

Court shelves occupier's bid for contribution

Notman v Wesfarmers Limited & Floyd Industries Pty Ltd [2016] VSC 457

Peter Moriarty & Anna Morris | August 2016 | Insurance & Financial Services

Summary

The Supreme Court of Victoria has dismissed a claim for contribution made by the occupier of a supermarket against an electrical contractor that installed metal shelving at the supermarket. The plaintiff, a supermarket employee, suffered electrical shock two months after the installation when she touched the shelving, which had been installed with bolts that contacted electrical wiring.

Facts

Ms Notman was employed by Wesfarmers Limited as a duty manager of a Coles supermarket.

On 19 April 2007, Ms Notman suffered an electric shock when she touched metal shelves in a storeroom that had once been the supermarket's meat room.

In February 2007 Floyd Industries, an electrical contractor, had installed the shelves, as requested by Wesfarmers, the occupier and operator of the store. The shelves were fixed using expanding anchor bolts, known as Dynabolts.

It was agreed that the metal shelves became live when the Dynabolts contacted electrical wires located within the wall cavity, thereby causing Ms Notman to suffer electrical shock.

Ms Notman issued proceedings against Wesfarmers alleging breach of its duties as an employer. Ms Notman also alleged that Wesfarmers failed to respond to an earlier complaint of an electric shock suffered by a contract cleaner in the meat room. It was also alleged that Wesfarmers were responsible for the work performed by Floyd Industries.

Ms Notman also sued Floyd Industries alleging that it failed to take proper precautions to avoid contacting electrical wiring.

Contribution Claim

Ms Notman's claim against both defendants settled five days into a trial before Justice Keogh and a jury. The terms of the settlement were not disclosed.

Wesfarmers had made a contribution claim against Floyd Industries and this claim proceeded before Justice Keogh alone.

Wesfarmers argued that:

1. the risk of electric shock injury arising from the installation work was not far-fetched or fanciful;
2. Floyd Industries had failed to undertake simple precautions, including an appropriate physical inspection, obtaining plans of electrical wiring or simply refusing to perform the work if it was not able to satisfy itself concerning the risk posed by the potential presence of wiring.

It was specifically argued that had an appropriate physical inspection been undertaken, which Wesfarmers argued required checking the cavity wall, then the presence of the electrical wiring would have been immediately obvious.

Issues

In his reasons for judgment Justice Keogh noted that the contribution claim centred on two factual disputes:

- 1) whether, when performing the installation work, Floyd Industries should have foreseen and taken precautions to prevent the Dynabolts contacting live electrical wiring;

2) whether Wesfarmers was on notice of the earlier electrical shock incident suffered by the contract cleaner in the meat room.

Findings

At trial, Floyd Industries called evidence from its employee who performed the installation work (a qualified electrician), its company director (also a qualified electrician) and an expert witness who was a licensed electrical inspector and contractor.

All of Floyd Industries' witnesses stated that the wiring of the meat room wall did not comply with the relevant Australian Standards, and that in fact there should have been no electrical wiring within the wall as the meat room had been a wet area. The witnesses stated that they had never seen electrical wiring installed in the manner that it was in the meat room. The expert witness stated that a reasonable electrician when working in the meat room would not have observed anything that would put him on notice of the possibility of electrical wiring within the walls.

As the supermarket premises were reasonably modern, Floyd Industries' employee had assumed that it had been wired in accordance with the applicable Australian Standards. Accordingly, he considered it safe to perform the installation work using Dynabolts.

Wesfarmers called evidence from an expert building consultant who stated that there were a number of visual cues that ought to have alerted Floyd Industries to the presence of potential hazards requiring further investigation before the installation work was undertaken. The expert stated that plans ought to have been obtained and that if they could not be accessed then the contractor ought to have inspected the wall cavity.

Justice Keogh placed significant weight on the fact that three experienced electricians had never seen wiring installed in the way that it was in the meat room. His Honour found that a reasonable electrician would not have been put on notice of the presence of wiring behind the walls.

His Honour also noted that whilst a contractor is not entitled to rely on the assumption that previous work is compliant to relevant standards, it was significant that in

this instance the electrical wiring deviated so much from the standards.

His Honour also held that it was reasonable for Floyd Industries' employee to expect that in a modern commercial building it had been constructed in accordance with the applicable standards.

It was also noted as relevant that Wesfarmers had its own engineering department that managed contract works at its various supermarkets. Wesfarmers had possession of the wiring plans for the building and it did not notify Floyd Industries of any risks associated with the work it was asking Floyd Industries to perform.

His Honour was not critical of the failure by the contractor to request copies of drawings or plans from the occupier. His Honour held that the onus was on the occupier to provide copies of drawings and to put the contractor on notice of any potential risks or hazards associated with the work.

Wesfarmers' contribution claim against Floyd Industries was dismissed because the risk of the electrocution injury that arose in consequence of the installation was not reasonably foreseeable so as to require the installer, acting reasonably, to take any of the precautions by which the existence of the wiring might have been discovered.

Implications

Whilst this judgment turns on its facts, it does serve as a reminder to the occupiers of commercial premises that it will be hard to establish contribution in circumstances where the hazard was non-standard, had been present for some years, and where it was reasonable to assume that the premises had been built or fitted in accordance with relevant standards.

His Honour accepted that contractors cannot assume previous work complies with a standard or code, but held that it was reasonable for the contractor to assume compliance in a relatively modern commercial building and with respect to highly regulated work such as electrical work which normally requires certification.

This judgment will give some comfort to specialist contractors, particularly those working in the electrical, plumbing and building industry, as well as their insurers,

about their limited liability in situations where the risk was not readily obvious or reasonably apprehended, and where appropriate reasonable precautions have been undertaken prior to performing works.

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