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ACT Court of Appeal upholds verdict in favour of NSW

In *Electro Optic Systems Pty Ltd v State of New South Wales; West & Anor v State of New South Wales* [2014] ACTCA 45 the ACT Court of Appeal has upheld the verdict in favour of NSW arising out of the 2003 Canberra bushfires.

Some history

The fires were started by lightning on 8 January 2003 and burned into urban Canberra on 18 January, claiming 4 lives, 500+ homes as well as farming properties and the Mt Stromlo observatory on the edge of Canberra. A number of people sued both the ACT and NSW Governments for alleged negligence in their response to the fires. The case against the ACT settled out of court ('Canberra bushfire litigation settles against the ACT' September 20, 2012). The case against NSW continued until 17 December 2012 (1 month short of 10 years since the fires) when Higgins CJ of the ACT Supreme Court found in favour of NSW ('Judgment in the litigation arising from the Canberra fires of 2003 – updated 19 December 2012)'. In a further judgment Higgins CJ ordered that the unsuccessful plaintiffs pay 50% of the State's costs ('Final chapter of the Supreme Court proceedings from the 2003 fires' August 8, 2013).

Wayne and Lesley West owned a property in New South Wales that was burned out during the fires. QBE insurance insured a number of property owners whose property was damaged. Having paid out on their policy the insurance company 'stood in their shoes' and could (and did) sue to recover the money it had paid out. One of the company's policy holders was Electro Optic Systems Pty Ltd that conducted laser

range finding on behalf of the Commonwealth at Mt Stromlo ([528] Katzmann J). The Wests and QBE appealed against the decision of Higgins CJ who had found that NSW, through the Rural Fire Service and the National Parks and Wildlife Service, was negligent but was not liable to pay damages because of the provisions in the *Rural Fires Act 1997* (NSW) and the *Civil Liability Act 2002* (NSW). The State of NSW filed a 'notice of contention' which, if you like, is the appeal you have when you're not really lodging an appeal. Having won the case at trial NSW did not wish to appeal, but with a notice of contention they could argue that even if the Court of Appeal agreed that the judge had made a mistake it, NSW, should still win the case. NSW also appealed against the costs order arguing that the plaintiffs should be required to pay 100% of the State's costs.

The case was heard by the Court of Appeal (Murrell CJ, Jagot and Katzmann JJ). (An historical footnote: this appeal 'was the first to be heard before an all-female bench of the ACT Court of Appeal'; Michael Inman, 'Bushfire Compensation appeal starts', *Canberra Times*, 26 May 2014). Normally, in an appeal, one would expect the winners to argue that the trial judge 'got it right' and the losers to argue that he or she (in this case he) made a mistake in the application of the law. In this case everyone agreed that the decision of Higgins CJ contained a 'number of errors' and although there was some dispute as to the significance of those errors, the 'primary judge's reasoning process miscarried so as to constitute error warranting appellate intervention' ([167] Jagot J; see also [525] Katzmann J). I have previously set out my own views on the decision of Higgins CJ ('Judgment in the litigation arising from the Canberra fires of 2003 – updated 19 December 2012)' and I will refer back to those comments as well as the reasoning of the three judges.

What Higgins CJ found

Higgins CJ found that the conduct of the State of NSW was negligent in two respects:

1. Failure to launch a direct attack on the Baldy Spot fire on 9 January 2003; and
2. Having identified the Goodradigbee River as the appropriate western containment line, 'the failure to 'clear and back burn along the Goodradigbee River before 16 January' ([4] Murrell CJ).

Further, His Honour found that had those actions been taken they would have been effective to contain the fires and thereby avoid the damage to the properties of the Wests and Electro-Optics. Even so the state won by operation of the *Civil Liability Act 2002* (NSW) s 43 which says:

> (1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a breach of a statutory duty by a public or other authority in connection with the exercise of or a failure to exercise a function of the authority.
>
> (2) For the purposes of any such proceedings, an act or omission of the authority does not constitute a breach of statutory duty unless the act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.

His Honour found that this action involved an alleged breach of statutory duty, that duty being a duty imposed by the Rural Fires Act, but that the actions of the incident controllers, although negligent were not 'so unreasonable' that no authority would consider that they were trying to perform their statutory functions.

Further, Higgins CJ found that the incident controllers (Ms Crawford who was an employee of the National Parks and Wildlife Service and who was the incident controller until relieved by Mr Arthur of the NSW Rural Fire Service) and also the state were protected by the *Rural Fires Act 1997* (NSW) s 128 which said (and still says):

> A matter or thing done or omitted to be done by a protected person or body does not, if the matter or thing was done in good faith for the purpose of executing any provision (other than section 33) of this or any other Act, subject such person personally, or the Crown, to any action, liability, claim or demand.

At the relevant time, a protected person included 'the Commissioner [of the Rural Fire Service] and any person acting under the authority of the Commissioner' and '… the Director-General of National Parks and Wildlife and any person acting under the authority of …' the Director-General.

The Court of Appeal

In what has to be one of the most damning judgments I've read, the Court of Appeal held that Higgins CJ got the law wrong in every, or nearly every respect and made findings of fact that were either not supported by the evidence or worse, were contradicted by the evidence.

Jagot J

Duty of care

Higgins CJ found that an organisation such as the NSW Rural Fire Service did owe a duty of care to individual property owners such as the Wests. In my earlier commentary I argued that this decision was contrary to case law such as the UK decision in *Capital & Counties plc v Hampshire County Council* [1997] 3 WLR 331 and the decision of the NSW Supreme Court in *Warragamba Winery Pty Ltd v State of New South Wales* [2012] NSWSC 701.

In finding a duty of care Higgins CJ relied on the decision of Kirby J in *Pyrenees Shire Council v Day* (1998) 192 CLR 330 where he, in turn, adopted a decision from the UK in *Caparo v Dickman* [1990] 2 AC 605. In my earlier commentary I said:

> Kirby J was a keen supporter of that approach but he was, eventually, overruled by the rest of the High Court and had to concede that the legal test formulated in *Caparo* did not reflect the law in Australia (*Graham Barclay Oysters v Ryan* (2002) 211 CLR 540, [237]-[238] (Kirby J)). Accordingly His Honour's reliance on Kirby's third question, 'is it fair, just and reasonable that the law should

> impose a duty of a given scope upon the alleged wrong-doer for the benefit of such person?' was not to apply the current Australian law on the issue of duty of care.

In the Court of Appeal Jagot J said (at [176], emphasis added):

> … **the primary judge's conclusion about a common law duty of care was based on** both a mischaracterisation of the case that was being put and the application of **principles rejected by the High Court as representing the law in Australia**.

Although appeal courts do not normally revisit findings of fact, this court had to because '… essential conclusions of the primary judge …[were] materially affected by error. Accordingly, this court must consider for itself the issues arising on the appeal and notice of contention…' ([174]; see also [552] Katzmann J).

Although not addressing the decision in *Capital and Counties*, the Court of Appeal found that the state did not owe a duty to either the Wests or Electro-Optics to protect their properties. The actions of the two incident controllers were actions taken under the *Rural Fires Act 1997* (NSW). The RFS is established to fight fires to achieve the greatest community good. They are not required to protect individual properties. RFS controllers can direct people, even those who are trying to protect their own property, to leave if by their presence they are hindering RFS operations, they may do damage to property in order to take steps to contain a fire. As Jagot J said (at [340]):

> If a person in the position of incident controller fighting a fire owed a duty of care to individual property owners to protect their property from damage, then there would be a real risk of the functions of the incident controller under the Rural Fires Act being distorted and impaired. There would be a real risk that the incident controller may favour the protection of private property over public property, or favour the protection of property over the safety of persons, or favour the protection of one property over another based not on an overall assessment of how best to control or suppress a fire but on the likelihood of a property owner suing or the value of one property compared to another. The effect of such a duty of care to individual property owners is potentially invidious. These are strong indications against the existence of any such duty of care.

A key issue in finding a duty of care is a question of whether or not the person at risk, if care is not taken, is vulnerable. It is a fundamental principle of Australia's bushfire and emergency management policy that people are not vulnerable, there is much that people can do to prepare for, and protect their property from, hazards such as fires (and floods and storms). In a 'nod' to concepts of shared responsibility and resilience (without using those terms or referring to the National Strategy for Disaster Resilience) Jagot J said (at [344]):

> … there are many actions people can take to try to protect their property from damage caused by fires… People are not wholly dependent on the RFS to protect them from bush fires. The Rural Fires Act contemplates, and in some circumstances requires, a substantial degree of self-help by individual property owners … while the capacity of property owners to protect themselves from harm caused by a fire escaping from land such as the Park is by no means absolute, property owners are not entirely dependent on the RFS or unable to take any step to protect themselves from that risk of harm. These circumstances also weigh against the existence of a duty of care to individual property owners on the part of an incident controller exercising functions under the Rural Fires Act to fight a fire.

Another factor to consider is the issue of 'control'. In *Pyrenees Shire Council v Day* (1998) 192 CLR 330 a council was found liable for failing to take steps to protect a shop owner from a risk posed by a defective chimney which the council was aware of, but the shop owner was not. In the absence of that information the shop owner could do nothing but the council had specific powers that would have allowed them to force the previous owners to remedy the defect. In that case the council had control over the relevant risk. In *Stuart v Kirkland-Veenstra* (2009) 237 CLR 215 where there was no duty on police to prevent Mr Veenstra's ultimate suicide, it was said 'It was not the officers who controlled the source of the risk of harm to Mr Veenstra; it was Mr Veenstra alone who was the source of that risk' ([114] (Gummow, Hayne and Heydon JJ)).

In this case ([345], Jagot J):

> NSW made the valid point that all it controlled was the response to the fire … [it] attempted to gain control of the fire once it had ignited. In part and for a time, NSW succeeded in that endeavour, but it never had control of all the elements that dictated whether the fire could ultimately be contained; in short, the weather conditions. One thing that NSW did not do through Ms Crawford or Mr Arthur was to assume responsibility for protecting any individual property owner from damage caused by the fire.

In *Capital and Counties* the UK court of appeal also held that fire authorities do not generally owe a duty of care to people whose property is at risk of fire again because the fire authorities are there for the community rather than individual good. If there is a duty it is a duty not to make the situation worse.

Although Jagot J did not specifically refer to *Capital and Counties* she did address the issue of whether, by their actions, the fire service had made the situation worse and they did not (at [354]):.

> There was no suggestion that the incident controllers increased the risk of harm that the fire presented. Nor did NSW, whether by Ms Crawford and Mr Arthur or otherwise, somehow create or transform the risk of harm. If NSW had done nothing, the outcome could not have been any better and might well have been worse. NSW did not, by adopting a strategy of containment rather than direct attack, change the fire from one that covered 200 hectares into a fire of 10,000 hectares. The fire grew because that is what fires do until the weather changes for the better, or the fire runs out of fuel or is extinguished. The fire escaped the containment lines because the weather changed significantly for the worse. All of this happened because of the natural behaviour of fire.

Jagot J (at [356] with whom Murrell CJ and Katzmann J agreed) found, contrary to the view of Higgins CJ, that

> The relationship between Ms Crawford and Mr Arthur, in their capacity as incident controllers dealing with a fire ignited by a lightning strike in a remote area, and individual property owners is not one which attracts the imposition of a duty to take reasonable care to avoid property damage caused by a fire spreading from the Park.

And further (at [357]):

> … the incident controller will not be exposed to a civil cause of action for damages in negligence by failing to take reasonable care of the interests of individual property owners in formulating and implementing a fire fighting strategy

Accordingly there was no duty of care. Even if there had been a duty of care, the plaintiffs would have to prove that there had been a breach of that duty in that the defendant, in effect the incident controllers for whom the State was liable, had failed to act reasonably in all the circumstances.

Breach of duty

Higgins CJ had found that the conduct of Ms Crawford had not met the standard of reasonable care required by the common law. Again the Court of Appeal disagreed. Remember that there were only two findings of negligence at trial; the failure to launch a direct attack on the 9th January and failure to reduce the fuel load, whilst the fire was burning, to the east of the Goodradigbee River in anticipation of using that river as the western containment zone.

Jagot J reviewed the evidence and found (at [398] 'The evidence overwhelmingly contradicts the primary judge's conclusion'. The evidence, even from the plaintiff's experts was that the condition of the land to the east of the river was such that one could not access it to conduct a safe and effective hazard reduction burn and further, to do so would have been to light a fire in drought affected fuel and allowed the fire to burn up hill and exposed fire fighters and people like the Wests to even greater danger. Jagot J said (at [400]):

> … the only conclusion reasonably open on the evidence was that a person in the position of Ms Crawford and Mr Arthur would not have undertaken clearing and back-burning along the length of the River between 8 and 16 January. It follows that Ms Crawford and Mr Arthur were not negligent in failing to do so.

As for failing to launch a direct attack on the Baldy Spot fire, there was no dispute that the decision not to commence a direct attack when the fire started on 8 January was reasonable because of the risk to fire fighters and because, on the information then available, the fire had already crossed the fire trail that could have been used as a containment line. The negligence, according to Higgins CJ was in failing to do a further reconnaissance on the 9th of January when it would, in his view, have been discovered that the Baldy Hill trail had not been overrun and that it would have been possible to have 'confined the eastward spread of the fire to the west of the Baldy trail' (*Electro Optic Systems Pty Ltd v The State of New South Wales; West & West v The State of New South Wales* [2012] ACTSC 184, [215] (Higgins CJ)).

Again the Court of Appeal disagreed. Ms Crawford had made concessions in response to cross examination that had she known then, what was known now, she would have made different decisions (see *Electro Optic Systems Pty Ltd v The State of New South Wales; West & West v The State of New South Wales* [2012] ACTSC 184, [185] (Higgins CJ)). Jagot J said (at [420]):

> In the context of this evidence, the primary judge's findings are "contrary to compelling inferences" (*Fox v Percy*). The findings appear to be based on supposed concessions by Ms Crawford which, on analysis, were either based on hindsight and knowledge that she did not possess at the time, or make no real sense when considered in the context of her evidence as a whole.

The evidence was that she believed the Baldy Hill trail had been overrun and further, crews were sent to the area to commence a direct attack but were withdrawn when helicopter observers advised that the fire was bigger than it appeared from the ground and the fire fighters were not safe.

In the circumstances Jagot J said (at [425]) that the findings of Higgins CJ as to breach of duty of care should be set aside. In effect the incident controllers had not been negligent and his conclusions were inconsistent with the evidence that had been put before him.

Causation

Even if there had been a duty of care and even if the conduct of the incident controllers had fallen below the standard to be expected of the reasonable incident controller, there could be no liability unless the breach of duty had caused the damage. Again the Court of Appeal disagreed with the findings of Higgins CJ.

The first alleged item of negligence was the failure to attack the fire on 9 January when Higgins CJ thought it could have been contained. In fact the fire was contained on 10-13 January. The plaintiff's experts gave evidence that it was not properly contained on those days, but the fact that it was demonstrated that if there was an opportunity to contain the fire it was not lost on the 9th January. If there was negligence it may have been in the conduct of operations on the 10-13 January but that was never alleged or tested in evidence. But the fire was contained from 10-13 January so either it could have been extinguished at that time, or it could not, but either way the 9th was not a crucial date. As Jagot J said (at [447]):

> … the evidence does not support a finding that it was more probable than not that, had the Baldy spot fire been attacked on the morning of 9 January 2003, the containment would have been any more effective than that carried out between 10 and 13 January, much less that the line would have been more likely than not to withstand the weather conditions of 17 and 18 January.

There was therefore no basis to find that the decision on the 9th was the cause of the losses to Electro-Optics.

The damage to the Wests property was allegedly caused by not stopping the fire at the Goodradigbee River. It could have been argued that the fire authorities should never have chosen the River as the containment line, but Higgins CJ had found that the choice of the river was not unreasonable and that was not challenged on appeal. The issue on appeal was about the need to burn up hill to the east of the river to reduce the fuel load for the oncoming fire. This view was not supported by the plaintiffs' experts (who argued the river should not have been chosen). The evidence was that trying to burn to the east of the river would have increased the risk to people like the Wests, not decreased it. As Jagot J said {at [454]-[455]):

> … the strategy supported by the primary judge's conclusion involved a substantially greater risk of the fire escaping over the River well before 17 January than the strategy that was in fact adopted… In other words, the primary judge's conclusion was that Mr Arthur and Ms Crawford breached their duty of care as incident controllers by not carrying out a task that Mr Fenwick described as "virtually impossible" … The exigencies of the weather resulted in the fire escaping over the River on 17 or 18 January. But, on the whole of the evidence, it cannot rationally be inferred that it was the failure

> to perform the virtually impossible task of clearing and back-burning along the River that caused the escape.

And so, even if the incident controllers owed the plaintiffs a duty of care (which they didn't); and even if they had breached that duty (which they didn't); the alleged breach did not cause the damage to the plaintiffs property, the fire and the weather, neither of which were controlled by the state, did.

Civil Liability Act 2002 (NSW) s 43

Higgins CJ found that the state, through its incident controllers, owed a duty of care to the plaintiffs, breached that duty and this caused the damage to the plaintiffs' properties. Even so, according to Higgins CJ, the state was not liable because of the *Civil Liability Act 2002* (NSW) s 43 (quoted above). The Court of Appeal said Higgins CJ got that wrong too.

Section 43 applies when what is alleged is a breach of 'statutory duty' that is a duty imposed by an Act of Parliament not the common law. The duty that Higgins CJ thought was relevant was the duties imposed by ss 63 and 64 of the *Rural Fires Act 1997* (NSW). These sections impose a duty on the occupier of land to take steps to mitigate the risk of fire (s 63) and if a fire occurs, to take steps to extinguish the fire and if they can't extinguish the fire, to call upon the fire fighting authorities. In my earlier commentary I said:

> Higgins CJ found that the duty arose from s 63 of the *Rural Fires Act 1997* (NSW) (see [202]) which he said imposed a duty on both the RFS and the NPWS. That analysis simply does not make sense. Section 63 says
>
> > (1) It is the duty of a public authority to take the notified steps (if any) and any other practicable steps to prevent the occurrence of bush fires on, and to minimise the danger of the spread of a bush fire on or from:
> >
> > (a) any land vested in or under its control or management, or
>
> The issue of 'notified steps' was not relevant, the issue was whether the agencies took any 'practicable steps to … minimise the danger of the spread of a bush fire … from any land vested in or under its control or management'. The land was not under the control or management of the Rural Fire Service so that section could not apply to them. In any event that section is more related to preparing for a fire rather than responding to an actual fire.

The Court of Appeal said that s 63 refers to steps to be taken to prepare land in anticipation of the fire season and to mitigate the risk of fire; s 64 is relevant when a fire is actually burning (see [180]-[181]). Section 63 was not relevant as the allegations of negligence related to the conduct of the incident controllers in managing the response to the fire, not any preparation conduct. Further it was the National Parks and Wildlife Service, and not the Rural Fire Service that was the occupier of the land where the fire was burning. Although Ms Crawford was an employee of National Parks her duties were as the incident controller under a plan of management prepared pursuant to the *Rural Fires Act 1997* (NSW) s 52.

Jagot J agreed with the submission from NSW, that:

> … s 63, on its proper construction, had nothing to do with the cases put by the plaintiffs; it was not the plaintiffs' case that NSW was negligent because the NPWS (or RFS) had failed to carry out some notified or practicable step, before the ignition of the McIntyres Hut fire, to prevent the occurrence of bush fires on, and to minimise the danger of the spread of a bush fire on or from, the Park. Accordingly, s 63 was not engaged.

Section 63 was irrelevant to the case despite it forming the corner-stone of Higgins CJ's conclusions.

Rural Fires Act 1997 (NSW) s 128

Here Higgins CJ, at least in the opinion of the Court of Appeal, got it right. This section, as quoted above, says that a protected person is not liable for any 'matter or thing done or omitted to be done …if the matter or thing was done in good faith for the purpose of executing any provision (other than section 33) of this or any other Act'.

Higgins CJ found that the two incident controllers, and the state, were protected by this section and the Court of Appeal agreed. The plaintiffs argued that Ms Crawford was not a 'protected person' as she was an employee of NPWS and further there was no evidence that the incident controllers were acting in 'good faith', rather it was argued they were 'reckless' and 'indifferent'.

Ms Crawford was a protected person. The *Rural Fires Act 1997* (NSW) Part 3, requires that there be a bush fire management plan for each rural fire district. The relevant plan for this fire provided that the first responding agency, in this case, the National Parks and Wildlife Service, would appoint an incident controller to take responsibility for the response. Ms Crawford was appointed in accordance with this plan and as such was acting not under the National Parks and Wildlife legislation but the *Rural Fires Act*. The Director General of the National Parks and Wildlife Service was a signatory to the management plan and she was his delegate so she was, by virtue of s 128(2)(e) a protected person.

According to Jagot J the issues at trial were the failure to attack the Baldy Hill fire on 9 January and the failure to arrange hazard reductions east of the Goodradigbee River. In her view these were alleged omissions or failure to act. Recall that s 128 says (emphasis added)

> (1) **A matter or thing done** or omitted to be done by a protected person or body does not, **if the matter or thing was done in good faith** for the purpose of executing any provision (other than section 33) of this or any other Act, **subject such person personally, or the Crown, to any action, liability, claim or demand.**

The argument from NSW was it was only if the thing were 'done' it needed to be done 'in good faith' for the section to apply; but if the allegation was that something were 'omitted to be done' the reference to 'good faith' did not apply and all that need be shown is that the omission was done 'for the purpose of executing any provision … of this or any other Act'. Jagot J rejected that argument (at [502]) and held that the requirement of 'good faith' applied where the allegation was that something was done, or omitted to be done, negligently. The issue therefore was whether the actions of the two incident controllers, first Ms Crawford and then Mr Arthur, were taken in good faith.

Jagot J accept (at [509]) that 'The requirement of good faith requires a real attempt to discharge the required function and more than "honest ineptitude"'. At [505] Jagot J says:

> … according to the plaintiffs, the primary judge made findings which showed that Ms Crawford and Mr Arthur conducted their functions as incident controllers ineptly and unconscientiously, with reckless disregard to obvious risks and that, in those circumstances, the primary judge should not have found that NSW had discharged the onus to prove that things were done in good faith.

This was rejected out of hand. At [518]-[520] Jagot J says:

> In the face of the evidence given by Ms Crawford and Mr Arthur, the notion that they acted recklessly, lacked diligence or conscientiousness or were honest but inept should be rejected as fanciful. To the contrary of the plaintiffs' submissions, the evidence discloses two highly experienced fire fighters confronted by a fire which, by the time they knew of its existence, was already large and had caused long-distance spot fires, appeared to be beyond a strategy of direct attack, and would require more resources than were available to them without invoking the powers of the Commissioner under s 44 of the *Rural Fires Act*. Confronted with this situation, they acted diligently and conscientiously to fulfil their responsibilities as incident controllers… The fact that they did not directly attack the Baldy spot fire on the morning of 9 January was not the result of recklessness or a lack of conscientiousness. It was a rational response to the best available information, as was the action of later checking whether that information remained reliable. The fact that they did not cause clearing and back-burning along the length of the River was the result of such action never having been intended and such action being practically impossible, labour intensive and risky… The submissions for the plaintiffs take evidence out of context and, on that unsound footing, accuse Ms Crawford and Mr Arthur of having been reckless with people's lives. For the reasons given, these submissions should be rejected.
>
> The evidence discloses no act or omission of Ms Crawford or Mr Arthur that was done or omitted other than in good faith for the purpose of executing the provisions of the Rural Fires Act engaged by their functions under the plan of operations as incident controller. In particular, each of their acts and omissions in respect of the Baldy spot fire and the Goodradigbee River was a thing done or omitted in good faith for the requisite purpose in s 128.
>
> For these reasons, s 128 of the *Rural Fires Act* applies to protect Ms Crawford and Mr Arthur, and NSW, from liability.

Two other claims

In her judgement Jagot J dealt with two other claims against the state.

Civil Liability Act 2002 (NSW) s 43A

The first was a claim that NSW was protected by the *Civil Liability Act 2002* (NSW) s 43A. That section says:

> (1) This section applies to proceedings for civil liability to which this Part applies to the extent that the liability is based on a public or other authority's exercise of, or failure to exercise, a special statutory power conferred on the authority.
>
> (2) A
> "special statutory power" is a power:
>
> (a) that is conferred by or under a statute, and

(b) that is of a kind that persons generally are not authorised to exercise without specific statutory authority.

(3) For the purposes of any such proceedings, any act or omission involving an exercise of, or failure to exercise, a special statutory power does not give rise to civil liability unless the act or omission was in the circumstances so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power.

The argument was that the incident controllers were exercising special statutory powers given the extensive powers given to them under the Rural Fires Act and therefore they could only be liable if there actions were 'so unreasonable that no authority having the special statutory power in question could properly consider the act or omission to be a reasonable exercise of, or failure to exercise, its power'.

The state had relied on this provision but it had been rejected by Higgins CJ on the basis that the provision was only put into the *Civil Liability Act 2002* on 13 November 2003 that is after the fires. Normally a case is determined on the law as it was on the date of the cause of action (ie on the date of the fires) but in this case Higgins CJ 'overlooked' a provision that said the section was to apply regardless of when the cause of action arose ([158] and [484] (Jagot J); see also *Electro Optic Systems Pty Ltd v The State of New South Wales; West & West v The State of New South Wales* [2012] ACTSC 184, [142] (Higgins CJ)).

The plaintiffs did not dispute that the decisions were not 'so unreasonable' rather they were not exercising special statutory powers. Jagot J rejected that; Higgins CJ had found that the Incident Controllers were negligent in failing to launch a direct attack on 9 January and for failing to prepare the east bank of the Goodradigbee River. To take those actions they had to command volunteer fire fighters and others and their power to do that came only from the Rural Fires Act – in short I'm free to ignore someone's directions but the Rural Fires Act imposes an obligation to recognise their authority (*Rural Fires Act 1997* (NSW) s 41). Further in doing the work they could have authorised actions that were contrary to National Parks and environmental protection legislation ([492], see also *Rural Fires Act 1997* (NSW) s 124B).

The authority for the incident controllers came from the Rural Fires Act and allowed them to do things that would otherwise be illegal or involved interference with the rights of others (including the right to make fire breaks, take water, damage property etc). In the circumstances they were exercising special statutory powers and were protected by s 43A.

Failure to warn

Electro-Optics alleged that the Commissioner of the Rural Fire Service, Phil Koperburg, had failed to issue a warning of the impending fire; worse, or more particularly that during an interview with ABC television he had downplayed the seriousness of the risk to the ACT and this was a negligent misstatement. Higgins CJ had rejected this claim (*Electro Optic Systems Pty Ltd v The State of New South Wales; West & West v The State of New South Wales* [2012] ACTSC 184, [368]-[373] (Higgins CJ)) and Jagot J agreed.

The critical issue is that during his interviews, Commissioner Koperburg was talking about fires in Southern NSW, not just the ACT fires but he did say that there was a threat to Canberra. Further it would not be appropriate for him, as Commissioner of the NSW Rural Fire Service, to formulate specific warnings for the residents of the ACT when the ACT had its own emergency service bureau. Even if Mr Koperburg had misstated the risk or his belief as to the risk (which he did not):

> … ACT residents could not reasonably have relied on what Mr Koperberg alone said. Mr Koperberg was not speaking as the Chief Fire Officer of the ACT… Mr Koperberg was not purporting to provide any warning or to assure residents that no danger was presented to Canberra, or otherwise to advise them as to what steps they might or might not take, nor could his statement have been reasonably interpreted to constitute such advice. Residents of the ACT ought to have known that Mr Koperberg's responsibility was to NSW and that he was speaking in his role as the head of a NSW organisation that was assisting the responsible agencies of the ACT with respect to the risks from the fires in the ACT (irrespective of their point of origin). The statement was being provided as a general overview of the RFS's operations in relation to the Brindabella complex of fires and nothing more. Residents would reasonably have looked to the ACT agencies for complete information about the risks that the fires represented and, if there was a significant risk of which they were entitled to be informed as asserted by the QBE plaintiffs, it was from those agencies and not the RFS that such a warning might reasonably be expected to come.
>
> For these reasons, the primary judge correctly rejected the case of the QBE plaintiffs against NSW in respect of alleged breaches of an asserted duty to warn.([481]-[482]).

Katzmann J

Katzmann J agreed mostly with Jagot J except in some aspects of her interpretation of the *Rural Fires Act 1997* (NSW) s 128. Accordingly Katzmann J gave detailed consideration of this section.

First she disagreed with Jagot J that the relevant issues should be classified as 'omissions' that is the allegations were not, when seen in their entirety, that the incidient controllers 'omitted' a direct attack on 9 January or 'omitted' to prepare the east bank of the Goodradigbee River, rather it was that they implemented a flawed firefighting strategy. Therefore the allegation was with a 'thing done' rather than a thing omitted to be done ([581] (Katzmann J)). Even so Katzmann J agreed that wether the allegation was about something done, or not done, the defendant had to show that the decision was made in good faith ([595]).

The next question was whether or not the decisions were made 'in good faith'. Katzmann J took a detailed look at the provision and earlier case law dealing with similar provisions. She agreed with the plaintiffs that the onus to prove 'good faith' lay with the state but that did not mean they had to call specific evidence about the state of mind of the decision makers; 'what matters is what is disclosed by the evidence' ([596]).

Fundamentally she found that mere negligence does not prove an absence of good faith; if it did the section would have nothing to do ([634]). She said (at [635]):

> In my opinion, for the purposes of s 128 a thing may be done (or omitted to be done) negligently but in good faith. Good faith may be made out where the relevant person does or fails to do something honestly, in good conscience, and for no improper or ulterior purpose, even if he or she acted or omitted to act negligently.

With respect to the other matters in the case, Katzmann J agreed with Jagot J that NSW did not owe a duty of care to the plaintiffs, that there was no breach of duty and that even if there had been, it did not cause the plaintiffs' damages.

Murrell CJ

The current Chief Justice of the ACT Supreme Court gave a short judgment agreeing with Jagot J except to the extent that she characterised the alleged negligence by the incident controllers as 'omissions' rather than actions. She preferred the view of Katzmann J that 'it is the overall fire fighting strategy that is the relevant "matter or thing", and the two alleged errors should be viewed as aspects of that strategy. The implementation of the strategy is a "matter or thing" that was "done" rather than one that was "omitted to be done" ([8]).

Costs

It should be recalled that Higgins CJ ordered that QBE pay 50% of the state's costs and the Wests contribute 5% of those costs to QBE. As I said in earlier commentary (costs ('Final chapter of the Supreme Court proceedings from the 2003 fires' August 8, 2013) 'In the circumstances a costs order was justified but it would be discounted because NSW was not successful on all points.'

Following this appeal the state of NSW was successful on all points. As Jagot J says (at [522]):

> … NSW is not liable to the plaintiffs because there was no duty of care owed by Ms Crawford or Mr Arthur in their capacity as incident controller to the plaintiffs in respect of the fire. Nor, if any such duty existed, did Ms Crawford or Mr Arthur breach the duty. Nor again, did any such breach cause the harm the plaintiffs suffered. In any event, the statutory defences under s 43A of the Civil Liability Act and s 128 of the Rural Fires Act would have protected Ms Crawford and Mr Arthur from any liability. NSW succeeded in its defence at every step. It follows that the primary judge's exercise of discretion in respect of costs cannot stand.

In the circumstances the Court of Appeal upheld the states appeal and ordered the plaintiffs to pay 100% of the state's costs.

A costs order is usually made on a party/party basis. This means the losing party has to pay the costs of the winning party that were essential to bring the matter to court, but there are always costs incurred that are not covered, such as investigations that don't turn out to be fruitful, conferences with witnesses that are not called etc.

To encourage settlement however, there are rules, both under statute and common law that can affect the costs order. In particular if the winning party makes an offer to settle that the losing party rejects, the losing party can be ordered to pay costs on an indemnity basis after the date of rejection. Indemnity costs covers all of the winning party's costs.

It was revealed that the state had made a settlement offer so the Court of Appeal noted that the state would obtain an order to cover its costs at both trial and on appeal. The plaintiffs (the Wests and QBE) were ordered to pay the state's costs, with the state given 14 days to apply for indemnity costs should it wish to make that application.

The High Court

Mr West is reported as saying 'a High Court bid would be considered, but his legal team would need to read the decision in full first' (Michael Inman, 'Court dismisses landholders' appeal over 2003 Canberra bushfire', *Canberra Times*, 31 October 2014). An appeal to the High Court is not a right; a potential appellant has to convince the High Court that there is a legal issue that deserves the attention of the nation's highest court. Had this decision gone in favour of the Wests there could have been a point that needed High Court resolution as the decision of the Supreme Court of ACT may have been inconsistent with the view of the NSW Supreme Court in *Warragamba Winery Pty Ltd v State of New South Wales* [2012] NSWSC 701 and that sort of disagreement is the sort of thing the High Court can resolve.

Whilst this decision raises many issues it is not obvious which matters might attract the interest of the High Court; that will be a matter for counsel should the Wests seek special leave to appeal.

Value as a precedent

Cases heard before single judges do not really count as legal precedents. Decisions of higher courts, such as the Court of Appeal or the High Court of Australia are precedents as, to the extent that they describe the law, they are binding on lower courts in the same jurisdiction. This case is significant as it is the first of the recent fire cases to reach the appeal level, but the decision is only binding on ACT courts, though it will be referred to should there be similar litigation in other states.

A case is only binding to the extent that it answers a legal questions. Sometimes the law is unclear and there may be conflicting authorities so that an appeal court's decision can resolve those issues. That is not the case here where it was agreed by all parties that the Chief Justice had failed to apply correct law. This court had to correct obvious errors rather than resolve complex legal issues.

The point that can be identified as a precedent is the ruling that the *Rural Fires Act 1997* (NSW) s 128 requires that there be 'good faith' regardless of whether the negligence is alleged to be a negligent act, or failure to act. That is probably not controversial or really a surprise.

The finding that there was no duty of care lends weight to the earlier authorities that the purpose of a fire brigade is to act for the common or greater good rather than for the protection of individuals but the reality is that determining in a particular case whether or not there was a legal duty of care depends on so many factors, and is so fact specific, that a finding in one case can hardly be applied in another. If that's true the finding in this case that the relationship of the incident controllers in a fire where it was envisaged from the start that the fire was 'likely to assume such proportions as to be incapable of control or suppression by the fire fighting authority or authorities' (Rural Fires Act 1997 (NSW) s 44) does not give rise to a duty of care to individuals may not be applicable in cases like *Hamcor Pty Ltd & Anor v State of Qld & Ors* [2014] QSC 224 (Dalton J).

Conclusion

In *Electro Optic Systems Pty Ltd v The State of New South Wales; West & West v The State of New South Wales* [2012] ACTSC 184 Higgins CJ found:

1) That the state of NSW through the Rural Fire Service and National Parks and Wildlife Service owed the plaintiffs a duty of care;
2) The defendant via the Incident Controllers did not act as a reasonable fire service;
3) Their failure allowed the fire to spread and damaged the plaintiff's property; but
4) The defendants were, however protected, by the operation of
   a) the *Civil Liability Act 2002* (NSW) s 43; and
   b) the *Rural Fires Act 1997* (NSW) s 128.
5) The Rural Fire Service did not owe a duty to warn residents of the ACT regarding the fire; and
6) The *Civil Liability Act 2002* (NSW) s 43A was not relevant as it had come into force after the date of the fires.

According to the ACT Court of Appeal Higgins CJ was wrong in nearly every respect. He made findings of fact that were 'inconsistent' ([453]) with the evidence, he overlooked relevant law ([484]), his reasoning depended upon a 'mischaracterisation of the case that was being put' and he applied legal principles that had been rejected by the High Court as representing the law in Australia ([176]).

The court of appeal held:

1) That the state of NSW through the Rural Fire Service and National Parks and Wildlife Service did not owe the plaintiffs a duty of care;
2) The defendant via the Incident Controllers did act as a reasonable fire service;
3) Their failure, if there was one, was not the cause of the plaintiffs' damage; but
4) **If there had been negligence, the defendants would have been protected, by the operation of**:
   a) the *Civil Liability Act 2002* (NSW) s 43A; and
   b) the *Rural Fires Act 1997* (NSW) s 128.

5) The Rural Fire Service did not owe a duty to warn residents of the ACT regarding the fire; and
6) The Civil Liability Act 2002 (NSW) s 43 was not relevant as this was not a case involving an alleged breach of statutory duty.

The text in bold represent the two areas where the judges of appeal agreed with the trial judge.

The two incident controllers involved in this case had to make calls in a very short space of time. They had to make decisions in the uncertain world of firefighting where events are fast paced, information difficult to obtain and where the outcomes can and did mean the difference between life and death and significant losses.

Higgins CJ heard the longest, most complex case in ACT history. There is no doubt that hearing all that evidence, trying to understand the arguments of counsel and working through masses of documents must be very difficult. Like the incident controller, a judge may be offered advice and assistance from others but the ultimate decisions are his and his alone. Having said that, these cases were filed three years after the fires but not resolved until 10 years after the fires. During that time the judge heard 80 days of evidence and reserved his decision from November 2011 (Louis Andrews and Megan Doherty, 'Fire litigation ends for ACT', *Canberra Times*, September 20, 2012) to 17 December 2012 - unlike the incident controllers who had hours to make their decision, Higgins CJ had over a year! Higgins CJ found that the actions of those incident controllers were not 'reasonable'. The ACT Court of Appeal, in turn, found that Higgins CJ was wrong in nearly every respect.

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