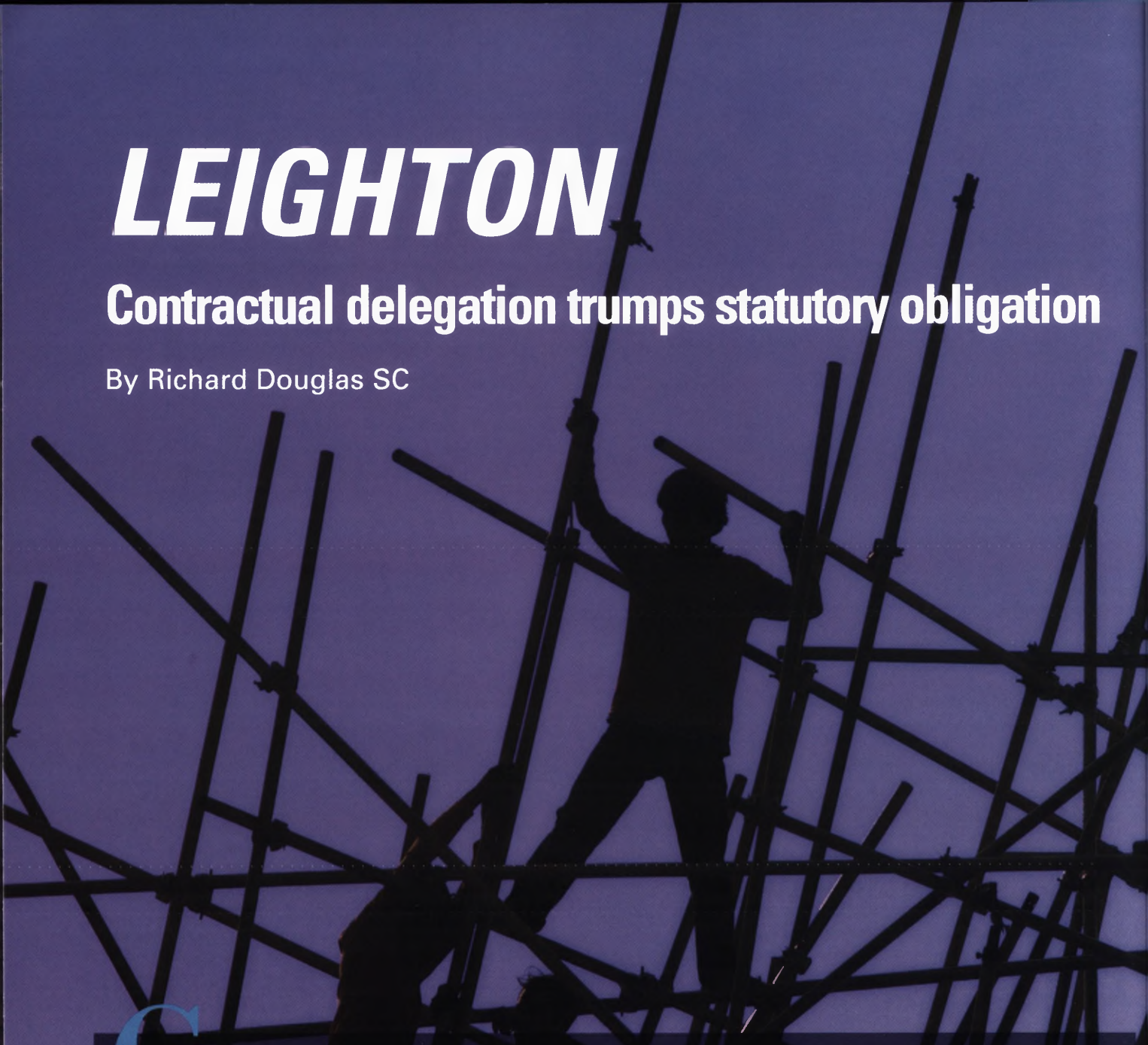
# LEIGHTON

## Contractual delegation trumps statutory obligation

By Richard Douglas SC



Construction site injury claims often entail a scramble for target defendants. Such a scramble may be initiated by:

- an employee of a subcontractor who has not achieved the requisite statutory injury threshold for suit against the employer;
- a non-employee subcontractor; and
- an employer/subcontractor joined as a defendant and seeking tortfeasor contribution against a superior contractor or principal.

Occupational health and safety legislation in the states and territories prescribe obligations of wide ambit protecting construction site personnel. An example is the *Occupational Health and Safety Act* 2000 (NSW) (the NSW Act). These enactments oblige not just employers, but also non-employer principal contractors and subcontractors.

Does such OH&S legislation assist in the grounding of a tortious duty of care being owed by a principal contractor to an injured low order subcontractor or subcontract employee? Given the approach of the High Court in *Leighton Contractors Pty Ltd v Fox*,[1] the answer must be 'no'.

### NEGLIGENCE NOT BREACH OF STATUTORY DUTY

In canvassing *Leighton*, it is important to understand that the cause of action in question was one in the tort of negligence, not a tortious cause of action for breach of statutory duty. The court was at pains to identify that the NSW Act, with which it was concerned, afforded little if any scope for a private right of action for breach of statutory duty.[2]

In contrast, the *Workplace Health and Safety Act* 1995 (Qld) does provide such a right of action.[3]

### THE FACTS IN *LEIGHTON*

On the construction project in question:

- Leighton was the principal contractor.
- Downview was Leighton's subcontractor.

- Still and Cook were Downview's concrete pumping subcontractors.
- The plaintiff (Mr Fox) and one Stewart, respectively, were the subcontractors of Still and Cook for a concrete pour scheduled for 7 March 2003.
- The plaintiff was injured in the pour when Stewart was in the process of cleaning a concrete pouring pipe. While the plaintiff was in the vicinity, the pipe had air pressure applied to it, swung violently under such pressure, and struck and injured the plaintiff.

The primary judge dismissed the negligence claim against Leighton and Downview respectively, but held against other parties. The NSW Court of Appeal overruled both the primary judge's dismissals.

Neither the plaintiff nor Stewart had any site induction training. Furthermore, the primary judge found that there was no adequate system of work in place for safe conduct of the pipe cleaning activity. Those findings, in turn, founded the Court of Appeal's findings against Leighton and Downview.

Under the subcontract between Leighton and Downview, the latter assumed the obligation of complying with a safe work method statement and the requirement of the NSW Act and *Occupational Health and Safety Regulation* 2001 (NSW) (the Regulation). Additionally, Downview was required to ensure that all persons proposing to engage in site work attend a prior site induction.

The primary judge had found that pipe-cleaning was a self-contained operation, not requiring co-ordination with other site trades.

## OH&S OBLIGATIONS

Two key statutory obligations inherent in *Leighton* were identified by the High Court.

Clause 213(1) of the Regulation required Leighton to be satisfied that a person attending the site had completed OH&S induction training. Further, s28 of the NSW Act imposed a statutory duty on Leighton to ensure that all systems of work and the working environment were safe and without risk to health to employees, and other persons coming on to the site.[4]

Downview carried similar statutory obligations.

## THE RELEVANT PRINCIPLES

Two legal principles expressly founded the High Court's upholding of the appeal by Leighton.

First, the court reiterated the principle that it had espoused in *Sweeney v Boylan Nominees Pty Ltd*;[5] namely, the common law distinction between independent contractors and employees for the purpose of vicarious liability in tort.

Second, the court referred to the principle that a principal was entitled to delegate a construction task to an apparently reputable third-party subcontractor.[6] This principle, of course, was subject to instances of non-delegable duty.[7]

The gravamen of the last-mentioned principle was expressed by Brennan J (as Brennan CJ then was), in *Stevens v Brodribb Sawmilling Co Ltd*,[8] in these terms:

'The duty to use reasonable care in organising an activity does not import a duty to avoid any risk of injury; it imports a duty to use reasonable care to avoid unnecessary risks of injury and to minimise other risks of injury. It does not import a duty to retain control of working systems if it is reasonable to engage the services of independent contractors who are competent in themselves to control their system of work without supervision by the entrepreneur. **The circumstances may make it necessary for the entrepreneur to retain and exercise the supervisory power or to prescribe the respective areas of responsibility of independent contractors if confusion about those areas involves a risk of injury.** But once the activity has been organised and its operation is in the hands of independent contractors, liability for negligence by them within the area of their responsibility is not borne vicariously by the entrepreneur.' [Emphasis added]

The emphasised portion of the above extract indicates that clarity (or absence of 'confusion') between trades must be established by the principal contractor. Injury caused by inadequacy in this sphere can support a right of action against such a principal.

## THE DECISION

Despite the above provisions of the NSW Act and Regulation, the duty of care contended a propos Leighton (or one having the content alleged by the plaintiff, Mr Fox) >>

was eschewed by the High Court.

The basis for upholding Leighton's appeal can be gleaned from the following passages:

'[49] The obligation imposed on Leighton under the Regulation, while not founding an action for breach of statutory duty, is central to the Court of Appeal's conclusion that a common law duty existed. **While it is true that obligations under statutory or other enactments have relevance to determining the existence and scope of a duty, it is necessary to exercise caution in translating the obligations imposed on employers, principal contractors and others under the OHS Act and the Regulation into a duty of care at common law.** This is because, as Gummow J explained in *Roads and Traffic Authority (NSW) v Dederer*, "whatever their scope, all duties of care are to be discharged by the exercise of reasonable care. They do not impose a more stringent or onerous burden."

...

[51] ... Leighton is correct in contending that the Court of Appeal imposed on it a duty to provide induction training to Mr Fox and Mr Stewart in the safe method of line cleaning, a function that forms part of the activity of pumping concrete.

[52] ... If Leighton owed a duty to Mr Fox and Mr Stewart to provide induction training to them in the safe method of line cleaning, it owed a duty to provide training in the safe method of carrying on every trade and conducting every specialised activity carried out on the site to every worker on the site. There is no reason in principle to impose a duty having this scope on a **principal contractor.** The latter is **unlikely to possess detailed knowledge of safe work methods across the spectrum of trades involved in construction work. And a duty to provide training in the safe method of carrying out the contractor's specialised task is inconsistent with maintenance of the distinction that the common law draws between the obligations of employers to their employees and of principals to independent contractors.**' [Emphasis added]

## DOWNVIEW

Broadly similar considerations informed the upholding of the appeal à propos Downview. Further, the High Court held that nothing in the Downview subcontract served to impose the duty of care alleged by the plaintiff, Mr Fox, to be harboured by Downview.[9]

## CONCLUSION

The scramble for parties will remain in construction cases.

Any party seeking to circumvent the principles in *Leighton* would do well to examine closely the statement of principle by Brennan J in *Stevens*. A favourable result may be obtained if the facts support a finding that the injury in question occurred in circumstances where a principal contractor (or subcontractor) fell short in terms of ensuring proper organisation of the task in question, such that there remains patent uncertainty and confusion between contractors as to their respective areas of responsibility.

In many cases, however, such point of certainty would have been reached under the contractual matrix well before the activity in question which gave rise to the relevant injury.

It is significant also that, on the facts of *Leighton*, the pipe-cleaning in question was found to be a self-contained task. Had the plaintiff been injured in some cross-trade activity, his prospects of recovery would perhaps have been improved.

Nonetheless, breach of OH&S statutory obligation will not invariably assist in grounding a tortious duty of care or establishing a breach thereof. ■

**Notes:** **1** [2009] HCA 35; (2009) 83 ALJR 1086. **2** *Leighton* at [43], footnote 50. **3** *Bourk v Power Serve Pty Ltd* [2008] QCA 225. **4** *Leighton* at [35], [36], [37]. **5** (2006) 226 CLR 161. **6** *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22; *Stevens v Brodribb Sawmilling Co Ltd* (1986) 160 CLR 16 per Brennan J at 47-8; approved in *Leighton* at [20]. **7** *Leighton* at [21]. **8** *Stevens v Brodribb Sawmilling Co Ltd* at 47-8. **9** *Ibid* at [60].

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