IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA563/2022
[2023] NZCA 198

BETWEEN	ACCIDENT COMPENSATION CORPORATION Appellant
AND	ANDERSON & O'LEARY LIMITED Respondent
BETWEEN	ACCIDENT COMPENSATION CORPORATION Appellant
AND	BUILDING CONNEXION LIMITED Respondent
BETWEEN	ACCIDENT COMPENSATION CORPORATION Appellant
AND	SOUTHERN LAKES BUILDING LIMITED Respondent

Court: Collins and Mallon JJ

Counsel: D A Laurenson KC and C J Hlavac for Appellant
V T J Sullivan for Anderson & O'Leary Limited
A J Isherwood and G D Pearson for Southern Lakes Building Limited and Building Connexion Limited

Judgment: (On the papers) 29 May 2023 at 3 pm

JUDGMENT OF THE COURT

A The application for leave to amend the grounds of appeal is declined.

B Costs on the application are reserved.

REASONS OF THE COURT

(Given by Mallon J)

Introduction

[1] The Accident Compensation Corporation (ACC) is required to classify employers in an industry or risk class that most accurately describes their activity for the purposes of setting levies payable by employers under the Accident Compensation Act 2001(the Act).[1] In 2019 ACC changed the classification of the respondents' activities to timber wholesaling, which had the effect of requiring them to pay higher levies. The respondents sought review of the reclassification, leading ultimately to the High Court dismissing ACC's appeal from the District Court decision determining that the appropriate classification for each respondent's activity was hardware and building supplies retailing.[2]

[2] ACC was granted leave by the High Court to appeal to this Court on the following question of law:[3]

> Was the High Court correct to conclude that s 170(2) of the Act will only be engaged where an employer operates two or more separately identifiable businesses, each of which must be a separate and distinct activity?

[3] ACC now applies for leave to amend the grounds of appeal to include the following additional questions:[4]

> (a) For the purposes of s 170 of the Act, in circumstances where an employer carries out one integrated operation, can:
>
> (i) an "activity" include an act, action or task and/or a series of acts, actions or tasks?
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> (ii) the employer be engaged in more than one "activity"?
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> (b) In circumstances in which an employer sells timber and other products – including, for example, plumbing supplies, hardware and building

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1 Accident Compensation Act 2001, s 170.

2 *Accident Compensation Corporation v Southern Lakes Building Ltd* [2022] NZHC 1288 [High Court decision].

3 *Accident Compensation Corporation v Anderson & O'Leary Ltd* [2022] NZHC 2517 [Leave decision].

4 Pursuant to r 34(2)(b) of the Court of Appeal (Civil) Rules 2005.

supplies – to both the general public and to trade customers as part of the same integrated operation, can the sale of timber to trade customers constitute an "activity" for the purposes of section 170 of the Act?

(c) In circumstances in which an employer is engaged in selling the same goods to both businesses and to the general public, which part/s of the Division F (Wholesale Trade) and Division G (Retail Trade) definitions in the Australian and New Zealand Standard Industrial Classification 2006 should be applied in determining whether, for the purposes of s 170 of the Act, the employer should be classified within the relevant wholesaling classification unit and/or the relevant retailing classification unit, set out in the Accident Compensation (Work Account Levies) Regulations?

[4] The respondents oppose this application.

Background

[5] Section 170 of the Act provides:

> **170 Classification of industries or risks**
>
> (1) For the purpose of setting levies payable under sections 168, 168B, and 211, the Corporation must classify an employer and a self-employed person in an industry or risk class that most accurately describes their activity, being an industry or risk class set out in regulations made under this Act.
>
> (2) If an employer is engaged in 2 or more activities, the Corporation must classify all the employer's employees in the classification unit for whichever of those activities attracts the highest levy rate under the regulations.
>
> (3) Despite subsection (2), the Corporation may classify the employer's employees in separate classification units for different activities if the employer meets the threshold (if any) specified in regulations and if—
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> (a) the employer so requests; and
>
> (b) the employer is engaged in 2 or more distinct and independent activities; and
>
> (c) each of those activities provides services or products to external customers in such a way that each activity could, without adaptation, continue on its own without the other activities; and
>
> (d) accounting records are maintained by the employer to the satisfaction of the Corporation that—
>
> (i) demonstrate the separate management and operation of each activity; and

(ii) allocate to each activity the earnings of employees engaged solely in that activity.

…

[6] "Activity" is defined in s 6(1) of the Act:

> **activity**, for the purposes of Part 6,—
>
> (a) means a business, industry, profession, trade, undertaking of an employer, a self-employed person, or a private domestic worker; and
>
> (b) includes ancillary or subservient functions relating to the activity, such as administration, management, marketing and distribution, technical support, maintenance, and product development; and
>
> (c) in the case of a self-employed person, refers to the nature of his or her work rather than the context or business in which he or she is working.

[7] The Accident Compensation (Work Account Levies) Regulations 2017 contain a list of classification units (CUs). Each CU provides a description of a business activity and the applicable levy for the activity.

[8] The respondents all operate timber and hardware stores that sell timber and hardware products both to members of the public and those engaged in trade. Up until 2019, the business activity of Building Connexion Ltd and Southern Lakes Building Ltd was assigned CU45390 – *Hardware Goods Wholesaling (not elsewhere classified)*. The classification assigned to Anderson & O'Leary Ltd was CU52330 – *Hardware and Building Supplies Retailing*. In 2019 ACC reclassified the business activity of all the respondents to CU45310 – *Timber Wholesaling*. This resulted in a higher levy due to the activity being assessed as having a higher level of workplace injury risk.

[9] The respondents applied to ACC for review of the reclassification decisions.[5] The review process resulted in ACC's decisions in respect of Southern Lakes Building Ltd and Building Connexion Ltd being set aside, and its decision relating to Anderson & O'Leary Ltd being modified.

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5 Pursuant to ss 134(5) and 236(1) of the Accident Compensation Act.

[10] ACC appealed to the District Court in respect of the decisions set aside and Anderson & O'Leary appealed in respect of the decision relating to it.[6] Judge Sinclair held that the appropriate classification for each of the respondents' businesses was CU52330 – *Hardware and Building Supplies Retailing*.[7]

[11] ACC then appealed to the High Court on questions of law.[8] ACC argued that the sale of timber to trade customers by each of the respondents constituted an "activity" in its own right. This meant that under s 170(2) it was required to classify the respondents according to the activity that attracted the highest levy. This was CU45310 – *Timber Wholesaling*.

[12] The High Court disagreed. Justice Lang found that s 170(2) was only engaged where an enterprise operates two separately identifiable businesses, with each business having a separate and distinct activity.[9] This was not the case for the respondents. They each sold a wide range of different products within and around the same premises. Customers had the same ability to view and purchase all products regardless of whether they were members of the public or engaged in trade. The only difference in the way they were treated was the price they paid at the point of sale. Therefore, in the Judge's view, the respondents operated a single integrated business at each store.[10]

[13] Having determined that s 170(2) was not engaged, the Judge went on to consider whether CU45310 – *Timber Wholesaling* was the correct classification under s 170(1). The primary issue here was whether the Court could (and should) have regard to the full definitions of "wholesale trade" and "retail trade" in the Australian and New Zealand Standard Industrial Classification 2006 (ANZSIC). ACC argued that it was not permissible to go beyond the provisional classification in each of those definitions, contending that the expanded preambles following the opening paragraphs were not relevant when determining the correct classification under s 170(1).

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6 Pursuant to s 149(1)(a).

7 *Accident Compensation Corporation v Building Connexion Ltd* [2021] NZACC 41; *Accident Compensation Corporation v Southern Lakes Building Ltd* [2021] NZACC 42; and *Anderson & O'Leary Ltd v Accident Compensation Corporation* [2021] NZACC 43.

8 Pursuant to s 162 of the Accident Compensation Act.

9 High Court decision, above n 2, at [35].

10 At [36].

[14] The Judge considered that the factors identified in the expanded preambles provided useful guidance for determining whether the respondents were most accurately described as retailers or wholesalers for the purposes of the Act.[11] Applying those factors, the Judge concluded that the classification of CU52330 – *Hardware and Building Supplies Retailing* most accurately described the activities in which the respondents were engaged.[12]

[15] ACC applied to the High Court for leave to appeal to this Court.[13] The questions of law on which it sought leave were the same the questions of law in respect of which it now seeks leave to amend the grounds of appeal to include. The Judge granted leave to appeal on the single question that he formulated as set out above (at [2]). In doing so he said that "[a]t the heart of [his] decision was [his] conclusion that s 170(2) of the Act will only be engaged where an enterprise operates two separately identifiable businesses".[14] The Judge went on to say that if any party considered it necessary for additional questions of law to be argued, they could raise those with this Court.[15]

[16] After filing its appeal in this Court, ACC filed an application to amend the grounds of appeal. It says that the further questions it has formulated (at [3] above) are additional important questions of law which are capable of bona fide and serious argument.

Relevant law

[17] Appeals to this Court on questions of law under the Act are provided for in s 163:

> **163 Appeal to Court of Appeal on question of law**
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> (1) A party to an appeal before the High Court under section 162 who is dissatisfied with any determination or decision of the Court on the appeal as being wrong in law may, with the leave of the High Court, appeal to the Court of Appeal by way of case stated for the opinion of that court on a question of law only.

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11 At [42].
12 At [47].
13 Pursuant to s 163 of the Accident Compensation Act.
14 Leave decision, above n 3, at [5].
15 At [6].

> (2) If the High Court refuses to grant leave to appeal to the Court of Appeal, the Court of Appeal may grant special leave to appeal.
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> (3) An appeal to the Court of Appeal must be dealt with in accordance with the rules of the court.
>
> (4) The decision of the Court of Appeal on any application for leave to appeal, or on an appeal under this section, is final.

[18] Given that the application to amend the grounds of appeal seeks to identify further questions of law for the purposes of an appeal under s 163, cases discussing the threshold for the grant of leave under s 163 will be relevant. In *Cullen v Accident Compensation Corporation*, this Court articulated the following principles applying to the grant of special leave under s 163(2):[16]

> [5] This Court has [the] power to grant special leave to appeal under s 163(2) of the Act. The principles applicable to an application for leave under s 67 [of the] Judicature Act 1908 apply equally to an application under s 163 of the Act. The Court will exercise this power if satisfied that there is a serious question of law capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of a further appeal. Other relevant considerations include the desirability of finality of litigation and the overall interests of justice. The primary focus is on whether the question of law is worthy of consideration.

Assessment

[19] ACC submits that the first and second proposed additional questions ([3(a) and (b)] above) are encompassed by the question of law for which leave has been granted. This is because it submits that the answer to this question is "no", based on a correct interpretation of "activity" addressed by the first and second proposed additional questions. Leave is sought to add these questions only to protect against the Court taking a narrower view of the question of law for which leave has been granted.

[20] We agree with the respondents that there is no need to amend the question of law for which leave has been granted to add these proposed additional questions. That is because we agree with ACC that its submissions on the approved question will necessarily encompass its submissions as to the meaning of "activity" that its proposed

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[16] *Cullen v Accident Compensation Corporation* [2014] NZCA 94 (footnotes omitted). Those principles were recently affirmed by this Court in *Larkin v Accident Compensation Corporation* [2020] NZCA 597 at [23], finding that the test in *Cullen* need not be disturbed, as it already set an appropriately high bar for leave and was well-established.

additional questions are intended to address. How this question of law is ultimately best formulated and answered will be for the Court hearing the appeal.

[21] As to the third proposed additional question of law ([3(c)] above), ACC contends that applying the full ANZSIC definitions excludes the possibility of a finding that an employer is engaged in both wholesale and retail activities. It submits that this defeats the purpose of s 170 to classify based on the highest risk activity. The respondents submit the question is not capable of bona fide and serious argument — the definitions should be considered as a whole when used as interpretative aids.

[22] In the District Court, ACC's argument was rejected. The Judge held that the words in the first paragraph of each definition could not be read as providing the complete definition of "wholesale trade" and "retail trade". The Judge did not agree with ACC's submission that the additional factors in subsequent paragraphs were only included in the definitions to assist in determining the "predominant activity" of a business unit for the purposes of the ANZSIC, which is not a consideration in respect of the Act's levy classification scheme. Instead, the Judge held that the additional factors further defined/clarified the broad definitions set out in the first paragraphs.[17]

[23] The High Court agreed. The Judge held that the two ANZSIC definitions in question contained "unbroken narrative[s]", and subsequent paragraphs built on the material contained in the first paragraphs.[18] In the present case, the specificity of the additional factors meant they provided useful guidance when considering whether the respondents were most accurately described as retailers or wholesalers for the purposes of the Act.[19]

[24] We consider it is not necessary to grant leave to amend the grounds of appeal to add this proposed additional question. That is because the High Court used the ANZSIC definitions only as an interpretative aid to determine the correct classification of each respondent's activity having already determined that s 170(2) did not apply.

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17 *Accident Compensation Corporation v Building Connexion Ltd*, above n 7, at [41]–[44]; *Accident Compensation Corporation v Southern Lakes Building Ltd*, above n 7, at [43]–[46]; and *Anderson & O'Leary Ltd v Accident Compensation Corporation*, above n 7, at [46]–[49].

18 High Court decision, above n 2, at [41].

19 At [42].

The Judge's approach did not therefore deprive s 170(2) of its purpose. We further consider that, in addressing the question of law on which leave has been granted, it is open to ACC to address whether the Court's approach to s 170(2) defeated its purpose.

Result

[25] The application for leave to amend the grounds of appeal is declined.

[26] Costs on the application are reserved.

Solicitors:
Young Hunter, Christchurch for Appellant
EY Law Ltd, Auckland for Anderson & O'Leary Ltd
Isherwood Le Gros Law Ltd, Nelson for Southern Lakes Building Ltd and Building Connexion Ltd