

## *Portrange Pty Ltd V Xstrata Nickel Australiasia Operations Pty Ltd [2015] WADC 118*

### Key Points

- This case highlights the importance of pleading all aspects of a case in the first instance

### Background

This action followed a separate personal injury claim made by Bradley Rollings (**Rollings**) against Portrange Pty Ltd (**Portrange**) and Xstrata Nickel Australiasia Operations Pty Ltd (**Xstrata**) (**the first action**).

In that action, Rollings commenced proceedings against Portrange and Xstrata for negligence and breach of statutory duty. The claim was settled for \$650,000.00 plus cost of \$60,000.00. Settlement was apportioned 20 per cent to Portrange and 80 per cent to Xstrata.

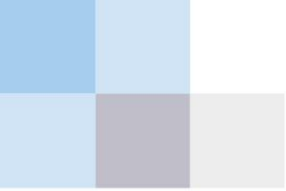
Xstrata commenced contribution proceedings against Portrange for full indemnity for the settlement sum, relying on an indemnity provision in terms and conditions (**terms**) that formed part of the broader contractual arrangement between Portrange and Xstrata.

Further, Xstrata sought damages for breach of contract on the basis that Portrange failed to maintain liability insurance covering Xstrata, which Portrange was contractually obliged to do.

By counterclaim, Portrange claimed a sum from Xstrata that included an amount for workers' compensation paid by Portrange to Rollings. Portrange did not raise in its counterclaim or during the trial the provisions of section 93 and or section 301 of the *Workers Compensation and Injury Management Act 1981* (WA) (**WCIM**) as a basis upon which Xstrata was obliged to pay any part of the sum that Portrange sought from Xstrata.

His Honour was satisfied that the terms had been incorporated into the contract between Portrange and Xstrata and Xstrata was entitled to a full indemnity for the settlement sum. He was also satisfied that Portrange breached its contract with Xstrata by failing to maintain liability insurance covering Xstrata. Xstrata was entitled to damages for the breach. Xstrata elected to enter judgement for relief by way of indemnity rather than damages for breach of contract.

Portrange then commenced a second action against Xstrata seeking recovery from Xstrata of a sum equivalent to 80% of the workers' compensation paid by Portrange to Rollings (in accordance with the agreement on apportionment between the parties in the first action). Portrange relied on sections 93 and 301 of the WCIM.



In its defence, Xstrata said that Portrange had raised the same issue in the first action and that the claim in the second action was *res judicata* and / or Portrange was estopped from maintaining its claim because the issue determined in the first action and / or the compensation paid by Portrange merged with the common law judgement in the first action.

## The Law

Ultimately the question before the Court was whether the issue raised in the second action by Portrange was the same issue raised by it in the first action.

## Conclusion

His Honour Scott DCJ held that neither *res judicata* nor issue estoppel were applicable. However, he was of the view that Portrange was estopped from maintaining its claim against Xstrata on the basis that there is an Anshun estoppel.

The claim in the second action was so closely connected with the subject matter of the counterclaim by Portrange in the first action that it was to be expected that section 93 of the WCIM would be relied upon as a basis for recovery by Portrange from Xstrata. Portrange was estopped from maintaining its claim in the action against Xstrata.

His Honour Scott DCJ further held that in the first action the damages that Xstrata was entitled to upon there being a breach of the contract would arguably be in a sum sufficient to cover its exposure to Rollings' claim including workers' compensation. That relief would not be adversely affected by section 301 of the WCIM. Had sections 93 and 301 of the WCIM been relied upon by Portrange in the first action this may have influenced Xstrata's election to enter judgment for indemnity or damages. Enabling Portrange's claim to be maintained would in all the circumstances be unjustifiably oppressive to Xstrata.

## Lessons Learnt

This case is a reminder of the importance pleading all aspects of a case in the first instance. The Court will not allow parties "two bites at the cherry" if they fail to raise all relevant causes of action in the first instance. The case is also a timely reminder for defendant parties and insurers of defendants that by virtue of section 301 of the WCIM, defendants cannot escape their liabilities under section 93, even when entitled to rely on a full indemnity under contract. On the other hand, an award for damages in the context of breach of contract is not likely to adversely affect section 301 of the WCIM.



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