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South Australian Industrial Relations Court Decisions

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← Moore → v ← Adelaide Brighton Cement Ltd → [2003] SAIRC 69 (30 September 2003)

Last Updated: 5 March 2004

← Moore → v ← Adelaide Brighton Cement Ltd → [2003] SAIRC 69

INDUSTRIAL RELATIONS COURT (SA)

← MOORE →, Ashleigh

v

ADELAIDE BRIGHTON CEMENT LIMITED

JURISDICTION: Prosecution

FILE NO/S: AMC-02-6445

HEARING DATES: 7-11, 21 and 22 July 2003

JUDGMENT OF: Industrial Magistrate M Ardlie

DELIVERED ON: 30 September 2003

CATCHWORDS:

Prosecution - Plea of not guilty - Alleged failure to provide and maintain so far as was reasonably practicable a safe system of work - Alleged failure to provide such information instruction training and supervision as were reasonably necessary to ensure that the employee was safe from injury and risks to health - Defendant engaged independent contractor to undertake repair operation involving replacement of cable - Repair operation carried out by employees of independent contractor on board ship owned by the defendant (Accolade II) - "Deemed employee" fatally injured when struck by a cable - Whether defendant was in control of repair operation as envisaged by s 4(2) [Occupational Health Safety and Welfare Act 1986](#) - Held - Extended duty under [s 19\(1\) Occupational Health Safety and Welfare Act 1986](#) arising from [s 4\(2\)](#) did not apply as defendant not in control - Defendant not guilty - Complaint and summons dismissed - [S 4, 4\(2\), 19\(1\) Occupational Health Safety and Welfare Act 1986](#).

Arrowcrest Group Pty Ltd v Stevenson (1990) 57 SAIR 368

CSR Ltd trading as CSR Wood Panels v Stevenson (1995) 184 LSJS 204

Softwood Holdings Ltd v Stevenson (1996) 188 LSJS 482

Complete Scaffold v Adelaide Brighton Cement & Anor [\[2001\] SASC 199](#)

← **Moore** → v *Fielders Steel Roofing Pty Ltd* [\[2003\] SAIRC 32](#)

REPRESENTATION:

Counsel:

Complainant: Mr J Powell

Defendant: Mr H Dixon SC with Ms K Noyen

Solicitors:

Complainant: Crown Solicitor's Office

Defendant: EMA Legal

Introduction

1. Adelaide Brighton Cement ("the defendant") through its counsel pleaded not guilty to an amended complaint and summons.
2. The amended complaint and summons as agreed between the complainant and the defendant stated as follows:-

"THE COMPLAINT of ASHLEIGH ← **MOORE** →, Inspector and Public Officer, Attorney General's Department of Level 3, 1 Richmond Road, Keswick (hereinafter called "the complainant") this 24th day of April 2002 who states that ← **ADELAIDE BRIGHTON CEMENT LTD** → of Level 1, 157 Grenfell Street, Adelaide (hereinafter called "the defendant") in the State of South Australia.

On the 13th day of May 2000, at Birkenhead in the said State, being an employer, failed to ensure so far as was reasonably practicable that its employee, namely Colin Hutchins, was, whilst at work, safe from injury and risk to health and, in particular:

- (a) failed to provide and maintain so far as was reasonably practicable a safe system of work; and
- (b) failed to provide such information instruction training and supervision as were reasonably necessary to ensure that the employee was safe from injury and risks to health.

Contrary to [section 19\(1\)](#) of the [Occupational Health Safety and Welfare Act, 1986](#).

Particulars

1. At all material times the defendant owned and operated the ship Accolade II. At all material times the Accolade II was being used to transport limestone.
2. On 12 May 2000 the Accolade II moored at Birkenhead. Whilst attempts were being made to

offload the limestone from the cargo hold, a cable supporting the aft longitudinal scraper aft beam broke, rendering repairs necessary.

3. On 13 May 2000 the defendant engaged the services of Macweld Industries Pty Ltd to provide the labour necessary to assist with replacing the broken cable ("the repair operation"). The engagement was partly oral and partly in writing. The oral conversations are set out in the statements of Mertzanidis and McMahon and the documents are CH10. Peter Hertzog and Colin Hutchins, riggers, were employed by Macweld Industries Pty Ltd, and were instructed by Macweld Industries Pty Ltd to attend the Accolade II to assist with the repair operation. At all material times Peter Hertzog and Colin Hutchins were under the control and direction of the defendant in that:

- (a) The defendant organized the labour, plant and supervision for undertaking the repair operation.
- (b) The defendant determined the scope of the employee's work - namely, the provision of labour for carrying out the repair operation.
- (c) The repair operation was to be carried out under supervision supplied by the defendant.
- (d) Plant specific to and necessary for the repair operation was supplied by the defendant.
- (e) The defendant was the occupier of the workplace at which the employee was injured while carrying out repair work to the defendant's property.
- (f) The defendant determined the specific nature of the job to be carried out - namely, the repair operation involving the replacement of a broken cable.

4. Colin Hutchins was fatally injured when he was struck by the cable he was feeding onto a winch drum during the repair operation.

5. The defendant failed to provide and maintain, so far as was reasonably practicable, a safe system of work in respect of its employee in that it:

- (a) failed to carry out a hazard identification and risk assessment in relation to the repair operation.
- (b) failed to ensure the aft longitudinal scraper aft beam was supported throughout the repair operation; and
- (c) failed to ensure all persons were either clear of the range of the starboard cables or behind a suitable barrier (a structure which would have prevented such persons from becoming injured) whilst winching was carried out during the repair operation.

6. The defendant failed to provide such information instruction training and supervision that was reasonably necessary to ensure that its employee was safe from injury and risks to health in that it:

- (a) failed to provide adequate instruction and training to the engineer/supervisor, Stephanie (sic) De Nichilo, in relation to:

- carrying out a hazard identification and risk assessment in relation to the repair operation;

- calculating relevant weights (the combined weight of the aft scraper and its components and the aft beam), establishing the points to be supported (the port and starboard ends of the aft beam of the aft scraper), and calculating the negating forces (the forces that would negate the consequences (falling) of the beam being freed) required in the repair operation;

- ensuring all persons were clear of the range of the starboard cables or behind a barrier (a structure which would have prevented such persons from becoming injured) whilst winching was carried out during the repair operation; and

(b) failed to provide adequate instruction and training to the riggers Peter Hertzog and Colin Hutchins in relation to:

- carrying out a hazard identification and risk assessment in relation to the repair operation;

- the rigging procedure required for the repair operation and the safe implementation of the supporting/lifting gear (pigstyng, clamps or crane) to be used;

- ensuring all persons (Colin Hutchins) were clear of the range of the starboard cables or behind a barrier (a structure which would have prevented such persons from becoming injured) whilst winching was carried out during the repair operation."

3. As Mr Powell, counsel for the complainant indicated at the commencement of his closing address there is little dispute in relation to the facts that evolved from these proceedings. I set out below a summary of the relevant facts.

Summary of Relevant Facts

4. It is not disputed that the defendant owned and operated the ship the *Accolade II* ("*Accolade*").

5. *Accolade* was used by the defendant to transport limestone from Klein Point on the Yorke Peninsula to the defendant's premises at Birkenhead.

6. The limestone cargo was being offloaded just before midnight on 12 May 2000. An equipment failure occurred when a cable supporting the aft longitudinal scraper aft beam broke necessitating repair work to be undertaken.

7. As a result of the cable breaking the aft beam dropped on the port side and became wedged (at its end) against the hold of the ship. The aft beam was at an angle. The position of the aft beam is depicted in the drawing marked Exhibit C1.

8. Colin McMahon ("*McMahon*"), a process operator employed by the defendant, commenced his shift at 11.00 pm on 12 May 2000. He described his position back then as a team leader and the point of contact for the running of the shift. Just before midnight he was advised of a problem that had occurred on the *Accolade*. This information was conveyed to him by a wharf operator. He was told that there was a breakdown. He went aboard the *Accolade* to inspect the breakdown. He observed that the aft scraper had snapped a cable and had dropped down inside the ship and in particular the aft beam had dropped down the port side.

9. Following his inspection McMahon returned to the plant and rang the on-call mechanical supervisor Stephenie De Nichilo ("*De Nichilo*"). De Nichilo was an employee of the defendant. He indicated that he called her because it was company procedure when any major mechanical breakdown occurred to contact the person on the calling list of mechanical on-call persons. McMahon's recollection of that conversation with De Nichilo was that he was instructed to organise a rigger and start checking for parts. Further De Nichilo indicated that she would travel into work.

10. McMahon stated that after his conversation with De Nichilo he went through the list of on-call riggers and ascertained that there was one rigger listed as being on-call but it turned out that he was unavailable because of illness. This particular on-call rigger was an employee of the defendant. McMahon indicated that once the defendant's employees have been exhausted the standard procedure

was to call the Macweld supervisor and this person's name appeared on the list indicating who was on-call from Macweld. McMahon then rang Macweld Industries ("Macweld") supervisor on the calling list. The person listed on that occasion was Vasilis Mertzanidis ("Mertzanidis") He recalled speaking to Mertzanidis, telling him what the problem was and that a rigger was required. He could remember little else. Mertzanidis was known to him at the time. He stated that Mertzanidis had previously worked for the defendant in a relatively senior position. Whilst his recollection was somewhat vague he stated that he did not go into much detail about the breakdown because he was of the opinion that Mertzanidis knew the type of work that was involved.

11. McMahon indicated that Peter Hertzog ("Hertzog"), an employee of Macweld, arrived on site shortly after De Nichilo. McMahon stated that he went on board the Accolade with De Nichilo and he thought that Hertzog came on board the ship whilst he was still there with De Nichilo. McMahon described an attempt to lower the scraper mechanism to take the tension off the cables. He maintained this was without success.

12. McMahon recalled (tr 137, 138) that Hertzog seemed to be familiar with the job more so than himself and De Nichilo. Hertzog told them what was required and Hertzog rang Mertzanidis to arrange another rigger and more labour. McMahon knew that other employees of Macweld were coming on site. Later he saw Colin Hutchins ("Hutchins") and he also became aware that Billy Jackson ("Jackson") would be coming to assist in the repair operation. Both Hutchins and Jackson are employees of Macweld. McMahon had no involvement whatsoever in the repair operation.

13. De Nichilo, as McMahon indicated, carried out an inspection before Hertzog arrived. She then carried out a second inspection in the presence of Hertzog. This inspection was conducted from the cross-scraper platform. De Nichilo stated that after she and Hertzog had made observations from this location a discussion followed regarding the positioning of the scraper and also what resources were required to carry out the repair work. De Nichilo said she was concerned about the weight of the scraper on the starboard wire and she together with Hertzog decided to lower the scraper as much as possible into the limestone cargo to provide support and take weight off the starboard side wire. Contrary to McMahon's recollection De Nichilo stated that the winch was operated and the scraper was lowered into the limestone cargo and this resulted in the wire on the starboard side becoming slack.

14. De Nichilo said (tr 206, 251) that Hertzog made an assessment as to what resources were required to carry out the repair operation. Hertzog's requirements included the provision of a crane, other employees from Macweld possessing particular skills, and the tools that were required to perform the work. De Nichilo obtained details of the cable required and passed that information onto Hertzog. De Nichilo then left the site and indicated that as far as she was concerned Hertzog was in charge of the work to be undertaken. She did not return home at that stage but went to her office at the defendant's premises and carried out some paperwork. Before she left the defendant's premises to go home she inquired of Hutchins, who had come to the site, whether he needed anything further. She was contacted later in the morning of 13 May 2000 regarding the progress of the job and returned on board the Accolade about midday.

15. The involvement of Macweld and its employees to undertake the repair work was initiated by the telephone call from McMahon to Mertzanidis. This telephone call was part of the procedure in place at the time when having ascertained that there were no riggers employed by the defendant available to perform the work Macweld was then called. Initially the repair work was undertaken by Hertzog and Hutchins, both very experienced riggers, together with Jackson, a trade's assistant. Like Hertzog both Hutchins and Jackson received a telephone call from Mertzanidis asking them if they were available to attend the defendant's premises and when they confirmed availability Mertzanidis indicated to them the nature of the work.

16. Throughout the repair operation Hertzog and Hutchins assessed what equipment and materials they might require and further called in additional resources when a welding cut was required. This

involved further employees of Macweld, Serotski and Vaux. As Hertzog indicated (tr 361) he did not in any way look to De Nichilo for advice or instructions as to how the job should be performed because he regarded himself as a qualified rigger and able to perform the necessary work. He had on a number of prior occasions undertaken the task of cable replacement on the Accolade. Hertzog did indicate that he was aware that he could call upon the defendant or De Nichilo for any information that he required to enable him to carry out the work and further could request of the defendant or De Nichilo any additional equipment to enable the job to be carried out.

17. As I have mentioned Serotski and Vaux were requested by Hutchins to attend the Accolade and cut a plate enabling access to the cable. Sertoski and Vaux both employees of Macweld were already at the defendant's premises performing other work. Serotski stated (tr 433) that he spoke with his supervisor at Macweld, Grant Leask, before he went to the Accolade to perform the work requested by Hutchins. He said he called Leask to seek his approval and permission to work on the Accolade.

18. Adam Durham ("Durham"), Production Supervisor employed by the defendant, commenced work at 3.00 am on 13 May 2000. He was contacted about 11.30 am over the radio by Hertzog to operate the winch. Durham operated the winch acting under the instructions he received from Hertzog.

19. I was referred to written documentation in relation to the replacement of the broken cable (see Exhibits C9 and D5). In particular the purchase order of the defendant directed to Macweld forming part of Exhibit C9 confirms that the defendant required Macweld Industries to replace as required the damaged hoisting wires on the Accolade II aft longitudinal scraper. This type of engagement was contrasted with a labour only or labour hire arrangement which Macweld from time-to-time undertook with the defendant (see Exhibit D16). An explanation of the two types of work appears at tr 605. The explanation was that the position accepted by the parties is that Macweld has two types of work that it is called upon to do by the defendant. One type of work is where Macweld is given a project or a repair or maintenance job to carry out under Macweld's supervision and the other type is to provide qualified tradespeople to carry out repairs under the defendant's supervision which type of work is labour hire through Macweld and the defendant's purchase orders reflect that. The two purchase orders that make up Exhibit D16 are examples of purchase as labour hire through Macweld.

Burden of Proof - Elements of the Offence

20. This proceeding is a criminal prosecution in the strictest sense of that term. The prosecution bears the onus of proving each necessary element of the offence charged beyond reasonable doubt. The defendant does not have to prove anything.

21. It has been held that the essence of the offence created by [s 19](#) arises from putting an employee at risk, rather than any injury which may have resulted. Once such a risk has been proved it is not an essential ingredient of the offence for the prosecution to prove precisely how that risk became evident and caused a particular injury. See *Arrowcrest Group Pty Ltd v Stevenson* (1990) 57 SAIR 368 in particular at 373, 374.

22. The key elements or ingredients of the offence created by [s 19](#) were considered by the Full Court of the Supreme Court in *CSR Ltd trading as CSR Wood Panels v Stevenson* (1995) 184 LSJS 204 in particular at 205 per Lander J.

23. The Full Court of the Supreme Court again dealt with the key elements of the offence created by [s 19](#) in *Softwood Holdings Ltd v Stevenson* (1996) 188 LSJS 482. At 484 Prior J with whom the other members of the Full Bench concurred set out the ingredients:-

"I agree with the submissions put by the Solicitor-General. The respondent had to prove beyond reasonable doubt that the appellant was an employer, that it employed Pasin, that Pasin was exposed to a foreseeable risk of injury and that there were one or more measures which the appellant may have practically taken, but did not take, which would have eliminated or ameliorated that risk. The risk

must be a foreseeable risk because the obligation upon the employer is to ensure the safety of the employee, "so far as is reasonably practical". The evidence clearly established beyond reasonable doubt that Pasin had been exposed to a foreseeable risk of injury. Indeed the evidence justified a finding that the appellant foresaw the risk of injury arising from the system of work actually in place. Nevertheless, all that was necessary for the prosecution to prove was that the system used by the appellant on the relevant day was unsafe and that, as a result, there was a foreseeable risk to an employee. The system of work in this case was one involving a foreseeable risk that the timber stacks would be unstable and that they might fall and cause injury. The risk was foreseeable, even if it was unlikely or improbable: Council of the Shire of Wyong v Shirt [1980] HCA 12; (1980) 146 CLR 40 at 47-48. The evidence before the magistrate was to the effect that the stack was unstable, with everyday events likely to cause injury. The system of work gave rise to a foreseeable risk of injury regardless of the reason for the collapse on this occasion. The stacking of the timber caused a foreseeable risk of collapse as a result of a combination of everyday events. The appellant's liability was established, even if it was not reasonably possible to "envisage the precise concatenation of circumstances" that gave rise to Mr Pasin's death. The contrary submission put below and before this court is incorrect. The mere fact that the way in which an injury happened could not be anticipated does not exclude liability. The charge was proved beyond reasonable doubt. The appeal must be dismissed."

24. The complainant must prove each necessary element of the offence charged beyond reasonable doubt. This means *inter alia* that the complainant must prove the defendant was an employer and that within the meaning of the Act it employed Hutchins.

25. The defendant was due to the application of [s 4\(2\)](#) of the Act the deemed employer of Hutchins. Hutchins was an actual employee of Macweld. What is in contention is whether the duty of the defendant under [s 19\(1\)](#) as enlarged by [s 4\(2\)](#) inculcates it in relation to Hutchins as set forth in the complaint and summons. The duties so imposed upon the defendant according to [s 4\(2\)](#) "extend only to matters over which the principal has control".

26. [S 4\(2\)](#) of the Act provides:-

"For the purposes of this Act, where a person ("the contractor") is engaged to perform work for another person ("the principal") in the course of a trade or business carried on by the principal, the contractor, and any person employed or engaged by the contractor to carry out or to assist in carrying out the work, shall be deemed to be employed by the principal but the principal's duties under this Act in relation to them extend only to matters over which the principal has control or would have control but for some agreement to the contrary between the principal and the contractor." (my emphasis).

27. The latter part of [s 4\(2\)](#) namely:-

"or would have control but for some agreement to the contrary between the principal and the contractor"

was as Mr Powell contended (tr 656) not applicable to this matter.

28. The Full Court of the Supreme Court in *Complete Scaffold v Adelaide Brighton Cement & Anor* [2001] SASC 199 (18 June 2001) ("*Complete Scaffold*") considered the scope of [s 4\(2\)](#). Per Doyle C J:-

"[50] It is a provision which I find puzzling.

[51] The maintenance work carried by Allied was done to facilitate the conduct by ABC of the trade or business that it carried on at its plant. ABC needed to do the work to carry on its trade or business. Carrying out maintenance work on its premises is something done by ABC as part of its trade or business, and in a sense in the course of that trade or business. But if that suffices for the purposes of [s 4\(2\)](#), then whenever a person engaged in trade or business employs a contractor to do work that

advances or facilitates that trade or business, the principal will be a deemed employer of any worker employed or engaged by the contractor. On this approach a firm that contracts with a contractor to clean its offices, will be a deemed employer of the cleaners. A business that retains an accountant for accounting advice, or a solicitor for legal advice, will be a deemed employer of the accountants and solicitors who work in those firms... I give these example merely to illustrate the wide reach of the suggested meaning of the provision. Of course, one must not overlook the limitation found in the latter part of [s 4\(2\)](#), and the need to consider the effect of the operative provisions of the *OHSW Act*. Nevertheless, allowing for all that, the suggested scope is so wide as to make me think that such a meaning could not have been intended.

[52] But, in the end, I have been unable to identify a more limited meaning that fits with the words of the provision. It is tempting to think that the expression "in the course of a trade or business" is to be read in limited fashion.

...

[54] The statutory expression is sufficiently imprecise to provide no firm criterion for a more limited operation to be given to the provision. Accordingly, with some hesitation and with some unease about the implications of the decision, I accept the submission that Mr Henry is to be deemed for the purposes of the *OHSW Act* to have been employed by ABC.

[55] ...But it has to be borne in mind that as a deemed employer ABC has limited duties under the Act. Mr Henry's injury resulted from a casual act of negligence by a scaffolder who put two planks in place, without making adequate enquiry as to how they would be used, and without considering the risk of the planks shifting. Mr Henry was injured as a result of carelessness in the course of a matter over which ABC had no control.

[56] 'Control' in s 4(2) of the *OHSW Act* should be read as referring to actual control, that is to things which the deemed employer is managing or organising. Unless s 4(2) is limited in this way, its reach would be very great."

29. S 4(2) concerns the relationship between a contractor engaged to perform work for a principal and if the contractor in turn employs or engages any person that person "shall be deemed to be employed by the principal".

30. The relationship that prevailed between Macweld and the defendant falls within s 4(2). Macweld was the contractor engaged to perform work for the principal the defendant and Macweld the contractor employed Hutchins to carry out or to assist in carrying out the work and therefore Hutchins pursuant to s 4(2) "shall be deemed to be employed by the principal". Much debate then centred on the remainder of the words that appear in s 4(2) namely "but the principal's duties under this act in relation to them extend only to matters over which the principal has control...".

Summary of Submissions Made By Counsel for the Defendant in Relation to the Scope of s 4(2)

31. Mr Dixon SC of counsel for the defendant submitted that the defendant did not have actual control over the repair work as contemplated by s 4(2) of the Act. The defendant was not managing or organising the repair work.

32. Mr Dixon SC highlighted aspects of the evidence when addressing the application of s 4(2). He mentioned such matters as:-

* The defendant engaged the services of Macweld to carry out the repair operation;

* Macweld at the request of the defendant inspected and made an assessment of what the repair

operation required;

- * Macweld through Hertzog carried out the assessment and selected the required resources and in turn (through Mertzanidis) selected the persons regarded as competent to perform the job required;
- * Macweld instructed or directed its employees to carry out the repair operation
- * In carrying out the repair operation Macweld employees (Hertzog/Hutchins):-
 - * Assessed what equipment and materials were needed;
 - * Requested the defendant to make available equipment and materials;
 - * Obtained from the defendant such information as they regarded as necessary to enable the repair operation to be undertaken;
 - * As the job progressed determined what additional resources were required and organised the same;
 - * At all times determined how the actual job was to be done and directed persons working on the job as to what to do and when;
 - * Did not seek approval or look to the defendant in any way relevant to the carrying out of the job;
 - * Regarded themselves in charge of the repair work.

33. Mr Dixon SC referred to the defendants role in the repair operations namely:-

- * The defendant satisfied itself that the persons directed by Macweld to carry out the task were experienced or competent;
- * The defendants personnel responded to requests to provide resources;
- * Did not supervise or purport to supervise the repair operation;
- * Did not give directions as to how the repair operation was to take place;
- * Were not consulted and did not authorise the use of additional resources that were required during the repair operation;
- * Defendants employees when on board the Accolade to perform any task were under the instruction and direction of Macweld employees.

Summary of Submissions Made By Counsel for the Complainant in Relation to the Scope of s 4(2)

34. Mr Powell of counsel for the complainant submitted that Hutchins was a deemed employee of the defendant due to the operation of s 4(2) and that he was under the control of the defendant. Mr Powell stated the defendant organised the labour, organised the plant, organised the supervision, determined the scope and nature of Hutchins' work, was the occupier of the site and De Nichilo, the on call supervisor/engineer, was a direct employee of the defendant.

35. Mr Powell contended that the replacement of the cable was work in the course of the trade or business carried out by the defendant. There was no contrary assertion by counsel for the defendant on this topic.



36. I summarise Mr Powell's submissions on the topic of control. He referred to His Honour Chief Justice Doyle's comment that the word control in s 4(2) of the act should be read as referring to actual control that is to things which the deemed employer is managing or organising. Mr Powell contended that this does not include performing the actual job but is limited to managing and organising the job.

37. The defendant was in control because it knew through De Nichilo and McMahon what had happened. Both De Nichilo and McMahon went on board the Accolade and inspected the breakdown. The defendant through its employees organised the repair operation which involved the contacting and contracting of skilled labour and the arrangements for equipment, plant, cable and so on. In this regard reference was made to para 3 (a) to (f) inclusive of the complaint and summons as matters indicating the control exercised by the defendant.

38. Supervision was provided by De Nichilo although the supervision she provided fell short of what was required namely, specific information and specific guidance in relation to the hazards involved and the identification and assessment of the risks.

39. The defendant owned and operated the ship. The defendant managed and organised the job and Mertzandis, the Macweld supervisor, made no request for supervision to be supplied (tr 156).

40. S 4(2) exists to prevent an employer escaping culpability simply by getting someone else to do the job.

41. Mr Powell at this point in his submissions indicated in the alternative, culpability still exists under the definitions of employer/employee contained in s 4 of the Act and made reference to  **Moore**  *v Fielders Steel Roofing Pty Ltd* [2003] SAIRC 32 ("*Fielders Steel*"). In *Fielders Steel* the relationship between the defendant and the worker was not a relationship between a contractor engaged to perform work for a principal and the contractor in turn employing or engaging a person to perform work as envisaged by s 4(2). The contract was between Select Staff, a labour hire company, and the worker Troy Holmes. Select Staff in turn placed Troy Holmes on the work site of its client, the defendant. This is not the situation that prevails here. S 19 (1) of the Act imposes a duty on an employer "in respect of each employee employed or engaged by the employer". The defendant's engagement was with Macweld. There was no engagement of any particular employee. I gained the impression that in any event Mr Powell did not make his submission with any force and indeed conceded that a different factual situation prevails here than the one which existed in the matter of *Fielders Steel* (tr 646). I reject the alternative argument put forward by the complainant.

Summary and Conclusions

42. It was suggested by Mr Powell that s 4(2) exists to prevent an employer escaping culpability simply by getting someone else to do the job. That is so, but there still remains the application of the limitation upon a deemed employers liability contained in s 4(2) itself. I am mindful that in construing this statute that it is social legislation intended to secure the safety and welfare of persons at work and to protect them against the risks.

43. S 4(2) enlarges the scope of the s 19(1) duty so that it extends for the benefit of an independent contractor of the principal (employer) upon whom the duty is imposed, or an employee of the independent contractor.

44. I have referred above to the judgment of His Honour Chief Justice Doyle in *Complete Scaffold*. As His Honour stated a deemed employer has limited duties under the act. The injured party in *Complete Scaffold* sustained injuries as a result of carelessness in the course of a matter over which the deemed employer had no control. His Honour indicated that the word "control" should be read as referring to actual control that is, to things which the deemed employer is managing or organising. In this regard I do not accept the complainant's submission that managing and organising does not

include performing the actual job. Indeed as the Chief Justice stated when addressing the factual situation in *Complete Scaffold* namely the erection of scaffold by a specialist independent contractor (para 70):-

"In my opinion the placement of scaffolding was not something over which ABC had control. ABC was not carrying out the work, or supervising it."

45. From the totality of the evidence it is in my view clear that the defendant contracted with Macweld to assess, organise, resource (albeit using the defendant's tools, materials and equipment) and undertake the repair operation in its totality. This was not a supply labour only situation.

46. The defendant engaged the services of Macweld to undertake the repair work namely the replacement of the cable supporting the aft longitudinal scraper aft beam. The fatal injuries sustained by Hutchins resulted from the sudden tensioning of the starboard cable during the winching process following the replacement of the cable. Control over the repair task rested with Macweld as the expert contractor hired to perform the work.

47. Consistent with the approach of His Honour Chief Justice Doyle in *Complete Scaffold* the principal (employer) or deemed employer, in this case the defendant, is not fixed with the expanded s 19(1) duty in all circumstances. The duty exists only in relation "to matters over which the principal (employer) has control". The defendant did not have control.

48. I therefore find the defendant not guilty.

Order

49. The order of the Court is:-

The complaint and summons against the defendant under [s 19\(1\)](#) of the [Occupational Health Safety and Welfare Act 1986](#) is dismissed.