

P & H Property Service Pty Ltd v Branigan; Westfield Shopping Centre Management Co Pty Ltd v Branigan [2008] NSWCA 195

The New South Wales Court of Appeal recently delivered judgment in the case of *P & H Property Service Pty Ltd v Branigan; Westfield Shopping Centre Management Co Pty Ltd v Branigan* [2008] NSWCA 195 which raised questions about the adequacy of shopping centre floor inspection procedures.

The facts of the case were that on 24 October 2001, Mr Branigan, who was employed by Joe's Meats at the Liverpool Westfield, was walking down one of the service corridors when he stepped on a piece of cardboard that had been placed over an oil spill and slipped. Although Mr Branigan did not fall, he strained his back while trying to steady himself, thereby sustaining injury.

The Trial Judge in the District Court of New South Wales found both Westfield (the occupier of the premises) and P & H (the cleaning contractors engaged by Westfield) liable with respect to Mr Branigan's injuries. Both Westfield and P & H appealed the quantum of the claim (\$588,125). P & H also appealed with respect to liability.

The Trial Judge found that the incident occurred "in an area adjacent to loading dock No 6, which runs behind a number of shops in the fresh food court at Westfield." The area was not a public thoroughfare. The Trial Judge also found that the area

was not a part of the loading dock. The significance of this finding relates to the contract between Westfield and P & H.

The contract between Westfield and P & H specified that loading docks were to be cleaned every day, with other areas requiring inspection every 20 minutes, in addition to cleaning as required. The difficulty that the Trial Judge found with the contract was that Westfield had not clearly delegated a responsibility to either P & H or the loading dock cleaners, Visy Ltd, to clean the corridors that were not a part of the loading dock or public area. It was on this basis that Westfield was held liable as it had breached its duty to provide a proper system of cleaning "because it did not assume the responsibility for cleaning the area itself, and it did not unambiguously designate some other reputable person to do that work".

On appeal, P & H submitted that the Trial Judge erred in finding that:

- the slip occurred in an area that was not a part of the loading dock
- there should have been 20-minute inspections for back corridors in addition to public mall areas
- the contract was ambiguous.

On Appeal, the majority found that the contract required cleaning of the corridor or area in which

the incident occurred once a day unless notice of a spill was given to P & H. No precise time for cleaning was specified. The only remaining question was whether P & H breached the contract.

The plaintiff tendered the incident report which indicated that there was a system of inspection every 40 minutes and an inspection had been undertaken 35 minutes prior to the incident. Neither P & H nor Westfield called any evidence from the cleaners who undertook the inspection and there was no evidence beyond the incident report to indicate when P & H performed inspections on that day or any other day. Having said that, the majority found that P & H had no contractual obligation to clean between 7.00am and 9.30am, and its failure to not clean during that time could therefore not be a breach of the contract. The finding of liability against P & H was set aside.

As a result of this decision, Westfield was found solely responsible for the plaintiff's injuries, given that Westfield engaged P & H to clean specific areas of the shopping centre at specific intervals. Any area not covered by the cleaning contract, or any area that was not cleaned as regularly as it should have been cleaned, was the responsibility of Westfield as P & H had discharged its specific duties.

It should be noted that Hodgson JA, in dissent, found against P & H given that, on the balance of probabilities, the danger of the cardboard on oil was present prior to the alleged 35-minute inspection by P & H and that the carrying out of reasonable procedures by P & H would have averted the accident.

What this case means

Supermarkets and shopping centres must take care when drafting contracts for cleaning services with external cleaners. The contracts must ensure that:

- every area occupied by the supermarket or shopping centre is inspected at timely intervals; and
- it is clearly specified whose responsibility it is to check the area.

It is often the case with supermarkets and shopping centres that on occasions when an illegible daily floor inspection sheet is tendered into evidence, the person who cleaned the area prior to the incident is neither found nor called to give evidence. Courts may find, as they did in *Branigan*, that a *Jones v Dunkel* (1959) 101 CLR 368 inference should be drawn ie, that, if the supermarket did call any evidence from the specific person responsible for the cleaning, that evidence would not have assisted the supermarket/occupier's case.

Gavin Creighton
Partner

T: 02 8281 4423
E: gwc@cbp.com.au

Debbie Kaminskas
Solicitor

T: 02 8281 4443
E: dlk@cbp.com.au