Not a "director" but still culpable!

Georgina Wu | March 2020 | Commercial

Summary

If a corporate employer fails to maintain a policy of workers compensation insurance and a worker sustains an injury during the course of employment, the corporate employer is liable to reimburse the Workers Compensation Nominal Insurer ('WCNI') for the medical expenses and compensation paid for or to the worker. In the event such amounts cannot be recovered from the corporate employer, section 145A of the *Workers Compensation Act 1987* (NSW) ('Act') holds officers who were directors of the corporate employer at the time of injury, known as culpable directors, personally liable to reimburse WCNI.

On 30 May 2019 the Local Court of NSW handed down a judgment finding in favour of Insurance and Care NSW ('ICARE'), who was acting as the agent of WCNI, under section 145A of the Act against the culpable directors, amid claims by one of the culpable directors that she was not validly appointed as a director but if she was, she had resigned as a director prior to the injury and in the event she is found to still have been a director at the time of injury, she has defences available to her under section 145A of the Act. That culpable director subsequently appealed the Local Court decision to the Supreme Court and on 27 February 2020, the Supreme Court dismissed the appeal with costs. TurksLegal represented ICARE in both proceedings.

Background

There were two culpable directors in the case, director A and director B. The two directors are married to each other but claim to be separated under the one roof. Only director B defended the claim at trial. Director A did not appear at trial. Director B put forward the following defence:

- She did not give a written consent to be appointed as a director nor was she appointed at a general meeting of the company (required under the company's constitution) and therefore her appointment as a director was invalid.
- If she was validly appointed as a director, notwithstanding the ASIC records, she had resigned by handing a written resignation to director A prior to the injury
- If she still remained as a director at the time of the injury, then under sections 145A(5) of the Act:
  - She did not know that the company had failed to obtain a policy of workers compensation insurance;
  - She was not in a position to influence the conduct of the company in relation to its failure to obtain such a policy; or
  - If she were in a position to influence the company's conduct, she had used all due diligence to prevent it contravening its obligations.

Director A did not serve or file any evidence and nor was he called to give evidence at the trial. Notwithstanding this, a statement made by director A to WorkCover NSW two months following the injury (which was more than 3 years before the trial) which contained admissions against director B as to her involvement and directorship in the company was admitted into evidence by the trial judge.

Trial decision

The trial judge found that director B was validly appointed as a director.

The trial judge drew a *Jones v Dunkel*[1] inference that the failure in director B to call director A to give evidence was

because director B was aware that the evidence director A would give would not assist her case. The trial judge also found director B's evidence to be disingenuous and:

- did not accept that director B had handed a written resignation to director A or the company's accountant prior to the injury; and
- director B had failed to establish the defences under section 145A(5) of the Act.

Appeal decision

On appeal, the Supreme Court found, *inter alia*:

- A written consent to act as a director is not a prerequisite to be appointed as a director.
- Notwithstanding that the formalities for calling a general meeting had not been observed, if all shareholders of a company were present at the time a director was appointed, it would not invalidate the appointment even though procedural requirements under the company's constitution had not been complied with.
- Even absent a valid appointment, a person may still be a director within the meaning under section 9 of the *Corporations Act 2001* (Cth).
- The purpose of ASIC records is to permit the world at large to rely upon the facts contained in those records. The person who challenges those facts bears the onus of proof.
- The statement of director A and the admissions therein against director B were properly admitted into evidence.
- The trial judge was entitled to draw the *Jones v Dunkel* inference in respect of director B's failure to call director A to give evidence.
- The objective evidence was all supportive of the case against director B.

The Supreme Court dismissed the appeal with costs against director B.

Implications

- When it comes to the validity of appointment of directors, the Court looks to substance rather than form.
- In certain circumstances a statement of a third party may be used as an admission against another party.
- A culpable director bears the burden of proof to establish the statutory defences under section 145A(5) of the Act.

[1] The rule laid down in *Jones v Dunkel* (1959) 101 CLR 298 pursuant to which an unexplained failure by a party to give evidence or to call a witness or to tender evidence may lead to an adverse inference against that party that the unpresented evidence would not have assisted the party.

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