Leighton* fortifies the existing common law position expounded by the earlier decisions of Boylan and Leichardt that generally a party will not be held liable for the negligence of its subcontractors, in that no non-delegable duty of care, nor vicarious liability, automatically applies.

As can be seen from the *Leighton* decision, a key factor remains the level of control that a principal excerpts over the actions of an independent contractor, including what level of training, directions and supervision are provided. However, no duty arises to provide training, directions and supervision to an independent contractor, if it can be shown that the contractor was 'reputable' and possessed a specialised knowledge or skill for which they were engaged.

Accordingly, it is critical that the principal ensures that the independent contractor is both 'reputable', and properly qualified to carry out the specialised tasks for which it is engaged.

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