

---

---

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES,  
COURT OF APPEAL

---

---

B E T W E E N :

T. H. BUSHBY Appellant

- and -

GLENMORE PTY. LIMITED Second Appellant

- and -

10 SYDNEY BLAIR MORRIS, R.D. GEORGE  
F.W. McKERN, C.F. WHITEHOUSE and  
THE REGISTRAR OF THE WORKERS'  
COMPENSATION COMMISSION OF NEW  
SOUTH WALES

Respondents

---

---

CASE FOR THE RESPONDENTS  
(THE REGISTRAR OF THE WORKERS' COMPENSATION  
COMMISSION OF NEW SOUTH WALES)

---

---

Record

1. This is an appeal by T. H. Bushby and  
Glenmore Pty. Limited from orders made on 28th  
November, 1977 by the Court of Appeal of New  
20 South Wales.

P.P. 227-231

2. The effect of the orders, insofar as  
they concern this appeal, was that:

(1) The Workers' Compensation Act (N.S.W.)  
1926 (as amended) permits of more than  
one award being made against more than  
one employer for the same period of  
incapacity; and

(2) Compensation paid by one employer  
30 discharges pro tanto the liability of the  
other employers.

3.(1) The action was brought by Sydney Blair  
Morris in the Workers' Compensation  
Commission of New South Wales (hereinafter

Record

called "The Commission") in which he claimed weekly payments of compensation for various periods of total (Section 9) and partial (Section 11) incapacity for work, commencing on 22nd December 1972 and for expenses for medical and hospital treatment (Section 10) resulting from injury which he alleged he received to his lower back arising out of and in the course of his employment with several employers between the years 1964 and 1975.

10

P.23, L.17-24  
P.29, L.28-35  
P.36, L.15-22

(2) Awards of compensation in exactly the same terms were made against both appellants and the Respondents R.D. George and F.W. McKern.

P.53, L.8-19

(3) In the exercise of his discretion the trial judge His Honour Judge Williams, did not make an order against the Registrar of the Workers' Compensation Commission of New South Wales (hereinafter called "The Registrar") (Section 18C(3)) for payment of the compensation which was payable by the Respondents R.D. George and F.W. McKern who were uninsured because they had not obtained or were not maintaining in force a policy of insurance or indemnity under the Workers' Compensation Act, for the full amount of their liability to the injured worker at the time of the happening of the worker's injury and they were not self-insurers (Section 18C(2)).

20

P.P.18-20

4. The proceedings came before the Court of Appeal by way of case stated. The Commission constituted by Williams J., stated the case of its own motion pursuant to Section 37(4)(b) of the Workers' Commission Act, 1926 (as amended).

30

5. Following the delivery of reasons for Judgment and the entry of Awards in the proceeding between the parties to this Appeal the answers to the following questions were sought from the Court of Appeal:

P.18, L.9-20

(1) Whether upon the true construction of the provisions of Section 6(3) of the Act, the Award made in favour of the Applicant against the Respondents R.D. George and F.W. McKern is invalid by virtue of the fact that, at the time the Award was made, the Commission had made, on 15th November, 1968 an award of compensation in favour of the Applicant on 16th November, 1964 in the course of the Applicant's employment with the Respondents R.D. George and F.W. McKern?

40

Record  
P.18, L.21-27  
P.19, L.1-2

- 10 (2) If the answer to question (1) be in the negative whether upon the true construction of the provisions of section 6(3) of the Act, the Award made in the instant proceedings in favour of the Applicant against the Respondent Glenmore Pty. Limited was invalid by virtue of the fact that the Award made in favour of the applicant against the Respondents R.D. George and F.W. McKern had been made before the firstmentioned Award was made?
- (3) Whether there was any evidence to support the findings set forth in the Award made in favour of the Applicant against the Respondents R.D. George and F.W. McKern? P.19, L.3-6
- 20 (4) Whether there was any evidence to support the findings set forth in the instant Award made in favour of the Applicant against the Respondent Glenmore Pty. Limited? P.19, L.8-11
- (5) Whether there was any evidence to support the findings set forth in the instant Award made in favour of the Applicant against the Respondent T.H. Bushby? P.19, L.12-14
- 30 (6) Whether the Applicant was disentitled to the award of compensation specified in the Award in his favour against the Respondent T.H. Bushby once the Commission had made validly any one of the two instant Awards against the Respondents R.D. George and F.W. McKern and the Respondent Glenmore Pty. Limited for the payment of the same compensation as he was awarded under the Award made against the Respondent T.H. Bushby? P.19, L.15-22
- 40 (7) Whether the order made by the Commission in each of the three above-mentioned matters, that the compensation paid by the respective respondents under the relevant Awards should be pro tanto a discharge of the liability of each of the other two respondents under the respective Awards made against them, it or him, as the case may be, was unlawful and without force and effect? P.19, L.23-27
6. The questions were answered as follows: P.189-191
- (1) No.
- (2) No.

Record

- (3) Yes.
- (4) Yes.
- (5) Yes.
- (6) No.
- (7) Not argued.

7. Submission

(1) Questions 1 and 2:

The appellants do not propose to argue these questions.

(2) Questions 3, 4, 5 and 6:

10

A. The Registrar has been informed that the Respondent Sydney Blair Morris, proposes to submit that more than one Award may be made against more than one employer for the same period of total or partial incapacity and the Registrar adopts the case of the Respondent.

B. (a) However, the Registrar submits that in the event of more than one Award being made in the above circumstances, where one of the employers is not insured and a claim has been made under the Uninsured Liability Scheme (Section 18C(1)), the Court should, in the exercise of its discretion (Section 18C(3)), refuse to make an order against the Scheme.

20

(b) It is submitted this should be done because if it is not, then licenced insurers (See Section 27(1)) who do not have a policy of insurance with the insured employer against whom an Award has been made, would be required to contribute to the Award, (See Section 41(5)).

30

(3) Question 7:

The question of pro tanto satisfaction was argued before the Court of Appeal and I am informed that a record of the argument is set forth in the appellants' case. It was submitted by Counsel for the Appellant T.H. Bushby that there is no jurisdiction within the Act to make such an order. The Registrar submits that there is.

40

Pro Tanto Satisfaction

- 1. There are not any specific provisions in the Act which provide that satisfaction, partial or complete, by one employer discharges pro tanto the liability of all others.
- 2. The Court of Appeal dealt very shortly with the question but all members agreed that payment by one was pro tanto satisfaction of all others.
- 3. Following the making of an Award for the payment of money, the Registrar, upon application, shall issue a certificate and upon its filing in the appropriate District Court, judgment will be entered.

P.127, L.27  
P.157, L.2-5  
P.175, L.2-25

10

"Jurisdiction.

36. (1) ..... (4)

Certificate may issue in respect of unsatisfied award or order.

20

(5)(a) Where an award or order of the Commission for the payment of money has been entered up or made in favour of any person, the Registrar of the Commission, upon the application of such person or of his solicitor or agent, shall issue and deliver to such person, solicitor, or agent a certificate in the prescribed form or to the like effect, and shall make a minute or memorandum thereof against the entry of the award or order.

30

Certificate may be filed in District Court

40

(b) Such person may file, or cause to be filed, the said certificate in any district court having jurisdiction within the district where the debtor resides, when the Registrar shall enter judgment for such person for the amount of the certificate together with the fees paid for such certificate to the Registrar of the Commission and the fees paid for filing such certificate and entering judgment."

Record

4. Judgment in the District Court is final.  
District Court Act, of New South Wales, 1973,  
Section 81:

"Judgment Final. Subject to this and any other Act, a judgment in an action shall, unless set aside in accordance with this Act, be final and conclusive between the parties to the action."

5. Satisfaction, partial or complete from one party, pursuant to judgment discharges pro tanto the liability of all others (See United Australia Ltd. v. Barclays Bank Ltd., 1941 A.C. at p.20; Kohnke v. Kanger (1951) 2 K.B. at p. 675 and 676; Cassimjee v. Jarrett 59 D.L.R. (3d) at p. 176; Castellan v. Electric Power Transmission (1967) 69 S.R. (N.S.W.) at p. 172-173).

10

Answers sought to Question

Q1. Not argued.

Q2. Not argued.

20

Q3. Yes.

Q4. Yes.

Q5. Yes.

Q6. No.

Q7. No.

L. J. DOWNS

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH  
WALES COURT OF APPEAL

---

B E T W E E N :

T.H. BUSHBY Appellant

- and -

GLENMORE PTY. LIMITED Second Appellant

- and -

SYDNEY BLAIR MORRIS, R.D. GEORGE  
F.W. McKERN, C.F. WHITEHOUSE and  
THE REGISTRAR OF THE WORKERS'  
COMPENSATION COMMISSION OF NEW  
SOUTH WALES

Respondents

---

CASE FOR THE RESPONDENTS  
(THE REGISTRAR OF THE WORKERS'  
COMPENSATION COMMISSION OF NEW  
SOUTH WALES)

---

LIGHT & FULTON  
24 John Street,  
London WC1N 2DA

Solicitors for  
the Respondent to above  
named Registrar