CITATION:	*ALCAN V BOWES [2022] NTWHC002*
PARTIES:	*Alcan Gove Pty Ltd*
	V
	Bowes Investments Pty Ltd trading as Zebra Metals & Environmental Services
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO(s):	2021-03509-LC
DELIVERED ON:	22nd March 2022
DELIVERED AT:	Darwin
HEARING DATE(s):	7th February 2022
DECISION OF:	Deputy Chief Judge Fong Lim

CATCHWORDS:

Work Health Court – strike out application – lack of jurisdiction – no statutory basis -application for indemnity-principal contractor

Hopkins v QBE insurance Ltd [1991] NTSC33 -distinguished

Laminex Group Pty Ltd v Catford [2021] NTSC – considered

William Sergeant v MPJ Enterprises & QBE insurance [2021] NTLC 017- distinguished

Consolidated Press Ltd v Maxwell Raymond Wheeler[1992] NTSC -considered

Section 14 Work Health Administration Act

Sections 3, 104, 127,132 of the Return to Work Act

REPRESENTATION:

Counsel:

Applicant:	Mr Tom Anderson
Respondent:	Mr Duncan McConnell SC

Solicitors:

Applicant:	Roussos Legal Advisory
Respondent:	Rees R & Sydney Jones

Decision category classification:	A
Decision ID number:	NTWHC002
Number of paragraphs:	37

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 2021-03509-LC

BETWEEN:

Alcan Gove Pty Ltd
(Applicant)

AND:

Bowes Investments Pty Ltd t/as Zebra Metals &
Environmental services
(Respondent)

REASONS FOR DECISION

(Delivered 22 March 2022)

DEPUTY CHIEF JUDGE FONG LIM:

1. The Applicant (Alcan) was the principal contractor of a workplace where Mr Burgess (the Worker) suffered a work injury. The Respondent (Bowes) was the sub – contractor who employed the Worker. The Worker was employed by Bowes at the time he suffered an injury while performing work at the Alcan's work site.

2. Alcan accepted the Worker's claim for compensation and has sought to recover the compensation paid to the Worker from Bowes through an indemnity created by section 127 (3) of the Return to Work Act.[1]

3. Bowes has applied to strike out Alcan's claim on the basis that the Work Health Court does not have jurisdiction to hear an application for indemnity under section 127(3).

4. The Work Health Court is created by the Work Health Administration Act and its jurisdiction is set out in Section 14 of that Act. That is :

The Court has the following jurisdiction:
(a)under the Return to Work Act 1986 to hear and determine:

(i) claims for compensation under Part 5 of that Act; and
(ii) all other matters required or permitted by that Act to be referred to the Court for determination;

(b) under the Work Health and Safety (National Uniform Legislation) Act 2011to hear and determine:

(i) all applications made to the Court under that Act; and
(ii) all other matters required or permitted by that Act to be

[1] A principal contractor who is liable to pay compensation under this section is entitled to be indemnified by any person who is liable to pay compensation to the worker other than by virtue of this section.

dealt with by the Court;

(c)to determine all matters and questions incidental to, or arising out of, matters before the Court;

(d) any other jurisdiction conferred on it under any Act

5. It is Bowes' contention that in relation to the present matter the Work Health Court does not have jurisdiction because this application is not a claim for compensation under Part 5 of the Return to Work[2] Act, the issue of indemnity between the principal contractor under section 127 of the Return to Work Act is not a matter required or permitted by the Return to Work Act to be determined by the Work Health Court [3]nor is it an application which arises incidental to or arising out of matters before the Court[4].

6. It is trite law that a court of statute derives its jurisdiction from the statute which creates it, further it is the long held view that while a court of statute does not have inferred powers it does have implied powers which are needed to discharge its statutory function[5]. It is also trite that any interpretation of the Act ought to be considered in light of the objects of that Act.

7. The objects of the Return to Work Act are contained in section 2-

"*(a) to provide for the effective rehabilitation and compensation of injured workers;*

(b) to provide for prompt and effective management of the workplace injuries in a manner that promotes and assists the return to work for injured workers as soon as practicable;

(c) to ensure that the scheme for the rehabilitation and compensation of injured workers in the Territory:

(i) is fair, affordable, efficient and effective; and

(ii) provides adequate and just compensation to injured workers; and

(iii) is balanced to ensure that the costs of workers compensation are contained to reasonable levels for employers.

8. The Return to Work Act is a code in relation to the compensation of workers for work injuries and is focussed on ensuring workers receive financial assistance and rehabilitation promptly and effectively. The Return to Work Act is beneficial legislation and the Work Health Court is a specialist Court empowered to adjudicate on disputes relating to compensation for work injuries, among other things.

9. There are no authorities either of this Court or the Supreme Court of the Northern Territory which have considered the jurisdiction of this Court to hear an application for indemnity under section 127(3).

10. Both parties referred to the decisions of the Supreme Court of the Northern Territory in the matters of *Hopkins v QBE Insurance Ltd [1991] NTSC 33 (Hopkins)*and the more recent case of *Laminex Group Pty Ltd v Catford [2021] NTSC 92 (Catford)* as the most relevant authorities on this issue.

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[2] Section 14(a) (i)

[3] Section 14(a)(ii)

[4] Section 14 (c)

[5] Consolidated Press Holdings Ltd v Maxwell Raymond Wheeler [1992] NT SC per Mildren J at page 6

11. In *Hopkins*[6] his honour Justice Martin considered the jurisdiction of the Work Health Court to adjudicate on the issue of recovery under section 132 of the Work Health Act as it then was. The factual matrix was the worker had made a claim against her employer for compensation and the employer had agreed to pay her that compensation. The employer defaulted on that payment and the worker then pursued the Insurer for that amount payable in accordance with the Act and the Insurer failed to pay that compensation. There had been no determination by the Court of the amount payable to the worker.

12. His Honour analysed the jurisdiction of the Work Health Court[7] and came to the conclusion that:

> "..There is a clear distinction between compensation payable by an employer to a worker under Part V of the Act and the right of the worker to seek recovery from an authorised insurer of a debt due and payable by the insurer to the worker by the operation of sections 132 and 133. In that latter situation the worker is not pursuing the right to compensation under part V or any matter incidental to or arising out of a claim for compensation under part V. The worker is, to the contrary seeking to recover from another party, the authorised insurer, a debt created by Part VII of the statute. The jurisdiction of the Work Health Court is limited to claims for compensation under Part V and matters and questions incidental to or arising out of claims for compensation under Part V not claims for compensation and debt under the Act and matters and questions incidental to or arising out of such claims. The phrase "incidental to" can add something liable to happen or naturally appertaining to the claim for compensation (the Concise Macquarie Dictionary) to the Court's jurisdiction. The nexus between a claim for compensation under Part V and a claim against the authorised insurer for a debt arising from the operation of Part VII do not have sufficient nexus such that the latter is incidental to the former".

13. Since the decision in *Hopkins* the Work Health Act has been replaced with the Return to Work Act which is the relevant Act in the present case. The jurisdictional provisions contained in section 94 of the Work Health Act have been reiterated in section 14 of the Work Health Administration Act and the effect of those provisions are much the same.

14. In *William Sergeant v MPJ Enterprises and QBE insurance (Australia) Ltd [2021] NTLC 017* Judge Neill of this court had cause to consider the jurisdictional issue in relation to section 132 & 133 of the Return to Work Act and applying the reasoning in *Hopkins* confirmed the Work Health Court had no jurisdiction to entertain any enforcement application under section 132[8]. In that matter his honour also had cause to consider the effect of sections 26 and 27 of the Law reform (Miscellaneous Provisions)Act 1956[9] and concluded those provisions read in concert with section 14 (d) of the Work Health Administration Act established jurisdiction in the Work Health Court and were an example of

> "any other jurisdiction conferred on it under any other Act"

15. In the more recent decision of *Catford*[10] Chief Justice Grant considered the broader jurisdiction of the Work Health Court in the context of whether Court had jurisdiction

[6] Hopkins v QBE Insurance Ltd [1991]NTSC 33

[7] Pages 10-16 of judgement

[8] Paragraph 17 of His Honour's judgement

[9] Such sections created a charge on insurance monies payable under an insurance contract in certain circumstances

[10] *Laminex Group Pty Ltd v Catford [2021] NTSC 92*

to consider a claim by the Employer in the form of a counterclaim and ruled that such a claim is capable of being characterised as arising from a claim for compensation as referred to in section 104 of the Return to Work Act. His honour was of the view that:

> "Part 5 of the Return to Work Act continues to regulate both claim, cancellation and reduction procedures and the benefits available and payable under the legislation. Given the Work Health Court's character and constitution as a specialist tribunal created to determine and enforce the rights and obligations arising under that Part , the jurisdiction "to hear and determine claims for compensation " is properly construed to include all matters arising out of a "claim" within the meaning of s 80 of the Return to Work Act"
>
> And further that:
>
> "section 104 of the Return to Work Act permits a person to commence a proceedings for an order or ruling in respect of a matter or question incidental to or arising out of a claim for compensation under Part 5. That formulation is broad enough to encompass either a separate application or a counterclaim by the employer even if it were to be accepted that s14(a)(i) of Work Health Administration Act is not"[11]

16. Bowes submit a claim for debt under section 132 can be equated to a claim for indemnity under section 127(3) for the purposes of the jurisdictional question. Bowes submit in the present case the liability of the employer (the principal contractor) has been decided by Allianz accepting liability for the claim on behalf of Alcan[12] accordingly there is no claim for compensation under Part V before the Court. It is argued without "matters before the Court" there is nothing to which an incidental claim can attach or arise out of and therefore section 14(c) does not confer jurisdiction in the circumstances of the present claim.

17. Alcan submit, in applying the reasoning in *Catford,* section 104 of the Return to Work Act is broad enough to include claim under section 127(3) because such a claim for indemnity arises out of the worker's "claim" for compensation rather than a "matter" before the Court.

18. At this point it is important to distinguish between section 132 and section 127 of the Act. While both provisions are contained in the same part of the Act -Part 7 of the Act titled "Insurance"- claims for indemnity under section 127 are not linked to insurance except to exclude a claim on the Nominal Insurer. Section 132 specifically refers to recovery from insurers.

19. Section 132 requires the liability for the compensation claimed to have been either agreed to or has been established according to the Act[13] before a claim for recovery is enlivened. There is also a reference to the "Court" in section 132 (2) & (3) which is defined as the Work Health Court[14]giving the " Court" the power to determine applications regarding an extension of time to pursue as claim under section 132(1). Any such application for extension of time assumes that the right to make a claim under section 132(1) has chrystallised. There is an additional question to pose in relation to the operation of section 132 and that is if the Work Health Court has specific power to consider an

[11] Note this decision is subject of appeal to the Full Court

[12] See paragraphs 10 – 13 of the Statement of Claim in this proceedings

[13] Section 132(2)

[14] Which was not referred to in Judge Martin's deliberations in Hopkins Case.

extension of time to pursue claims under section 132(1) why would it then not have the jurisdiction to adjudicate on the claim proper? However that is not a matter before this Court in the present matter.

20. Section 127(3) has the pre-condition that the worker has made an election to claim against the principal contractor not the subcontractor[15]. Once that election is made it creates a claim for indemnity against any other person who is liable to pay compensation to the worker[16]. There is no pre condition that the liability to pay compensation to the worker has already been settled by agreement or the under the Act as there is in section 132 - only that there is a claim for compensation from the principal contractor and the worker has exercised their election to proceed against the principal contractor. It is the claim for compensation that enlivens the claim for indemnity between the principal contractor and any other person who may be liable to pay compensation once the principal contractor becomes liable under the section[17]. There is no equivalent time limit as set out in section 132 the inference being the compensation payable to the worker may not necessarily have been settled, either between the parties or by order of this Court.

21. It is also prudent to consider the phrase "claim for compensation". "Compensation" is defined in the Return to Work Act as

means a benefit, or an amount paid or payable, under this Act as the result of an injury to a worker and, in sections 132 to 137 inclusive and section 167, includes:

(a) an amount in settlement of a claim for compensation; and
(b) costs payable to a worker by an employer in relation to a claim for compensation.

22. While "compensation" is not defined in Work Health Administration Act the definition in the Return to Work Act must be imported because the reference to "compensation" in section 14 of the Work Health Administration Act is inextricably linked to the Part V of the Return to Work Act[18] .

23. The reference to a "claim for compensation" in section 14 (a) (i) the Work Health Administration Act confers the jurisdiction of this Court in relation to a "claim for compensation" which must include a claim for "an amount paid or payable" which, by definition, includes any disputed claims for compensation as well as any accepted claims (where there may be a dispute about continuing compensation or treatment costs).

24. In *Hopkins* his honour concluded

The nexus between a claim for compensation under Part V and a claim against the authorised insurer for a debt arising from the operation of Part VII do not have sufficient nexus such that the latter is incidental to the former".

25. What his honour did not consider is the meaning of the additional words "arising out of" which appear in both section 14(a)(c) of the Work Health Administration Act and section 104 (1) of the Return to Work Act. In both of those provisions the jurisdiction is vested in the Court for matters arising out of a matter before the Court or a claim for compensation.

[15] See section 127 (5)

[16] Section127(3)

[17] Section 127(2)

[18] Section 14 (a)(i)

26. Using the same dictionary referred to by his honour (Macquarie Dictionary) "arising" means "come into being or action". Applying that meaning to section 14(a)(c) would mean the court has jurisdiction to hear a matter or question which has *come into being* out of a matter before the Court. Applying that meaning to section 104(1) of the Return to Work Act a person may commence proceedings before the Court for an order or ruling in respect of a matter or question incidental to or *which has come into being* out of a claim for compensation.

27. Alcan also referred the Court to my decision in *Reilly v HD Enterprises trading as Humpty Doo Hardware [2012] NTMC 3* and to the decision in *Consolidated Press Holdings Ltd v Maxwell Raymond Wheeler [1999] NTSC 58.* In my view my decision in *Reilly v HD Enterprises* does not add anything to the discussion on the issue of jurisdiction in relation to the operation of section 127 - the operation of section 127 was not before the Court.

28. In *Consolidated Press Holdings Ltd v Maxwell Raymond Wheeler [1999] NTSC 58* Kearny J considered section 127(1) in the context of whether the section included a right in the principal contractor to be indemnified by the Nominal Insurer. His Honour found it did not. Much of his honour's judgement was spent on what factors should be present to characterise someone as a "principal contractor". His Honour's attention was not directed to whether the Work Health Court had jurisdiction to consider an application under section 127(3) as the jurisdictional issue was not a ground of appeal. This authority is of limited assistance to this Court. I do not accept the argument that his honour and the magistrate in this Court did not "apparently had any concern that they were acting beyond their jurisdiction"[19]. They simply may not have turned their minds to the issue.

29. Even if there is any merit to Alcan's submission that the courts in *Wheeler's* case had no concern about jurisdiction Bowes suggested that case should be distinguished from the present case because in *Wheeler's* case the court the Court had before it was the a worker's application for compensation, in which there was an argument whether the respondent fell within the term "principal contractor" and whether that application entitled the principal contractor to seek indemnity from the Nominal Insurer. In short there was a "matter before the Court,"- the worker's claim for compensation, therefore jurisdiction was not an issue because the facts of that case fell within section 14(c). It was submitted the claim for indemnity in *Wheeler's case* was "incidental to or arising from" a "matter before the Court. In the present case there is no "matter before the Court".

30. What is missing from that submission is a recognition that section 14(c) is only one source of jurisdiction. What of the operation of 14 (a) (ii) where the Court has jurisdiction to hear and determine

> " *all other matters required or permitted by that Act (the Return to Work Act) to be referred to the Court for determination"*

31. Reading section14(c) in conjunction with section 104 (1) of the Return to Work Act it must be considered whether section 104 "permits" the principal contractor to make an application to the Court for an order that they be indemnified pursuant to section 127(3).

32. In particular the question to be answered in the present case is whether a principal contractor's claim for indemnity from another under section 127(3) is a claim which "arises out of a claim for compensation" and can form the basis of an application to the Court permitted under section 104(1) of the Return to Work Act. The answer must be yes - without a claim for compensation there would be no basis for a claim for indemnity in other words the basis for indemnity comes into being when

[19]See paragraph 14 of Alcan's submissions

there is a claim for compensation against the principal contractor under section 127(1) and in no other way.

33. Considering all of the above I find this Court is invested with the jurisdiction to consider an application by a principal contractor for indemnity under section 127(3) whether or not that principal contractor has agreed or been ordered to pay compensation to the worker or is merely subject to a claim for compensation, which has not been resolved by either agreement or court order. That jurisdiction extends to an application for indemnity from <u>any other person</u> who is liable to pay compensation to the worker the section does not limit the indemnity to the subcontractor who employed the worker by using the broader term "any person" instead of the "employer".

34. Further "liability for compensation" referred to in section 127(1) must by inference be liability to the "worker" by their employer as section 127(1) places the principal contractor in the place of the subcontractor "as if the worker has been employed by the principal contractor". Section 127(2) specifically places the principal contractor in the shoes of the worker's employer with all of the responsibilities and obligations required of an employer toward an injured worker and contemplates a circumstance where the principal contractor may seek to rely on all of the defences ordinarily available to the "employer".

35. If this Court is precluded from determining the issue of indemnity between principal contractor and subcontractor then the Worker could be subject to two sets of proceedings in which some of the same issues stand to be decided by a different court. The worker's entitlement to compensation would be subject to consideration by two different courts and may result in two different findings. This would be contrary to the objects of the Return to Work Act to ensure the scheme for compensation of workers is "efficient and effective"[20] and "is balanced to ensure that the costs of workers compensation are contained to reasonable levels for employers."[21]

36. The Respondents application to strike out the Applicant's claim is dismissed.

37. I will hear the parties on costs of the application.

Dated this 22nd day of March 2022

Tanya Fong Lim
WORK HEALTH COURT JUDGE

[20] Section 2 (c)(i) of the Return to Work Act

[21] Section 2(c)(iii) of the Return to Work Act