IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M 176 of 2010

BETWEEN:

MAURICE BLACKBURN CASHMAN

Appellant

- and –

FIONA HELEN BROWN

Respondent

APPELLANT'S SUBMISSIONS IN REPLY

Part I – Internet certification:

1. These reply submissions are in a form suitable for publication on the internet.

Part II – Contested material facts:

2. The appellant accepts each of the matters set out in paragraphs [5] to [8] of the respondent's submissions. As to paragraph [9], the appellant accepts that the application under s 134AB(4) was a precondition to the respondent's ability to recover damages, which is implicit in paragraph [12] of the appellant's submissions.

Part III – Reply:

1. Issue Estoppel

3. There are four reasons no issue estoppel arises from the opinion of the Medical Panel: first, the opinion of the Medical Panel was not a final judicial decision; secondly, there is no identity of parties; thirdly, the same question does not arise in the damages proceeding; and fourthly, the suggested issue estoppel is inconsistent with the scheme of s 134AB, and would give rise to incoherence in the law.

1.1 Final judicial decision

4. A final judicial decision is one which is final and conclusive on the merits of a cause, and not some preliminary matter[1]. Lord Guest said that the cause of action must be

[1] See: *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] AC 853 at 918F to 919C per Lord Reid, at 927A per Lord Hodson, at 935D per Lord Guest, at 948E per Lord Upjohn, at 969E and 970A per Lord Wilberforce

Minter Ellison
Lawyers
Rialto Towers
525 Collins Street
MELBOURNE VIC 3000

DX 204, Melbourne
Tel: (03) 8608 2000
Fax: (03) 8608 1000
Ref: CXB:DSP (Carmen Buccheri)
carmen.buccheri@minterellison.com

extinguished by the decision which is said to create the estoppel[2]. To be a judicial decision, it is not necessary that the adjudicating tribunal be a "court" in a strict or conventional sense[3]. In *Administration of Papua and New Guinea v Daera Guba*[4], a case concerning cause of action estoppel, and not issue estoppel[5], Gibbs J, with whose reasons Menzies J and Stephen J agreed, stated that the doctrine of estoppel extends to the decision of any tribunal which has jurisdiction to decide finally a question arising between parties even if it is not called a court, and notwithstanding that its jurisdiction is derived from statute or from the submission of the parties, and that it has only temporary authority to decide a matter *ad hoc*.

10 5. At paragraph [43] of the respondent's submissions it is submitted by reference to s 104B(12) that the finality of the Medical Panel's opinion does not appear controversial. However, the privative provision in s 104B(12) is not determinative of the question whether the Medical Panel opinion is a final judicial decision for the purposes of issue estoppel[6].

6. There were no parties to any proceeding before the Medical Panel. There was no curial hearing. There was no ability to cross examine. The Medical Panel was an expert panel to which questions were referred by the Authority for its opinion pursuant to s 104B(9). In answer to those questions the Medical Panel (inter alia) assessed the respondent's degree of impairment, and expressed an opinion as to the permanence of that assessed
20 impairment. There were fixed statutory consequences of the Medical Panel's opinion as to the respondent's degree of impairment. Those consequences were –

(a) the calculation of the respondent's entitlement to lump sum compensation for non-economic loss under the formula in s 98C(3); and

(b) pursuant to s 134AB(15) the respondent was deemed to have a "serious injury" for the purposes of engaging sub-s 134AB(2).

---

[2] *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] AC 853 at 935D

[3] *Kuligowski v Metrobus* (2004) 220 CLR 363 at 373, [22]

[4] (1973) 130 CLR 353 at 453

[5] (1973) 130 CLR 353 at 452-3 per Gibbs J. Cause of action estoppel was considered in *Trawl Industries of Australia Pty Ltd (in liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406 at 409 and 418 per Gummow J. The distinction between cause of action estoppel and issue estoppel was addressed in *Arnold v National Westminster Bank plc* [1991] 2 AC 93 at 104 *et seq* per Lord Keith. See generally, Spencer Bower & Handley, *Res Judicata* (4th edition), Chapter 7.

[6] In other jurisdictions the inability to appeal a decision has been suggested to be a factor giving rise to special circumstances telling against the imposition of an issue estoppel. See: *Arbuthnot v Chief Executive of the Department of Work and Income* [2008] 1 NZLR 13 (NZSC) at 41 to 43, [29] to [32], citing *Re State of Norway's Application (No 2)* [1990] 1 AC 723 at 743 per May LJ and 772 per Woolf LJ and *Arnold v National Westminster Bank plc* [1991] 2 AC 93, where at p 110 the refusal to grant leave to appeal an anterior judicial decision on a question of construction of a rent review clause which was later considered to be wrongly decided was a factor giving rise to special circumstances which prevented an issue estoppel from operating.

7. In exercising the functions conferred by s 104B(9) the Medical Panel did not adjudicate any question between parties, and its opinion did not extinguish any cause of action. Its opinion should be regarded as administrative, and not judicial, in a like way to which in *Pastras v The Commonwealth*[7] the determination of the Commonwealth Employees Compensation Commissioner, based upon a certificate of a medical board, was regarded as administrative. The privative provisions in s 68(4) and s 104B(12) do not convert the Medical Panel's expert opinion function into a judicial function[8] which attracts the doctrine of issue estoppel.

1.2 No identity of issues

10 8. The requirement that there be identity of issues in order for an issue estoppel to arise is a strict requirement[9]. There is no identity of issues between the Medical Panel opinion and those which arise on the trial of the respondent's damages proceeding. Furthermore, there is no identity between the Medical Panel opinion, and the matters alleged in sub-paragraphs 1A (A) to (D) of the respondent's amended reply **(AB-23)**. The matters alleged by the respondent were not necessarily and directly[10] decided by the Medical Panel. Nothing in sub-paragraphs 1A (A) to (D) of the respondent's amended reply **(AB-23)** reflects the issues which were properly the subject of the Medical Panel's opinion[11]. At most, the issues alleged by the respondent were collateral issues which were outside the Panel's limited jurisdiction[12].

20 ### *1.3 No identity of parties*

9. The Authority has at least two relevant functions under the Act: its statutory function to manage the accident compensation scheme and administer the Act[13], and its function as statutory insurer of employers' liabilities pursuant to the *Accident Compensation (WorkCover Insurance) Act 1993* (Vic). The Authority is the appellant's insurer pursuant to a policy issued pursuant to the WorkCover Insurance Act.

---

7 (1966) 9 FLR 152 at 155 per Lush J, cited in.

8 *Sherlock v Lloyd* [2010] VSCA 122 at [21] per Maxwell P, Ashley JA and Byrne A-JA.

9 *Ramsay v Pigram* (1968) 118 CLR 271 at 276 per Barwick CJ, cited in *Kuligowski v Metrobus* (2004) 220 CLR 363 at 379, [40] and 381, [47].

10 *Ramsay v Pigram* (1968) 118 CLR 271 at 276 per Barwick CJ

11 See paragraph [51] of the appellant's submissions dated 1 February 2011.

12 *Ex parte The Amalgamated Engineering Union (Australian Section); Re Jackson* (1937) 38 SR (NSW) 13 at 19-20 per Jordan CJ; *Tavares v Tavares* (2003) 6 VR 577 at 581, [6] per Phillips JA and at 582, [10] per Batt JA, both citing *Torrisi v Oliver* [1951] VLR 380 at 383-4 per Coppel A-J.

13 See *Accident Compensation Act*, ss 19 and 20

10. The appellant was not a party to the referral of questions to the Medical Panel. The questions were referred to the Medical Panel by the Authority pursuant to s 104B(9) in exercise of its statutory administrative functions. In the common law proceeding the appellant is not a privy of the Authority[14]. The appellant is a party in its own right, joined as defendant to the common law proceeding because it is alleged to be a tortfeasor. The appellant does not make any claim under or in virtue of the Authority, or of any right of the Authority, and does not derive any interest through the Authority[15].

1.4 Coherence

11. The common law must be applied consistently with relevant surrounding statutes in order to achieve coherence of legal principles[16]. The question whether any issue estoppel arises from the Medical Panel opinion must be answered in a way that preserves the coherence of the scheme of the Act[17]. An estoppel should not prevail against the scheme of the Act, which serves public purposes[18]. The scheme of the Act includes the following features –

(a) a worker has three principal gateways to the commencement of a damages proceeding, including an application to the Court under s 134AB(16)(b) for leave to bring a proceeding;

(b) on the trial of a damages proceeding –

(i) no finding of the court on the hearing of an application under paragraph (16)(b) gives rise to an issue estoppel [s 134AB(19A)]; and

(ii) the jury is not to be informed of the matters set out in s 134AB(23).

12. Section 134AB evinces an intention that questions as to the existence, cause and nature of a plaintiff's injuries, and their consequences, are to be determined by the court at trial, and not by reference to any findings made, or opinions formed, in the course of considering any of the statutory gateways to the bringing of a proceeding for damages. Correspondingly, s 104B(9) should not be construed as conferring on Medical Panels jurisdiction to make findings as to final issues which are binding on the court upon the

---

[14] *Tavares v Tavares* (2003) 6 VR 577 at 580-1, [5] per Phillips JA and 582, [11] per Batt JA. See generally the principles essayed in *Trawl Industries of Australia Pty Ltd (in liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406 at 413 to 418 per Gummow J.

[15] See *Ramsay v Pigram* (1968) 118 CLR 271 at 279 per Barwick CJ

[16] *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia* [1977] AC 850 at 871 per Lord Wilberforce, cited in *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [100] per Gummow, Hayne and Kiefel JJ; *CAL No.14 Pty Ltd v Motor Accidents Insurance Board & Anor* (2009) 239 CLR 606 at 407-8, [41]

[17] *Sullivan v Moody* (2001) 207 CLR 562 at 579-580 [50] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ

[18] *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993; *Barilla v James* (1964) 81 WN (Pt 1) (NSW) 457; *Tudor Developments Pty Ltd v Makeig* (2008) 72 NSWLR 624

trial of common law claims, or (by necessary extension) upon applications for leave to bring common law claims. Consistently with the scheme of s 134AB, there is no abuse of process in permitting an employer defendant to put in issue before a common law court a fact which had been decided against it, not by a court, but by an expert panel for statutory compensation and statutory gateway purposes before which there was no curial hearing, and no ability to test evidence, and from which there was no right of appeal.

2. *Paragraphs [59] and [60] of the Court of Appeal's reasons*

13. The respondent's submission at paragraph [12(a)] that, "difficulties with the appellant's construction identified by the Court of Appeal at [59] and [60] have thus far gone unanswered" raises a false issue. At [58] to [60] Ashley JA rejected the appellant's submission that, absent s 134AB(19)(c), damages would not be recoverable in a proceeding authorised by a grant of leave under paragraph (16)(b) without the issue of serious injury being re-established at the later common law trial. That submission is not made in this Court, and the respondent's submission at [33] has noted the change.

14. The object of s 134AB(19)(c) was plain enough: no finding on an application under paragraph (16)(b) was to give rise to an issue estoppel. And the words in brackets, which were introduced by an amendment to the Bill[19], were to ensure that the "serious injury" finding, as a gateway to the recovery of damages, could not be revisited at trial.

15. Paragraph 134AB(19)(c) was repealed, and sub-s (19A) was inserted, before the Court of Appeal gave judgment[20]. Sub-section (19A) has no direct bearing on this proceeding, because the respondent did not bring an application for leave under paragraph (16)(b). But the terms of sub-s (19A) have the consequence that, if there was any anomaly arising from the terms of paragraph (19)(c), that anomaly has been removed.

Michael Wheelahan
Tel: (03) 9225 8475
Fax: (03) 9225 8015
Email: mfwheelahan@vicbar.com.au

Stephen O'Meara
Tel: (03) 9225 8654
Fax: (03) 9225 8015
Email: someara@vicbar.com.au

DATED: 22 February 2011.

---

[19] As appears by comparing the Bill circulated in the Legislative Assembly dated 13 April 2000, with the Bill as sent dated 12 May 2000, and as evidenced by the list of circulated government amendments on 11 May 2000.

[20] Paragraph 134AB(19)(c) was repealed, and sub-s (19A) was inserted by the *Accident Compensation Amendment Act 2010*, s 57(2) and (3). The amending Act received Royal Assent on 23 March 2010. By sub-s 2(5) of the amending Act, sub-sections 57(2) and (3) were deemed to have come into operation on 10 December 2009.