“Competent Professional Advice”

Section 42(2)(a)
Workers Rehabilitation and Compensation Act 1986 (SA)

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The recent judgment of the Full Bench of the South Australian Workers Compensation Tribunal ("the Tribunal") in WorkCover Corporation/ Employers Mutual Ltd (Pollard Brothers Pty Ltd) v Mericka [2012] SAWCT 42 provides welcome clarification to solicitors who provide advice to clients on redemptions under section 42 of the Workers Rehabilitation and Compensation Act 1986 (SA) ("the Act").

Background

Section 42 of the Act sets out the terms upon which the compensating authority can redeem its liabilities to pay compensation to a worker. A redemption can only be entered into by mutual agreement between the parties. Section 42(2) sets out additional criteria that must be met. Relevantly, section 42(2)(a) provides that an agreement to redeem cannot be made unless the worker first receives “competent professional advice about the consequences of redemption.”

Until recently it was generally accepted that solicitors could confine such advice to the legal aspects of the redemption; in particular, that the worker will lose weekly payments for all time in return for a lump sum, the effect of section 35(6a) of the Act upon any future workers compensation claims, the implications for future medical treatment and its payment, and the taxation, Centrelink and Medicare implications of the redemption.
The decisions of the Tribunal in *Blocki v WorkCover/CGU (Pyrotech Fire Protection Pty Ltd)* [2001] SAWCT 144 and *Tsimplinos v WorkCover/Allianz (K and A Transport Pty Ltd)* [2001] SAWCT 138 were consistent with the common practice of solicitors to provide their clients with advice regarding the legal ramifications of redemption and then allowing the client to decide whether the proposed redemption was adequate in his or her circumstances.

In *Shore v Palios Meegan & Nicholson Holdings Pty Ltd & Palios* [2009] SADC 5, Judge Tilmouth briefly expanded the scope of “competent professional advice about the consequences of redemption” to include not only advice regarding the legal ramifications of redemption, but also advice regarding the adequacy of the amount offered and whether the worker should accept it or not. This decision was overturned on appeal by the Full Court of the Supreme Court of South Australia [2010] SASCFC 21. Justices Nyland and Gray found that the worker was given the professional and financial advice mandated by the Act. Justice Vanstone accepted the evidence of Ms Palios that,

“...only clients had the ability to discern if they had the capacity to work, or would later seek further medical treatment or, generally, what was in their best interests. Only a client knew whether he or she would attempt to get a job the very next week [and] a client would not necessarily be totally frank about such issues” [para 159].

### Mericka v Employers Mutual/WorkCover (Pollard Brothers Pty Ltd) [2011] SAWCT 25

On 5 September 2011, Auxiliary Judge Olsson delivered his judgment in *Mericka v Employers Mutual Ltd/WorkCover Corporation (Pollard Brothers Pty Ltd)* [2011] SAWCT 25

In that case the worker, Mr Mericka, suffered a work injury and his claim for compensation was accepted. Thereafter he lodged a series of further claims for sequelae to the original injury. A redemption of his entitlements was considered and ultimately redemption agreements were entered into on 8 May 1997.

On 5 May 2005, Mr Mericka lodged a Notice of Dispute asserting that the redemption agreements were invalid as he had entered into them as a consequence of undue influence and duress on the part of the compensating authority and also because they were executed absent the requisite advice under section 42(2).

Auxiliary Judge Olsson accepted that on 9 May 1997, Mr Mericka’s solicitor adequately explained the legal implications of the redemption. However, His Honour was not satisfied that the solicitor had pointed out to his client that, “what was proposed was a very poor financial bargain and positively and also unequivocally advised him against taking a redemption where, financially, it was, on the face of the situation, manifestly not in his best interest to do so” [para 418(10)].

His Honour’s decision meant that to satisfy the requirement for “competent professional advice about the consequences of redemption”, the advice must clearly address the adequacy of the proposed sum and whether it is in the client’s best interests, as well as addressing the legal consequences of redemption. A solicitor would be required to provide emphatic advice on whether the client should accept or reject a redemption in the terms offered.
Auxiliary Judge Olsson concluded that the redemption agreements did not comply with the requirements of section 42 of the Act because the worker was not given competent professional advice (nor competent financial advice). His Honour also held that no estoppel operated against the worker on the basis of his representation (in certificates attached to the redemption agreements) that he had received competent advice in this regard. His Honour therefore determined that the agreements were void. The decision had potential to open the floodgates to workers who were disenchanted with their redemptions. The WorkCover Corporation appealed.

**APPEAL - WorkCover/Employers Mutual (Pollard Brothers Pty Ltd) v Mericka [2012 SAWCT 42]**

On 10 October 2012, the Full Bench of the South Australian Workers Compensation Tribunal, comprising Deputy Presidents McCusker, Hannon and McCouaig unanimously allowed the appeal.

In a joint decision McCusker DPJ and Hannon DPJ held that:

- The word “competent” is straightforward and allows for a range of advices provided the advisor has sought adequate knowledge and material about the facts of the case and has a good understanding and command of such matters. [para 90]

- “The phrase ‘about the consequences of redemption’ requires that the worker clearly understands the lump sum will end the right to weekly payments and/or medical expenses. It will also require the worker to be informed of the s35(6a) consequence, the extent and period of the social security exclusion, the medical insurance effects and taxation effects.” [para 93]

- “Competent professional advice about the consequences of redemption does not require advice as to the fairness of the amount… It does not require the professional advisor to know the financial advice that may have been given.” [para 95]

- The professional and financial advices only involve the matters specified in the section 42(2) provisos. [para 95]

Their Honours agreed with Vanstone J in Shore that to conclude otherwise would elevate the role of solicitor from professional advisor to decision-maker.

McCouaig DPAUJ stated that:

- “Not all bargains concluded under the Act are fair bargains… Settlements are influenced by all manner of reasons, some idiosyncratic to the parties.” [para 125]

- “Advice about the fairness of a proposed redemption is not a matter contemplated by s42(2)(a).” [para 145]

- Advising the worker against his acceptance of a redemption proposal is not a requisite part of competent professional advice about the consequences of redemption. [para 145]
Conclusion

The decision in *Mericka* provides welcome guidance to solicitors who are called upon to advise clients about the consequences of redemption. The duty of both professional and financial advisors under section 42(2) has been appropriately confined. Clients will continue to receive sufficient advice to enable them to decide whether the proposed redemption is in their best interests, as is contemplated by the legislation.

In many of the cases referred to above, a lack of written confirmation of the advice provided to the client made it difficult to prove the nature and extent of that advice. It is a good practice to ensure that clients are provided with written advice (a pro-forma advice doubles as a check list) or written confirmation of oral advice.

There will be occasions where a solicitor may wish to express an opinion regarding the adequacy of a redemption offer, or the client may ask for an opinion. There is no impediment to providing such an opinion, provided that the client is not pressured and it is made clear that the decision to redeem is solely that of the client. A record of the client’s instructions to enter into a redemption agreement and (where possible) the reasons underlying those instructions should be made. It should be remembered that section 42(2) only sets minimum requirements for redemption advice; clients are entitled to receive broad general advice regarding their entitlements under the Act.

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