

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
WELLINGTON**

[2012] NZERA Wellington 29  
5334771

BETWEEN

RAY CUTTER  
Applicant

AND

WELLINGTON CITY  
TRANSPORT LIMITED T/A  
GO WELLINGTON  
Respondent

Member of Authority: Robin Arthur

Representatives: Kevin O'Sullivan for Applicant  
Susan-Jane Davies for Respondent

Investigation Meeting: 19 October 2011

Determination: 2 April 2012

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**DETERMINATION OF THE AUTHORITY**

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- A. The decision by Wellington City Transport Limited to dismiss Ray Cutter was justified.**
- B. Costs are reserved.**

**Employment relationship problem**

[1] Ray Cutter worked as a bus driver for Wellington City Transport Limited from 17 August 2009 until 11 February 2011 when WCTL dismissed him for poor performance.

[2] On 13 January 2011 the bus he was driving collided with a skip bin in Adelaide Road, Newtown. WCTL suspended Mr Cutter from his duties and began an investigation of the accident. His suspension was on full pay.

[3] Mr Cutter made a written statement about the accident and attended investigation meetings with WTCL operations manager Lori Burns and other company representatives on 19 and 25 January and 2, 7, 10 and 11 February. At each meeting he was accompanied by two or three representatives of his union, the Wellington Branch of the New Zealand Tramways Union.

[4] As a result of her inquiries Ms Burns decided the accident on 13 January was due to driver error by Mr Cutter and the bus hit the skip because he had not applied the brakes. In reaching that conclusion Ms Burns took account of previous incidents including an “*at fault accident*” for which Mr Cutter was issued in May 2010 with a final written warning for poor performance.

[5] In her written witness statement to the Authority Ms Burns said she had:

*“concluded that [Mr Cutter] didn’t react correctly or quickly enough when he realized that there was a serious risk of a major impact with the skip. I concluded that he didn’t apply the brakes, or if he did, he didn’t apply them correctly.”*

[6] Mr Cutter denied he was at fault. He said a car had abruptly pulled out from the other side of the narrow road as he drove up to the area where the skip was sitting on the same side of the road as the bus. Initially in the investigation Mr Cutter said he had tried to apply the brakes “*sharply*” to avoid hitting the bin but the brake pedal had gone to the floor without resistance. At a later meeting his union representatives suggested Mr Cutter may have pushed his foot down on only the lower part of the pedal and full braking could not be achieved as the pedal would have hit a valve sitting under the lower part of the pedal.

## **Issues**

[7] The Authority identified the following issues for investigation:

- (i) was WCTL’s investigation full and fair; and
- (ii) was WCTL’s conclusion on technical issues reasonable; and
- (iii) did Mr Cutter’s explanation of events change, and, if so, could

WCTL fairly take account of that as a factor in the decision to dismiss;  
and

- (iv) was WCTL entitled to take account of previous warnings and dismiss for poor performance; and
- (v) if the decision to dismiss or how it was reached was found to be unjustified, what remedies should be awarded, considering:
  - (a) whether reinstatement was reasonable and practicable; and
  - (b) lost wages (subject to evidence of reasonable endeavours to mitigate loss); and
  - (c) distress compensation.
- (vi) if any remedies were awarded, should they be reduced to any extent for blameworthy conduct by Mr Cutter contributing to the situation giving rise to his grievance; and
- (vii) should costs be awarded, and if so, how much?

### **The Authority's investigation**

[8] For the purposes of the Authority's investigation written witness statements were provided by Mr Cutter, bus driver and union vice-president Chris Morley, NZ Bus Limited southern regional operations manager Lori Burns, Go Wellington operations team leader Gerard Cooper and NZ Bus Limited fleet maintenance manager Roy Scahill.

[9] A written statement was also provided by WCTL's former fleet maintenance manager Graham Bidois. Mr Bidois had given Ms Burns technical advice about bus brakes during her disciplinary inquiry but by the time of the Authority investigation he had left WTCL and was working in Western Australia. It was not necessary to consider or rely on his statement as I was satisfied that matters on which Mr Bidois might have been able to assist the Authority were adequately addressed through the evidence of Ms Burns, Mr Cooper, Mr Scahill and Mr Morley.

[10] At the investigation meeting Mr Cutter, Mr Morley, Ms Burns, Mr Cooper and Mr Scahill – under oath or affirmation – each confirmed their own written statement and answered questions from the Authority member and the parties' representatives.

The representatives also gave closing submissions on the facts and issues.

[11] This matter has been determined on the basis of the written and oral evidence of those witnesses, relevant documents supplied by the parties, and counsels' written and oral submissions at the investigation meeting. As permitted under s174 of the Act this determination has not set out all evidence and submissions received but has stated the Authority's findings of facts and law and its conclusions on matters requiring determination. The Authority's findings were made on the civil standard of the balance of probabilities, assessing the evidence to determine what was more likely than not to have happened. I regret the demands of other Authority matters delayed the issuing of this determination and acknowledge the patience of the parties.

### **WCTL's investigation**

[12] In his statement of problem Mr Cutter described WCTL's investigation process as "*flawed*" and said he was "*denied access*" to WCTL's accident investigator during the investigation.

[13] The evidence of all witnesses, I find, established Mr Cutter was clearly notified of the allegations of poor performance through driver error – that was not braking quickly enough – and was given fair opportunity to comment on all adverse information through the extensive series of meetings held as part of the investigation and disciplinary process during which he had full union representation.

[14] Ms Burns relied on technical advice she was given by Mr Bidois and, in one meeting, relayed to Mr Cutter and his representatives the answers to particular questions given to her by Mr Bidois. I was not convinced that having those questions put in writing – which Ms Burns had asked union branch secretary Kevin O'Sullivan to do – and having them answered through her amounted to denying access to the accident investigator in any way that affected the reliability of the information or the conclusions drawn from it.

[15] Rather the meeting notes show the union representatives canvassed a range of concerns and possibilities about various technical or mechanical issues that might

have contributed to the accident and each such concern was fairly considered by the WCTL representatives. Some, such as Mr O'Sullivan's claim that a Land Transport New Zealand representative had verbally expressed doubts about the reliability of the brake testing done on the bus, were not subsequently confirmed in writing by LTNZ as requested by Ms Burns. Unverified hearsay criticism was not enough.

[16] Another theory, advanced by Mr O'Sullivan for the first time at the fifth meeting with company representatives (10 February), was that Mr Cutter may have had his foot on only the lower part of the brake pedal and full braking effect was prevented because of a valve that sat under that lower part of the pedal. Ms Burns again took advice from Mr Bidois on that theory before discounting it and continuing with the disciplinary process. I find no unfairness in the steps she took on those points.

[17] There were two other points on which WCTL's inquiry could have been more comprehensive – the position of the skip on the day of the accident and whether another bus driver on the scene soon after could have provided relevant information.

[18] Mr Cutter said he had talked to residents who came out of their houses after the accident and that the skip, which he knew had been there for several weeks, was protruding further than usual onto the roadway that day. While Ms Burns, some days after the accident, did personally visit the house at which the skip was being used, she only spoke to a workman who said he was not there at the time of the accident. She could have done more.

[19] However even if a different skip position were established, the issue for Ms Burns was whether Mr Cutter was driving carefully enough in the conditions as they were that day. Mr Cutter's first accident report said he had pulled out to avoid the skip and then swerved back to avoid a car pulling out abruptly from the other side of the road but the brakes failed as he then tried to stop the bus before it hit the skip. On that account he was aware of the position of the skip and the issue was really whether he was driving carefully enough to quickly and properly respond to other potential hazards such as the car pulling out.

[20] Mr Cutter and the WCTL managers who attended the scene soon after the accident knew that another bus had stopped and picked up the passengers from Mr Cutter's bus. Mr Cutter, in his evidence to the Authority, was unsure of the distance between the two buses but believed there may have been as few as three cars between them at the time (although the distance may have been considerably longer than three car lengths). Surprisingly neither company nor union representatives interviewed the driver of the other bus about whether he saw anything of what happened on the road ahead of him at the time of the accident or whether he had any relevant information from what he saw when he stopped to transfer the passengers from Mr Cutter's bus.

[21] However neither point of potential further inquiry, I find, resulted in WCTL's investigation being inadequate or flawed. At the time of the disciplinary inquiry, the union representatives neither suggested further inquiries be made by WCTL on either point nor made their own. There was no information before the Authority suggesting inquiries on either point would, in fact, have resulted in further relevant information being before Ms Burns at the time of her decision. Rather I accept her inquiry adequately focussed on Mr Cutter's explanations, firstly regarding the alleged failure of the braking system and secondly the alleged difficulty caused by pushing down only the lower part of the pedal.

### **Were WCTL's conclusions on technical issues reasonable?**

[22] Two reports written by Mr Cutter suggested technical problems with air pressure in the bus braking system caused the accident.

[23] His first report was written at the depot on 13 January soon after returning from the scene of the accident. He wrote a second report at home on 17 January. In both reports he referred to pushing down the brake pedal without any immediate effect and then "*pumping*" the brake pedal. He eventually stopped the bus by pulling on the handbrake. In the 13 January report he said he had "*stood*" on the brake but the air pressure had gone and his reaction was to pump the brakes. In the 17 January report he said that, as he attempted to avoid the skip and the car by braking sharply, "*the brake went to the floor without resistance*" and he then tried "*pumping the brake pedal vigorously*". He also suggested bus 1132 that he drove on 13 January was

“*perpetually in a hazardous condition*” because he had problems on previous occasions with the power steering and door functioning due to a loss of air pressure.

[24] On 10 February his union representative had raised the further technical or design issue of whether a valve below the lower part of the brake pedal had prevented Mr Cutter braking effectively.

[25] Several technical issues arising from those explanations were discussed in detail by the witnesses at the Authority’s investigation meeting. It would add unnecessary length and complexity to this determination to set out those exchanges and information already well known to the parties and the witnesses. Rather I accept Mr Scahill’s oral and written evidence satisfactorily responded to each concern raised and summarise my findings on the technical evidence as follows.

[26] The evidence **did not** establish that

- (i) there were repeated and unrepaired problems with the opening of the doors and loss of air pressure on bus 1132 that affected operation of the braking system on that particular bus; and
- (ii) the placement of a valve under the lower part of the pedal affected the ability to operate the brake pedal correctly; and

[27] The evidence **did** establish that:

- (i) it was highly improbable that the bus had lost air pressure prior to the accident and without the warning buzzer sounding; and
- (ii) pumping the brakes – as Mr Cutter said he did – would result in a loss of air pressure and affect the ability to brake; and
- (iii) tests conducted on the day following the accident confirmed the braking system was most likely working satisfactorily prior to the accident; and
- (iv) an air hose that was observed to be disconnected after the accident most likely came loose as a result of skip hitting the side of the bus during the accident; and
- (v) the air hose needed to be clamped by mechanics in order to release the park brake in order to tow the bus from the accident scene; and

- (vi) the clamping of the air hose for that purpose did not affect the reliability of the subsequent brake testing.

### **Mr Cutter's change of story**

[28] The letter of dismissal issued to Mr Cutter on 16 February referred, among other things, to his account of events having changed. In a meeting on 25 January he referred to the brake pedal going all the way to the floor but in a meeting on 10 February his representatives referred to the pedal not going down because his foot was on its lower part (and then said to be impeded by the valve beneath it).

[29] Ms Burns confirmed in her oral evidence that those changes of account diminished Mr Cutter's credibility in her eyes. However on either account she considered she was justified in concluding driver error contributed to the accident and the damage to the bus. On the information available to her about the operation of the bus braking system, if Mr Cutter had pushed the brake pedal to the floor with his foot, the brakes would have worked. If his foot was not fully on the pedal – as he later claimed – he was not operating the brakes correctly. I agree her conclusion was open to a fair and reasonable employer.

### **Were the previous warnings legitimately considered?**

[30] Mr Cutter contended WCTL was not entitled to take account of previous warnings he had received regarding his driving following earlier accidents. One was issued to him on 30 March 2010 and said to “*remain in effect for 6 months*”. A further warning – headed “*Final Written Warning - Poor Performance*” – was issued to him on 26 May 2010. That warning had no reference to how long it would remain in effect but included the following words:

*Any further issues of poor performance may lead to further disciplinary action, which could result in the termination of your employment.*

*As discussed with you, a final warning is a serious step in the employment relationship, and a failure on your part to meet performance standards, in the future, is likely to lead to further*

*disciplinary action which could include termination of your employment. If you require assistance in meeting the standards set by the Company you should speak to management or a member of the human resources team immediately.*

*We trust you understand the seriousness of the final warning process and this will be the end of your involvement in the disciplinary process. A copy of this warning will be placed on your personal file.*

[31] The collective employment agreement applicable to Mr Cutter included a term stating that “*all warnings will lapse after 6 months, but remain on the employee’s personal file*”.

[32] Mr Cutter submitted that the final written warning issued to him on 26 May 2010 was not effective more than seven months later at the time of the 13 January 2011 accident and subsequent disciplinary inquiry. Consequently, he submitted, WTCL was not entitled to take account of that warning in reaching a decision to dismiss him.

[33] I do not accept those submissions as they are contrary to the following principles, as described by the Employment Court in *Butcher v OCS Limited* and which, I hold, apply to the circumstances of the present matter:<sup>1</sup>

- (i) An expired warning may be taken into account by an employer when deciding to dismiss an employee, and by the Authority in deciding whether the employer has acted reasonably or unreasonably.
- (ii) Previous misconduct referred to in the expired warning may be relevant in determining the reasonableness of the employer’s response to the new misconduct.
- (iii) A recently expired warning for the same conduct cannot be completely disregarded as it is part of all the circumstances to be considered under the statutory test of justification.

### **Was dismissal for poor performance permissible?**

[34] WCTL’s actions in dealing with instances of poor performance by Mr Cutter,

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<sup>1</sup> [2008] ERNZ 367 at [55].

including dismissing him for driver error in the accident on 13 January 2011 were, I find within the scope of the four step process contemplated by the collective employment agreement provisions for warnings about misconduct. I have reached this conclusion on the basis of:

- (i) an analysis of the actual conduct of Mr Cutter and WCTL's actions between February 2010 and his dismissal; and
- (ii) consideration of the actual wording of the clause; and
- (iii) the application of the principles stated in the *Butcher* case (referred to above) regarding expired warnings; and
- (iv) the application of familiar principles for fairly handling and attempting to remedy unsatisfactory work performance.<sup>2</sup>

[35] Mr Cutter submitted the collective employment agreement provided for dismissal only in the circumstances of serious misconduct or, following four breaches and two warnings of no more than six months duration, for misconduct. WCTL did not describe his actions as serious misconduct or misconduct in the two written warnings issued to him in 2010 or on his letter of dismissal in 2011. Rather WCTL referred to his actions as "*poor performance*" and Mr Cutter submitted he could not be dismissed on that basis other than following a final written warning issued within the previous six months. He submitted that dismissing him on that basis was a major change to workplace practices and consequently triggered another term of the collective agreement requiring prior consultation with his union on such changes. WCTL was said not to have previously dismissed a driver for poor performance unless she or he had a final written warning issued within the previous six months.

[36] This is the collective agreement term on warnings:

*60. Warnings*

*SERIOUS MISCONDUCT*

*The following steps will apply:*

- (a) The employee may be immediately suspended, in which event the suspension will be on pay.*
- (b) A meeting will be held between the employee concerned, the Union delegate if required and the supervisor to hear the case and*

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<sup>2</sup> *Trotter v Telecom* [1993] 2 ERNZ 659, 681.

*decide if dismissal will proceed or a lesser penalty imposed.*

**MISCONDUCT**

*The following will apply:*

*(a) First Breach:-*

*Discussion between the employee concerned and their supervisor.*

*(b) Second Breach:-*

*The supervisor will issue a verbal warning. The Union delegate will be informed unless the employee instructs to the contrary.*

*(c) Third Breach:-*

*The supervisor will issue the worker concerned with a final written warning. The Union delegate will be informed unless the employee instructs to the contrary. If requested, the employee can have a Union delegate to represent them.*

*(d) Fourth Breach:-*

*The employee can be dismissed. The employee concerned can, if requested, have a Union delegate to represent them.*

*All warnings will lapse after 6 months, but remain on the employee's personal file.*

[37] Another term, regarding how complaints and disciplinary charges will be dealt with, included the following relevant provision:

*Where a complaint, report or charge against an employee is found to be justified, the employer may, at its discretion and as an alternative to disciplinary action, refer that employee to an appropriate course or programme aimed at remedying the employee's activity or behaviour.*

[38] In the first six months of his employment Mr Cutter was involved in six accidents while driving a bus for WTCL – panel damage on three occasions (7 September 2009, 11 November 2009, and 20 January 2010); scraping a door (12 November 2009); and two accidents involving a car (21 September 2009 and 10 February 2010). In light of this accident history Mr Cooper met with Mr Cutter on 18 February 2010 and made arrangements with him to undergo driver assessment and remedial training. He was put on alternative duties refuelling and washing buses while that assessment and an investigation of how to improve his driving skills was underway. I find that meeting and the arrangements subsequently made met:

- (i) the requirements of the term of the collective agreement regarding

- remedial measures as an alternative to disciplinary action; and
- (ii) the first step of the warning process for misconduct (requiring discussion between the worker and their supervisor); and
  - (iii) the requirements of the *Trotter* principles for Mr Cutter to be advised of his employer's dissatisfaction, the need to achieve higher standards of performance, and assistance being put in place to enable him to reach those standards.

[39] Between 19 and 25 February Mr Cutter underwent driver assessment and attended two days of remedial training and a further two days of tutor assessment.

[40] After returning to driving duties Mr Cutter was involved in an accident between his bus and a stationary truck on 23 March 2010. A truck stem mirror was damaged and a bus window shattered. In his report on that accident Mr Cutter stated his "*judgement was in error*" and he took "*full responsibility*".

[41] A disciplinary meeting was held and Mr Cutter was issued with the first written warning dated 30 March 2010. Further remedial training was not required but the following steps were put in place to assist in improving his performance: he was placed on a permanent shift to provide consistency and routine; regular meetings with his team leader were arranged; and a training school follow-up assessment was arranged for three months later. Those steps I find met the requirements of the second step of the collective agreement's warning procedure for misconduct and the *Trotter* principles regarding continued support in reaching performance standards.

[42] On 24 May 2010 a bus driven by Mr Cutter was involved in a 't-boning' collision with a car at an intersection. There was substantial damage to the front of the car and panel damage to the bus. Mr Cutter said he had not seen the car as he drove into the intersection.

[43] He was issued with the final written warning dated 26 May 2010 and arrangements were made for a driving assessment (which was consistent with the anticipated three month assessment planned at the time his first written warning was issued). Before that assessment took place Mr Cutter was involved in another

accident on 31 May 2010 when the front of the bus he was driving was scraped in a collision with a courier van. An investigation meeting held on 1 June regarding that accident confirmed arrangements for his assessment. It was held on 2 June. The assessor reported Mr Cutter's defensive driving was "*good apart from the specific recurring theme*" and said Mr Cutter sometimes used mirrors too late and "*need[ed] to react more quickly or not proceed if another road user [is] in the space he needs to occupy*". The assessor recommended Mr Cutter "*remember the space cushion and who may be in it or about to [be] and act accordingly*".

[44] In a follow up meeting with Mr Cutter soon after Ms Burns decided no further training was needed but cautioned him about the need to change his attitude to driving. Mr Cutter confirmed in his oral evidence to the Authority that he had then apologised to Ms Burns about the latest incident and said he would take on board the advice from her and the assessor.

[45] The final written warning and the assessment following it, I find, met both the requirements of the third step of the collective agreement's warning procedure for misconduct and for continued support in reaching performance standards required under the *Trotter* principles.

[46] I find WCTL's actions following the 13 January 2011 accident were then within the scope of the fourth step of the warning procedure. That step allowed for dismissal following a fourth breach. Having accepted WCTL was entitled to reach its conclusion that the bus hit the skip due to driver error by Mr Cutter, there is no doubt the accident was a fourth breach because this was unsatisfactory performance of his duty to drive carefully and was a form of misconduct.

[47] The wording of the clause under the heading 'fourth breach' does not limit the ability to dismiss to circumstances where a final written warning has been issued within the previous six months. Mr Cutter, through his union representative, submitted that the wording immediately following that term – referring to *all* warnings lapsing after six months – meant such a limit did apply. However it is all of the words of the term, not just some of them, that must be considered and those words say the warning will lapse after a certain period but remain on the worker's file. The

reference to remaining on the file must have some meaning and purpose. That purpose, I hold, is to take account of earlier warnings in circumstances such as those found in the present case. The principles cited from the *Butcher* case support that construction of the terms of the collective agreement.

[48] This is further confirmed by the fact that the final written warning itself was not expressed to apply for a limited term. Its wording clearly put Mr Cutter on notice of the potential consequences of further failure to meet the performance standards of which he was advised and trained to reach.

[49] The logic of the union's position – that a dismissal for dangerous poor performance could only be made where a final written warning had been issued within the last six months – would mean a driver could repeatedly have an 'at fault' accident every six months and one day and never be dismissed. It is a construction of the terms of the employment agreement that I consider neither case law nor commonsense supports.

[50] WCTL had, I find, justifiably reached a point in the particular circumstances of Mr Cutter's employment and accident record where a driver's right to job security had to yield to the right of bus passengers and other road users to be protected from risks to their safety due to his poor driving and to WCTL's reasonable interest in minimising damage, disruption and cost caused by repeated accidents.

[51] This is not a conclusion that would (or now could) automatically be fairly reached in the circumstances of *every* 'at fault' accident (or even a series of accidents) by one of WCTL's drivers, except, arguably where the proven circumstances were so negligent or reckless that the driver's actions amounted to serious misconduct. The circumstances of a sufficiently serious single instance of negligence impairing trust and confidence might warrant a dismissal on such grounds but the standard of proof of the allegedly careless or reckless behaviour would have to match the gravity of the charge.<sup>3</sup> However this point need be taken no further in the present case because the evidence of WCTL's witnesses did not characterise Mr Cutter's actions on 13 January

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<sup>3</sup> See *W&H Newspapers Limited v Oram* [2000] 2 ERNZ 448 at [45] (CA) and *Honda NZ v NZ Shipwrights Union* ERNZ Sel Cas 855 at 858 (CA).

as serious misconduct and, in closing submissions, WCTL took the most cautious view that such misconduct required wilfulness and not merely carelessness (with his poor performance said to be the latter).

[52] Accepting as WCTL appears to have done that Mr Cutter's poor performance in this instance was not at that level of serious misconduct, the justification for WCTL's decision to dismiss him for it must be assessed against all the particular circumstances of his case. These included the extensive prior efforts of WCTL to improve his performance through remedial measures and its consideration of alternatives to his dismissal.

[53] I find that, assessed against the non-exhaustive list of steps set out in the *Trotter* case, WCTL had taken sufficient steps to provide Mr Cutter with reasonable assistance to improve his performance against clear standards discussed with his managers (Ms Burns and Mr Cooper) and the company's trainers and assessors who had worked with him. Ms Burns' evidence also confirmed that she had, through earlier steps in 2010 and before deciding to dismiss Mr Cutter in 2011, taken advice from the trainers on whether there was anything more that could usefully be done with or for Mr Cutter. The answer she got was no.

[54] I also accept she had considered whether there were alternative duties to which Mr Cutter could be reassigned as an alternative to dismissal. There were not because all roles to which he might be redeployed also required some driving and Ms Burns decided she lacked confidence that Mr Cutter could do so safely.

[55] WCTL's decision to dismiss Mr Cutter was justified and he does not have a personal grievance. Due to the conclusions reached in this determination I have not had to determine issues of remedies and contribution.

### **Costs**

[56] Costs are reserved.

[57] The parties are encouraged to agree any matter of costs between themselves.

If they are not able to do so and an Authority determination of costs is sought, WCTL may lodge and serve a memorandum as to costs within 28 days of the date of this determination. Mr Cutter would then have 14 days from the date of service to lodge any reply memorandum. No application for costs will be considered outside this timetable without prior leave.

[58] If a determination on costs is sought, the Authority is likely to make an award on its usual tariff basis, subject to the parties' submissions about any factors requiring an upward or downward adjustment of the notional daily rate in the particular circumstances of the case.<sup>4</sup>

Robin Arthur  
Member of the Employment Relations Authority

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<sup>4</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808.