HIGH COURT OF AUSTRALIA

Public Information Officer

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BEROWRA HOLDINGS PTY LTD v RODNEY JOHN GORDON
BRIGHTON UND REFERN PLASTER PTY LIMITED under external administration and/or controller appointed v SCOTT RAYMOND BOARDMAN

A lack of strict compliance by two injured workers with workers compensation laws did not prevent them from pursuing damages from their employers, the High Court of Australia held today.

Mr Gordon was a farm hand on "Berowra" near Dubbo in central New South Wales when his legs were severely injured by the spinning shaft of a post hole digger. Mr Boardman was employed by Brighton as a carpenter on a construction site in the Sydney suburb of Rockdale when he developed persistent back injuries from lifting and laying Hebel blocks weighing up to 150kg. Both were injured in 2001. Section 151C of the NSW *Workers Compensation Act* stipulates that a worker cannot commence court proceedings against an employer for damages until six months have elapsed since the employer was notified of the injury. Both workers initiated proceedings in the NSW District Court before the six months had elapsed. Neither Berowra nor Brighton took any point as to non-compliance with section 151C until considerable time had passed and after numerous steps had been taken pursuant to the District Court Rules.

In Mr Gordon's case, Berowra took no point in relation to non-compliance with section 151C until the day before the case was set for hearing in the District Court, 18 months after Mr Gordon filed his statement of claim. An offer of compromise, valid for 28 days, had been made under the District Court Rules and this could not be withdrawn without leave of the Court. The evening before the hearing, Berowra's solicitors told Mr Gordon's solicitors that they would apply to the Court to withdraw the offer, seek an order that the proceedings were a nullity, and seek summary dismissal. The next morning, Mr Gordon's solicitors faxed Berowra's solicitors his notice of acceptance of the offer of compromise. At the hearing that day, the District Court held that the proceedings were a nullity and should be dismissed. This was reversed by the NSW Court of Appeal. Berowra then obtained special leave to appeal to the High Court.

In Mr Boardman's case, when Brighton failed to appear at a show cause hearing in April 2002, an order for judgment was made against it under the District Court Rules, it was deemed to have admitted liability, and the matter was listed to proceed to trial for the assessment of damages. In August 2002, 13 months after the statement of claim had been filed, Brighton first raised section 151C when it filed a notice of motion for summary dismissal of the proceedings for non-compliance. The order for judgment was still in force when the notice of motion came on for hearing in February 2004. The Court accepted Mr Boardman's argument that Brighton by its conduct had waived its right to rely on section 151C and dismissed its motion. The Court of Appeal refused leave to appeal and Brighton obtained special leave to appeal to the High Court.

The Court unanimously dismissed both appeals. It held that non-compliance with section 151C did not render the proceedings a nullity. Section 151C should not be read as if waiting six months to commence court proceedings were a precondition to the jurisdiction conferred upon the District Court to determine claims for work injury damages. The section does not extinguish or create rights; rather, it postpones the remedy. Section 151C potentially gives defendants a right to apply to strike out proceedings commenced in non-compliance, but that right must be exercised in accordance with the procedural rules of the Court. The effect of non-compliance will depend in each case upon a defendant's actions under the Rules of Court.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

Address: PO Box 6309, Kingston ACT 2604 Telephone: (02) 6270 6998 Fax: (02) 6270 6909
Email: fhamilton@hcourt.gov.au