SUPREME COURT OF QUEENSLAND

CITATION:	*King & Ors v Gunthorpe & Ors* [2018] QSC 1
PARTIES:	**THOMAS KING AS EXECUTOR OF THE ESTATE OF RODNEY KENNETH KING, DECEASED** (first plaintiff) and **EDITH PATRICIA KING** (second plaintiff) and **JRB FINANCE PTY LTD** ACN 142 023 390 (third plaintiff) **v** **DAVID STUART GUNTHORPE** (first defendant) and **SRJ FINANCIAL PTY LTD** ACN 010 194 662 (second defendant) and **SECURITOR FINANCIAL GROUP LTD** ACN 009 189 495 (third defendant)
FILE NO:	BS No 4015 of 2015
DIVISION:	Trial Division
PROCEEDING:	Applications
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 January 2018
DELIVERED AT:	Brisbane
HEARING DATES:	7 December 2016; Directions by order dated 25 August 2017; supplementary submissions on behalf of the defendants received on 31 August 2017; supplementary submissions on behalf of the plaintiffs received on 7 September 2017
JUDGE:	Burns J
ORDER:	**The orders of the court are that:**

1. **Leave is granted to the defendants to read the affidavit of Shaun Ian Reeves filed on 21 August 2017;**
2. **Leave is granted to the plaintiffs to read the affidavit of the second plaintiff filed on 28 August 2017 and the affidavit of the first plaintiff filed on 29 August 2017;**
3. **The applications are dismissed;**
4. **The defendants pay the plaintiffs' costs of and incidental to the applications calculated on the standard basis unless one or more of the parties, by submissions in writing filed and served within seven days, contend for the making of a different order.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COMMENCING PROCEEDINGS – TIME FOR SERVICE OF ORIGINATING PROCESS AND RENEWAL – where the proceeding was started by the filing of a claim and statement of claim – where service was not effected on any of the defendants within the period of one year from the day on which the claim was filed – where the plaintiffs made an ex parte application for renewal of the claim nearly fifteen months after the proceeding was started – where the plaintiffs made no attempt to serve any of the defendants during the one year period from the day on which the claim was filed – where the Registrar made an order renewing the claim for one year pursuant to r 24(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) – where service was effected on the defendants some sixteen months after the proceeding was started – where the defendants filed applications to set aside the order for renewal together with consequential orders dismissing the proceeding – whether the defendants would be prejudiced in their defence of the claim by its renewal – whether there existed 'good reason' for renewing the claim pursuant to r 24(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the court should exercise its discretion to set aside the order renewing the claim

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 16, r 16(d), r 24, r 24(2), r 367, r 367(2), r 667, r 667(2)(a)

Babcock & Brown Pty Ltd v Andersen [2010] QSC 287, cited
Birkett v James [1978] AC 297, cited
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, cited
Crompton v Buchanan & Ors [2010] QCA 250, cited

Gillies v Dibbetts [2001] 1 Qd R 596; [2000] QCA 156, cited
Hamilton v Oades (1989) 166 CLR 486; [1989] HCA 21, followed
Hightop Pty Ltd & Anor v Caffe Pty Ltd & Ors [2009] QSC 402, cited
Hightop Pty Ltd & Anor v Kay Sheila Lawrence trading as 'Kay Lawrence Accountancy' [2010] QCA 270, followed
MacDonnell v Rolley [2000] QSC 58, cited
Major v Australian Sports Commission [2001] QSC 320, cited
McIntosh v Maitland [2016] QSC 203, cited
Muirhead v The Uniting Church in Australia Property Trust (Q) [1999] QCA 513, followed
Owen v Menzies & Ors [2010] QCA 137, cited
Re Criminal Proceeds Confiscation Act 2002 [2004] 1 Qd R 40; [2003] QCA 249, cited
Sailorchard Pty Ltd (Administrators Appointed) v Thrifty (Australia) Pty Ltd [2003] QSC 41, cited
Simpson v Saskatchewan Government Insurance Office (1967) 65 DLR (2d) 324, cited
Sproule v Long [2001] 2 Qd R 335; [2000] QSC 232, cited
The IMB Group Pty Ltd (in liq) v Australian Competition and Consumer Commission [2007] 1 Qd R 148; [2006] QCA 407, discussed
Van Leer Australia Pty Ltd v Palace Shipping KK (1981) 180 CLR 337; [1981] HCA 11, cited

COUNSEL: D G Clothier QC for the plaintiffs
G A Thompson QC with S J Webster for the defendants

SOLICITORS: Holman Webb for the applicant plaintiffs
McInnes Wilson for the first and second defendants
HWL Ebsworth for the third defendant

[1] This proceeding was started by the filing of a claim and statement of claim on 22 April 2015. A year later, service having not been effected on any of the defendants, the claim became stale.

[2] By letter from the plaintiffs' solicitors dated 6 July 2016, an *ex parte* application for renewal of the claim was made to the Registrar. On 15 July, the Registrar made an order renewing the claim for one year pursuant to r 24 of the *Uniform Civil Procedure Rules* 1999 (Qld). The order had effect from 22 April 2016.

[3] Between 9 and 12 August 2016, some 16 months after the proceeding was started, service was effected on the defendants. Conditional notices of intention to defend were

later filed on their behalf. Then, on 2 November 2016, the defendants filed applications[1] to set aside the order for renewal together with consequential orders dismissing the proceeding.

[4] There having been no attempt to serve any of the defendants, the sole issue on the hearing of these applications was whether there existed "good reason" for renewing the claim: r 24(2) UCPR.

[5] On 11 August 2017, the parties were notified that judgment would be handed down seven days later (18 August). However, before that could occur, the solicitors for the defendants advised that they wished to seek leave to adduce further evidence in the form of an affidavit from a former director of the second defendant, Mr Shaun Reeves. His affidavit was filed on 21 August 2017 and, on 25 August 2017, directions were made for the filing and service of any affidavit material by way of response as well as written submissions from the parties as to whether leave should be granted and, if granted, as to what effect this further evidence has on the questions to be decided on the applications. That all duly occurred; affidavits from the first and second plaintiffs were filed on 28 and 29 August 2017, the defendants filed supplementary submissions two days later and the plaintiffs responded with their supplementary submissions on 7 September 2017.

[6] It is convenient to first deal with the application for leave.

Leave to adduce further evidence

[7] A former managing director of the second defendant, Mr Lance Milham, died unexpectedly on 20 July 2017. The defendants wish to place evidence before the court as to the circumstances of Mr Milham's death and why his death is a source of prejudice to the defendants arising from the plaintiffs' failure to serve their claim within 12 months. Mr Reeves' affidavit goes to the proof of these matters.

[8] The plaintiffs object to leave being granted. They submit that the identification of potential witnesses and their roles was something about which evidence could have been adduced at the hearing, but it was not. That was, it was submitted, a "forensic decision" which the defendants made at the time of the hearing and Mr Milham's death does not justify a reversal of that decision. Further, it was submitted that the evidence contained in Mr Reeves' affidavit is deficient in a number of respects.[2]

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1 Because of separate legal representation, one application was filed on behalf of the first and second defendants and another on behalf of the third defendants. That remained the position at the time of the hearing, although they were represented by the same counsel. The applications seek orders in substantially the same terms.

2 The deficiencies were submitted to be as follows: " [T]he further evidence does not convincingly explain why and in what respects Mr Milham would have been a witness in respect of any material and controversial issue of primary fact, how his death causes material prejudice to the defendant such that a fair trial is not possible or how such prejudice is occasioned by any delay of the plaintiffs": Supplementary submissions for the plaintiffs, par 6.

[9] Rule 367 UCPR confers a broad power on the court to make "any order or direction about the conduct of a proceeding it considers appropriate". In deciding whether an order or direction should be made, the interests of justice are paramount: r 367(2). Even without r 367, the court's inherent power to control and supervise proceedings includes "the power to take appropriate action to prevent injustice".[3]

[10] In circumstances where judgment on the applications had not been handed down before leave was sought to adduce the further evidence and the evidence has relevance to the question whether the defendants might suffer specific prejudice if the claim stands renewed, the interests of justice are best served by a grant of leave. If, as the plaintiffs have submitted, the further evidence is deficient, that is something which can be taken into account when assessing the extent to which the defendants have established specific prejudice.

[11] The defendants shall have leave to read the affidavit of Mr Reeves filed on 21 August 2017 with an accompanying grant of leave to their opponents to read the affidavits from the first and second plaintiffs filed on 28 and 29 August 2017.

Factual and procedural history

[12] The first plaintiff, Mr Thomas King, is the son and executor of the estate of his deceased father, Mr Rodney King. The second plaintiff, Mrs Edith King, is Mr King Snr's widow. The third plaintiff, JRB Finance Pty Ltd, is the present trustee of the King Family Investment Trust.[4]

[13] The first defendant, Mr David Gunthorpe, is a financial advisor. Since 2 September 2004, he has been a director of the second defendant, SRJ Financial Pty Ltd, and he has been the sole director since 9 August 2016.[5] Mr Gunthorpe and SRJ Financial were held out, at least, to be authorised representatives of the third defendant, Securitor Financial Group Ltd.[6]

[14] The second defendant is described by Mr Reeves as a "small financial planning firm"[7] operating out of premises in Brendale. Mr Milham was its managing director from 2 September 2004 to 9 August 2016.[8] Over the period of relevance to the plaintiffs' claim,[9] there were three other directors, Mr Gunthorpe, Mr Reeves and Mr Steven

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3 *Hamilton v Oades* (1989) 166 CLR 486, 502 per Deane and Gaudron JJ. And see *Owen v Menzies & Ors* [2010] QCA 137, 5 per Muir JA (with whom McMurdo P and Holmes JA agreed).

4 Mr King Snr was previously the trustee.

5 Affidavit of S I Reeves filed on 21 August 2017, Exhibit SIR-1, p 4.

6 See footnote 20.

7 Reeves, par 9.

8 Ibid, Exhibit SIR-1, p 4.

9 From in or about June 2005 to in or about June 2006.

Jones.[10] Mr Reeves and Mr Jones were non-executive directors and not involved in the operational aspects of the business conducted by the second defendant.[11] Three advisers were also employed by the second defendant over the same period, one of whom was Mr Gunthorpe.[12]

[15] Mr King Snr died on 23 June 2014, aged 69 years. Some six months previously, he had been diagnosed with malignant pleural mesothelioma and given a couple of years to live but he succumbed to the cancer more quickly than his doctors had anticipated. In consequence, his financial affairs were not left in the kind of order that he would no doubt have hoped they would be left when first diagnosed.

[16] Prior to his death, Mr King Snr in association with another man, Mr John McCormack, conducted a successful business in the design, manufacture and installation of outdoor shelters, rest rooms and the like.[13] The vehicle for the business was initially a private company – Landmark Products Pty Ltd. Mr King Snr and Mr McCormack were the directors. In 2005, the company was publicly listed. According to Mrs King, Mr King Snr was the "main shareholder".[14] Prior to Mr King Snr's diagnosis, an agreement had been entered into for the sale of the Landmark "business".[15] The sale had not been completed by the time of Mr King Snr's death and, as such, it fell to his son to "oversee the finalisation".[16] To that end, Mr King was appointed as a director of Landmark Products and remained in that position for approximately nine months. Although he was assisted by Mr McCormack as well as his parents' accountant over many years, Mr Paul Nutter, Mr King found this "role" to be "very stressful and time consuming".[17]

[17] In addition to the work required to finalise the sale, Mr King spent some time coming to grips with his parents' financial affairs.[18] When he did, he was concerned that they had been the recipients of questionable advice regarding a number of agribusiness investments he believed Mr Gunthorpe had recommended to his father (in his personal capacity as well as trustee of the King Family Investment Trust) in 2005 and 2006. At first, he consulted a firm of solicitors who were already handling a personal injuries

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10 Reeves, par 9.

11 Ibid, pars 11 and 14.

12 Ibid, par 9. The others were Mr Andrew Dudman and Mr Gordon West.

13 Affidavit of E P King filed on 2 December 2016, pars 17 and 19.

14 Ibid, par 22. There is, however, some evidence before the court (in the form of an unsigned sale agreement) which would suggest that the shares were owned by a separate company as trustee for a trust (see second affidavit of C D Blurton filed on 2 December 2016, par 63(a) and exhibit CDB-42, p 223), but nothing turns on this point.

15 Affidavit of T M King filed on 2 December 2016, par 7; E P King, par 37.

16 T M King, par 12.

17 Ibid.

18 T M King, pars 10-13.

claim brought by his father. They advised Mr King to contact an organisation known as "Financial Rescue" with a view to enlisting the aid of the Financial Ombudsman. Although Mr King learned from this organisation that his concerns did not fall within the jurisdiction of the Ombudsman, he was told that "there was a time limit to commence a claim and that [they] needed to act quickly".[19] Mr King was then referred to the plaintiffs' present solicitors, Holman Webb Lawyers.

[18] On 6 March 2015, Mr King consulted Mr Blurton from Holman Webb. Mr King supplied a number of documents, including a copy of written statements of advice from SRJ Financial to Mr and Mrs King (dated 30 June 2005), Mr King (dated 1 and 15 July 2005) and the King Family Investment Trust (dated 13 June 2006).[20] Mr King also advised that Mr Nutter might have retained some records of relevance. Mr King asked Mr Blurton to investigate whether the plaintiffs had a claim against Mr Gunthorpe. According to Mr King:

> "My mother and I were cautious to commence a spurious claim against Mr Gunthorpe and wanted to make sure that there were prospects of success. Given my mother's age and financial position we were conscious that commencing a claim which lacked prospects was not in her best interests."[21]

[19] On reviewing the written statements of advice, Mr Blurton saw that the statements of advice dated 30 June 2005 and 13 June 2006 contained a number of recommendations regarding agribusiness investments. He also noted that Mr Gunthorpe had "provided advice as a representative of CB Financial Pty Ltd … and as an authorised representative of GuardianFP Ltd … from 2 September 2006".[22]

[20] On either 18 or 23 March 2015,[23] Mr Blurton met again with Mr King but, on this occasion, Mrs King also attended. Mr Blurton advised them that the limitation period with respect to the investments recommended in the statements of advice dated 30 June 2005 and 13 June 2006 "may have been close to expiry".[24] He recommended that "they file a claim and statement of claim urgently to protect the limitation period".[25] Mr Blurton later deposed:

> "I did not know for certain when any limitation period or periods might expire but was aware that Timbercorp Securities Ltd was placed into administration on 23 April 2009 and considered it prudent to file before the

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19 Ibid, par 23.

20 Each statement of advice appears to have been signed by Mr Gunthorpe on behalf of SRJ Financial. Both Mr Gunthorpe and SRJ Financial are recorded to be authorised representatives of Securitor.

21 T M King, par 26. And see E P King, pars 44-56 and 73-78.

22 Blurton 2, par 12.

23 The actual date is not material, but see E P King, par 62; T M King, par 28; Blurton 2, par 13.

24 Blurton 2, par 13.

25 Ibid.

expiration of 6 years from that date."[26]

[21] Mr Blurton also recommended that an "expert financial advisor" be retained to provide an opinion with respect to "the appropriateness of the advice" and as to "whether there were prospects in the claim".[27] He also recommended that a number of investigations be carried out in order to "obtain further information and documentation to support the claim".

[22] Both Mrs King and Mr King accepted that the commencement of a proceeding prior to 23 April 2015 was a "prudent step to take"[28] in light of the advice provided by Mr Blurton and, further, that expert opinion should be sought as recommended. However, Mrs King was unable to fund the cost of the litigation and, for that reason, Holman Webb agreed to act on a speculative basis. They were formally retained on 8 April 2015.

[23] On the next day (9 April 2015), Mr Blurton asked Mr King to arrange for Mr Nutter to provide a number of additional documents including various income tax returns for Mr King Snr, Mrs King, the King Family Investment Trust and associated entities. These were provided by Mr Nutter on 14 April 2015. Then, on 16 April 2015, Mr Nutter was asked to supply further information to Mr Blurton regarding the "plaintiffs' investment background" [29] and the structure of the business conducted by Landmark. Mr Nutter supplied some information by telephone the next day and in a document he later emailed to Mr Blurton.

[24] Prior to 22 April 2015:

(a) a forensic accountant – Paul Green of Vincents Chartered Accountants – was briefed with a copy of the material sourced from Mr King and Mr Nutter and, on 21 April 2015, formally retained to "provide his opinion with respect to liability and quantum".[30] The brief of material was accompanied by eight pages of considered instructions;

(b) Mr Monks of counsel was briefed to draw and settle a claim and statement of claim, and did so. Like Holman Webb, Mr Monks also agreed to act on a speculative basis;

[25] On 22 April 2015, the claim and statement of claim as drawn and settled by Mr Monks were filed in the registry. By the statement of claim, damages for breach of contract, negligence, breach of statutory duty and breach of fiduciary duty are claimed against the defendants with respect to the statements of advice dated 30 June 2005 and 13 June

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26 Ibid.

27 T M King, par 28. And see E P King, par 65.

28 T M King, par 30. And see E P King, par 66.

29 Blurton 2, par 24.

30 Ibid, par 20.

2006.[31] In broad terms, it was alleged that:

(a) both statements of advice were prepared by Mr Gunthorpe and SRJ Financial as authorised representatives of Securitor;

(b) taken together, Mr King Snr (personally and as trustee of the King Family Investment Trust) and Mrs King were advised to borrow almost $1.2 million to invest in several agribusiness "products",[32] one of which involved the purchase of olive tree "grovelots" through Timbercorp for a price of $294,400;[33]

(c) relying on the statements of advice, Mr King Snr and Mrs King borrowed the money, made the recommended investments and, thereafter, paid interest on the money borrowed along with management fees and other charges in relation to the investments;

(d) the defendants failed to undertake any "proper assessment of Mr and Mrs King's risk profile",[34] provide them with proper advice on a suitable investment strategy[35] or give any, or any adequate, explanation about the risks inherent in the recommended investments;[36]

(e) the investments were "wholly inappropriate"[37] for Mr King Snr and Mrs King given their personal circumstances;[38]

(f) the value of the investments has either been entirely lost or reduced significantly; and

(g) the plaintiffs were left with the liability to repay the loans.

[26] After filing the claim and statement of claim, Mr Blurton considered it "prudent to continue investigations and obtain an expert opinion as to the merits of the plaintiffs' claim prior to the service"[39] on the defendants. That was, of course, consistent with his instructions.

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31 Exhibits CDB-02 and CDB-05 to Blurton 2.

32 Statement of claim, par 11 and par 14.

33 The other investments are described in the pleading as "Rewards Group Sandalwood Project 5", "Willmot Forests", "FEA Plantations", "ITC" and "Macquarie Forestry".

34 Statement of claim, par 18.

35 Ibid, par 19.

36 Ibid, par 21.

37 Ibid, par 20.

38 Ibid. The pleaded circumstances are summarised in the Outline of Submissions for the Plaintiffs in these terms: "Mr & Mrs King had a conservative or balanced investment history; Mrs King had retired and Mr King was close to retirement; Mr King had a goal of financial security in retirement; Mr & Mrs King had sufficient net assets to fund their retirement; and the investments were speculative and risked substantial losses": par 2.

39 Blurton 2, par 22.

[27] To that end, Mr Blurton forwarded letters on 4 May 2015 to several corporations with the aim of identifying "whether further investments were recommended by Mr Gunthorpe".[40] Supporting documents were requested. That all took some time but, by August 2015, each of the corporations had responded and supplied the requested documents.

[28] In the meantime, Mr Blurton followed up Vincents on 2 June 2015 to enquire whether Mr Green required anything further to complete his opinion. Then, on 22 June 2015, he asked Mr Nutter for a complete copy of the file he maintained with respect to the plaintiffs and their associated entities. This request was followed up by Mr Blurton on 9 July 2015 and, on 23 July 2015, a copy of the file was provided.

[29] On 16 July 2015, Vincents responded by email to the enquiry made by Mr Blurton on 2 June 2015. Further instructions and documents were requested on behalf of Mr Green. In the same email, it was noted that some Timbercorp investments had been made in 2007 and 2009 and confirmation was sought "whether the plaintiffs were provided with statements of advice with respect to these".[41]

[30] After reviewing the documents contained in the file provided by Mr Nutter on 23 July 2015, Mr Blurton considered that further information and documents, as well as instructions, would be required to satisfy Vincents' request of 16 July 2015. Accordingly, on 24 July 2015, Mr Blurton requested information and various documents by letters forwarded to the investment managers for four of the investments recommended in the statements of advice dated 30 June 2005 and 13 June 2006.[42] By 5 November 2015, the information and documents had been provided by the investment managers.[43]

[31] On 26 August 2015, Mr Green was briefed with a supplementary bundle of material and, on 11 September 2015, Vincents were provided with some of the instructions from the plaintiffs that had been sought in their 16 July 2015 email. At the same time, Mr Blurton advised that "investigations were ongoing" in relation to the balance of the information and documents that had been sought in that email.[44]

[32] On 17 September 2015, Mr Blurton telephoned Mr Nutter to request a copy of the working papers for the King Family Investment Trust. On the same day, the Westpac Bank was requested to provide a copy of the statements for the plaintiffs' business

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40 Ibid, par 29. The corporations were Timbercorp, MIS Funding No 1 Pty Ltd, Macquarie Bank Ltd, Investec, Elders Rural Bank Ltd, FEA Plantations Ltd, Westpac Bank, St George Bank, Australian Skandia Ltd and Asteron Life.

41 Blurton 2, par 35(c).

42 PPB Advisory (Willmot Forests Project), Investec (Rewards Sandalwood Project 5), Timbercorp (2006 Olive Project) and Macquarie (Macquarie Eucalypt Project).

43 Blurton 2, par 40 and par 50.

44 Ibid, par 42.

account, personal account and superannuation account. Mr Blurton believed that the working papers and account statements would contain the "details required by [Vincents] in [their email dated 16 July 2015] and that Mr Green would be able to finalise his opinion in this matter shortly".[45]

[33] On 29 September 2015, Mr Blurton was supplied with approximately 500 documents by Mr Nutter. He reviewed the documents on the same day, compiled a second supplementary brief of material for Mr Green and this was provided on 1 October 2015.

[34] When the last of the documents requested from the investment managers was received on 5 November 2015, Mr Blurton reviewed them with a view to ascertaining whether there were any investments (in addition to those which were the subject of the filed claim) that had been recommended by Mr Gunthorpe. Although he was unable to identify any such investments, he "considered that it would be prudent to amend the Claim and Statement of Claim to protect the plaintiffs' interests with respect to any additional investments of that kind".[46] Mr Blurton was otherwise satisfied that he had received all necessary information and documents for Mr Green to be in a position to provide his opinion on liability and quantum so, on the same day, he forwarded an email to Vincents enquiring whether Mr Green required anything further to finalise that opinion.

[35] On or about 24 November 2015, Mr Monks was briefed to draw and settle amendments to the claim and statement of claim so as to join CB Financial and GuardianFP as the fourth and fifth defendants to the proceedings. The amended claim and amended statement of claim, as settled by Mr Monks, was filed in the Registry on 10 December 2015.

[36] Two days earlier (8 December 2015), Mr Green telephoned Mr Blurton to request further information in order to provide his opinion. He suggested that a telephone conference with Mr Nutter could be arranged to facilitate this. That occurred on the following day (9 December 2015) and various topics were discussed.[47] Until then, Mr Blurton was unaware of the "potential significance" [48] of the sale of Landmark but, following the conference, Mr Blurton caused further investigations to be undertaken regarding this topic.

[37] On the next day (10 December 2015) Vincents requested further information and documents to assist Mr Green to provide his opinion. In consequence of this request, Mr Blurton telephoned Mrs King to enquire whether she retained any records relating to the Landmark business and that resulted in Mr Blurton travelling to Mrs King's residence in Nambour a week later. Also on 10 December 2015, Mr Blurton requested Mr Nutter to

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45 Ibid, par 44 and par 46.

46 Blurton 2, par 51.

47 Blurton 2, par 58.

48 Ibid, par 59.

provide further information and documents in response to Vincents' request. In addition, Mr Blurton spoke with a witness concerning his involvement in the business and "subsequent exit".[49]

[38] On 16 December 2015, Mr Blurton forwarded a letter to the accountant for Landmark, Mr Tim Allen, in which he requested a copy of various documents relating to that company. It was necessary for Mr Blurton to follow up this request on a number of occasions and, in the result, it was not until November 2016 that the documents were retrieved from archives and supplied to Mr Blurton by Mr Allen.

[39] As already mentioned, on 17 December 2015, Mr Blurton travelled to Mrs King's residence to inspect the documents she had in her possession relating to the Landmark business. Various documents of relevance to the "liability investigations"[50] were located.

[40] By 11 January 2016, Mr Blurton "considered that the liability investigations were close to being completed and anticipated that Mr Green would provide his expert opinion shortly".[51] He therefore decided to place the defendants (including CB Financial and GuardianFP) on notice of "the plaintiffs' intentions with respect to the claim" so that they "could locate records with respect to the plaintiffs", have "the opportunity to notify their insurers" and "be in a position to respond to the plaintiffs' claim upon service".[52] Accordingly on that day, he forwarded a letter by registered post to each of them.[53] The letters were in similar terms. By way of example, the relevant contents of the letter forwarded to Mr Gunthorpe were as folows:

> "We act on behalf of Edith King, the Estate of Rodney King and the King Family Investment Trust (now JRB Financial Pty Ltd).
>
> We are instructed to commence a claim for damages against you as the authorised representative of Securitor Financial Group Ltd and GuardianFP Ltd.
>
> We intend to serve a Claim and Statement of Claim shortly.
>
> Please notify your insurer of our clients' intention to commence proceedings."[54]

[41] It will be observed that the terms of the letters forwarded by Holman Webb on 11 January 2016 were misleading. The impression conveyed was that the proceeding was

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49 Ibid, par 61(c).

50 Ibid, par 63.

51 Ibid, par 103.

52 Ibid, par 103.

53 Blurton 2, Exhibits CDB-59 to CDB-63.

54 Blurton 2, Exhibit CDB-59; Affidavit of D S Gunthorpe filed on 2 November 2016, Exhibit DSG1.

yet to be commenced when that had in fact occurred several months earlier. Each of the letters was signed by Mr Blurton and countersigned by his supervising partner, although Mr Blurton was responsible for its drafting. When cross-examined on this issue at the hearing, Mr Blurton accepted that none of the letters, by their terms, disclosed that the proceeding had already commenced. He said that, at the time when the letters were sent, he anticipated that he would be able to serve the amended claim and amended statement of claim "shortly" because he felt that the "investigations were getting to a stage that the matter could be served".[55] Mr Blurton accepted that in "hindsight [the letters] could have been worded in a different way",[56] but emphasised that he had no intention to mislead the recipients. Their purpose:

> "[W]as merely to put them on notice, to ensure that they could take steps to notify their insurer, retain records, and that was the sole intention."[57]

[42] Not without some hesitation, I am prepared to accept that, although the terms of the letters were misleading, that effect was not intended by Mr Blurton or, for that matter, by his supervising partner. As the plaintiffs' counsel submitted, it would be unlikely if that were the case because it was inevitable that, at some point in time, the date on which the proceeding was commenced would be revealed to the defendants.

[43] That said, between 12 and 21 January 2016, each of the defendants along with CB Financial and GuardianFP acknowledged receipt of the letters forwarded on 11 January 2016. One – Suncorp Bank on behalf of GuardianFP – requested further information regarding the claim so that investigations could be undertaken, but that request was not made until 3 March 2016.[58]

[44] In the meantime, Mr Blurton attended on Mr Nutter on 18 January 2016 to review a number of archived records. Again, this resulted in the identification of a considerable number of additional documents of possible relevance.[59] Those documents were flagged and a copy requested from Mr Nutter. According to Mr Blurton, until that time, he "had not appreciated that such a significant amount of further information was available".[60]

[45] Also, by email dated 12 January 2016 and letter dated 3 February 2016, Mr Allen was requested to provide a copy of the file he had retained with respect to Landmark. On the second of those dates, Mr Blurton spoke with Mr Allen who advised him that, although any such records would have been archived, he would attempt to locate the documents

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55 T. 1-14.

56 T. 1-13, 1-15.

57 T. 1-15.

58 Blurton 2, par 69.

59 Ibid, par 64.

60 Ibid, par 65.

and provide them "in the future".[61]

[46] On 12 February 2016, Mr Blurton received a copy of the documents he had requested from Mr Nutter on 18 January 2016. These were then collated with the other documents that had been obtained by Mr Blurton since December 2015 and provided to Mr Green by way of a supplementary brief.

[47] On 4 March 2016, Vincents forwarded to Mr Blurton a copy of Mr Green's draft opinion with respect to quantum. By the same email, further information – said to be necessary to finalise Mr Green's opinion – was sought from Mr Blurton. On the same day, Mr Blurton made telephone contact with Mr Wilson QC to enquire whether he would accept instructions on a speculative basis to advise as to prospects. Mr Wilson QC said that he would consider acting on that basis once he had an opportunity to consider the brief. Mr Blurton regarded the seeking of advice on prospects as a "prudent step",[62] before service of the amended claim and amended statement of claim because "the plaintiffs could not afford the risks of adverse costs orders" if the proceeding lacked prospects of success.[63]

[48] On 14 March 2016, Mr Wilson QC was briefed to settle a further amended statement of claim and to "advise generally".[64] On the following day, Mr Blurton instructed Mr Wilson QC to advise as to the plaintiffs' prospects. The next day (16 March 2016) Mr Wilson QC was briefed with further documents.

[49] On 4 April 2016, Mr Blurton contacted Mr Wilson QC to enquire whether there was anything further he needed to consider the matter. It is not clear what (if any) response was then given. However, on 21 April 2016, Mr Wilson QC advised that he was on holidays and would be returning to his chambers on 30 April 2016.

[50] On the next day (22 April 2016) the proceeding became stale.

[51] Nonetheless, Mr Blurton considered that it was "prudent" to await Mr Wilson QC's return from holidays before doing anything else because "the plaintiffs did not have a liability opinion from Mr Green and were yet to be provided with counsel's opinion with respect to prospects".[65]

[52] On eight separate occasions between 10 May 2016 and 27 June 2016, Mr Wilson QC was "contacted with respect to his instructions".[66] In the meantime, Mr Blurton had contacted Vincents on 20 May 2015 when a request for further information was made

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61 Ibid, par 67.

62 Blurton 2, par 73.

63 Ibid, par 75.

64 Ibid, par 76.

65 Ibid, par 81.

66 Ibid, par 85.

on behalf of Mr Green. During the same conversation, Mr Blurton emphasised that the plaintiffs required Mr Green's opinion "as soon as possible".[67] On the same day, Mr Blurton forwarded a letter to Mr Nutter requesting a copy of the documents sought by Vincents that day. They were subsequently supplied and then provided to Vincents on 30 May 2016.

[53] On 20 June 2016, Mr Wilson QC provided his advice as to prospects. Nine days later, a notice of discontinuance with respect to CB Financial and GuardianFP was filed. According to Mr Blurton, that occurred because Vincents had by then determined that the particular payments which led CB Financial and GuardianFP being joined as defendants to the proceedings had been made "in connection with existing investments rather than new investments".[68]

[54] On 6 July 2016, Mr Blurton caused a letter to be forwarded to the Registrar requesting that the claim and statement of claim be renewed for a period of 12 months. On the same day, Mr Blurton swore an affidavit in support of that request, and it was filed in the registry on the following day. In it, he relevantly deposed:

> "5. The plaintiffs seek to recover damages from the first, second and third defendants relating to investment advice provided between 2005 and 2015.
>
> 6. The plaintiffs have instructed an expert to author two separate reports in relation to liability and quantum. Given that the advice took place over 10 years the expert is required to review a significant amount of information.
>
> 7. The plaintiffs are yet to receive the expert report and cannot serve these proceedings without an expert opinion to support their allegations and to calculate the loss and damage."

[55] On 15 July 2016, the Registrar renewed the claim for a period of 12 months, with effect from 22 April 2016.

[56] Two days earlier (13 July 2016), Mr Green was requested to finalise his opinion and, on 28 July 2016, he did so. On that date, he forwarded two reports to Holman Webb; one devoted to the topic of liability[69] and the other to the topic of quantum.[70] The liability report in particular is substantial - excluding annexures, it is 73 pages in length.

[57] On 2 August 2016, the further amended claim and further amended statement of claim were filed in the registry. They had been finalised and available for filing on the day prior to the receipt of Mr Green's reports (27 July 2016). By the further amended claim,

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67 Ibid, par 86.

68 Ibid, par 55.

69 Blurton 2, Exhibit CDB-57.

70 Ibid, Exhibit CDB-58.

all allegations against CB Financial and GuardianFP were removed, the claim for breach of contract was discontinued and various other allegations and amendments were made.[71]

[58] On 9, 11 and 12 August 2016, the defendants were served with the further amended claim and further amended statement of claim. After conditional notices to defend were filed on behalf of the defendants,[72] they were served on the plaintiffs' solicitors.

[59] On 2 November 2016, the subject applications were filed on behalf of the defendants.

[60] By the time the applications were heard (7 December 2016), Holman Webb had gathered together in excess of 1,500 documents which were housed in 15 arch lever folders. According to Mr Blurton, a number of those documents refer to the recommendations made by Mr Gunthorpe regarding investments at or around the time the statements of advice were provided. He has expressed the opinion that "very significant documentation in relation to the claim is available". In addition, Mr Blurton has identified a number of potential witnesses, each of whom was said to be available to give evidence if necessary.[73] One of those potential witnesses is Mr Nutter. An affidavit from Mr Nutter was read on the hearing of the applications. In it, he deposed to having attended a meeting between Mr King Snr and Mr Gunthorpe to discuss agribusiness investments in about 2006. He was able to produce two documents – an email from Mr Gunthorpe dated 23 May 2006 and an undated handwritten document entitled, "Issues for 05/06 Year" – which he believed had been generated in the context of that meeting.[74]

[61] Mrs King was 76 years of age at the time of the hearing of the applications. She deposed that, throughout their married life, she "generally left most of the financial decisions" to her husband.[75] She believed that he had a "moderate understanding of financial matters insofar as household and business affairs" were concerned but a "very limited understanding or experience in financial investments".[76] In any event, it was Mr King Snr who looked after their bank accounts, liaised with their "accountant and financial advisor" and arranged their tax returns.[77] She could not recall having ever met Mr Gunthorpe or any representative of the second defendant and the first time she could recall reading the statements of advice in question were when her son showed them to

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71 These are summarised in Blurton 2, par 98(c).

72 Affidavit of K M Whalan filed on 2 November 2016, pars 3-4; Affidavit of C D McIvor filed on 2 November 2016, par 17.

73 Blurton 2, par 118.

74 Affidavit of P Nutter filed on 5 December 2016, pars 4-6 and exhibits PN-01 and PN-02.

75 E P King, par 9.

76 Ibid, par 14.

77 Ibid, par 16.

her in "about late 2014 or early 2015".[78] She has some recollection of her husband informing her that Mr Gunthorpe had recommended the making of some agricultural investments in "about 2005 or 2006".[79] She could not recall any further discussion about the investments,[80] and nor could she recall Mr King Snr ever explaining to her they had "borrowed in excess of $1,000,000" to fund the investments.[81] She has some recollection of her husband mentioning to her "a few years before his death" that they "had losses associated with the investments", but she was not provided with any specifics.[82] Mrs King could not recall ever speaking to Mr Milham or her husband ever mentioning that he had spoken to, or received advice from, Mr Milham.[83] Likewise, Mr King never spoke with Mr Milham and nor could he recall his father ever mentioning that he had spoken to, or received advice from, Mr Milham.[84]

[62] Mrs King was not aware that the claim would become stale if not served within 12 months but she understood from her discussions with Mr Blurton that "an opinion from an expert was required to confirm whether the case had prospects".[85] In particular, she deposed that:

> "Given my age, retirement and financial position I did not want to commence and proceed with a claim which lacked merit. I accepted the advice of Mr Blurton that the expert opinion was required and I agreed to wait until we received this opinion. To clarify this point, I did not instruct Holman Webb to withhold service of the claim, I did not want to continue with the claim unless there were prospects. I then left matters to … Holman Webb to progress as they considered appropriate."[86]

[63] Mrs King swore that, because she was not in a financial position to fund the litigation or able to pay the defendants' costs of the claim is unsuccessful, she "could not pursue a claim unless there were sufficient prospects".[87]

[64] Likewise, Mr King was not aware that the claim would become stale is not served within 12 months. Otherwise, he swore:

> "As my mother and I had recently been through a traumatic period

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78 Ibid, par 26.

79 Ibid, par 28.

80 Ibid, par 30.

81 Ibid, par 34.

82 Ibid, par 36.

83 Supplementary affidavit of E P King filed on 28 August 2017, par 3.

84 Supplementary affidavit of T M King filed on 29 August 2017, par 3.

85 E P King, par 73.

86 Ibid.

87 Ibid, par 76.

> following the passing of my father it was my priority to ensure that if any claim was continued against Mr Gunthorpe, that the claim had prospects of success. It was important that we understood this and only continued with the claim once we had an understanding as to the merits of the claim.
>
> I understood and accepted the advice of Mr Blurton that the merits of the claim would only be known when we received an opinion from an expert. To clarify this point, I did not instruct Holman Webb Lawyers to withhold service of the claim, however I did not want to continue with the claim unless there were prospects.
>
> If the claim against the defendants cannot be pursued it is possible that my siblings and I may need to to help my mother financially given that we anticipate she has many years remaining."[88]

[65] According to Mr Reeves, as managing director of the second defendant over the relevant period, Mr Milham would have had knowledge of the facts, matters and circumstances relevant to the allegations made by the plaintiffs in the most recent version of their pleading.[89] Mr Reeves, on the other hand, has no direct knowledge and nor does the other non-executive director, Mr Jones.[90]

[66] In his capacity as managing director, Mr Milham was responsible for the supervision and oversight of staff members, including "discussing and endorsing (if appropriate) any recommendations for client investment".[91] He was also responsible for monitoring and ensuring compliance with the second defendant's internal compliance processes.[92] Mr Gunthorpe told Mr Reeves, and Mr Reeves believes, that Mr Milham was "involved in assessing whether the products recommended for the plaintiffs were appropriate and in mentoring [Mr Gunthorpe] to discuss with Mr King [Snr] his financial affairs and appropriate advice".[93]

The discretion to renew a claim

[67] The order for renewal was made pursuant to r 24 UCPR. If satisfied that "reasonable efforts have been made to serve the defendant" or that "there is another good reason to renew the claim", the Registrar is empowered to renew the claim for "further periods, of not more than 1 year at a time, starting on the day after the claim would otherwise end": r 24(2). Here, there was no attempt to serve any of the defendants prior to the making of the application before the Registrar and, as such, the only basis on which the claim

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88 T M King, pars 39-41.

89 Reeves, pars 16 and 17.

90 Ibid, pars 13 and 15.

91 Ibid, par 17.

92 Ibid.

93 Ibid, par 18.

could have been renewed was that there existed "another good reason" to do so.

[68] On the hearing of applications such as these, the renewal order may be set aside under r 16(d) UCPR (because it was an order extending the time for service of an originating process), r 667(2)(a) UCPR (because it was made *ex parte*[94]) or in the exercise of the court's inherent jurisdiction.[95] The applications proceed as hearings *de novo*, and are to be determined upon a consideration of the whole of the material before the court.[96]

[69] In *Muirhead v The Uniting Church in Australia Property Trust (Q)*,[97] Pincus JA (with whom Davies JA agreed) provided the following summary of the views expressed by Stephen J in *Van Leer Australia Pty Ltd v Palace Shipping KK*[98] as to the principles to be applied in applications such as this:

> "(1) There is a tendency to relax rigid time limits where that is legally possible and where it can be done without prejudice or injustice to other parties.
>
> (2) The discretion may be exercised although the statutory limitation period has expired.
>
> (3) Matters to be considered include the length of delay, the reasons for it, the conduct of the parties and the hardship or prejudice caused to the plaintiff by refusing renewal or to the defendant by granting it.
>
> (4) There is a wide and unfettered discretion and there is 'no better reason for granting relief than to see that justice is done'."[99]

[70] As to the first of the principles summarised by Pincus JA, it is now well-established that the discretion to renew must be exercised in the context of, and by reference to, the other provisions of the UCPR and, in particular, r 5. In *The IMB Group Pty Ltd (in liq) v Australian Competition and Consumer Commission*,[100] Keane JA (with whom McMurdo P and Cullinane J agreed) said this:

> "[26] It will be noted that r. 24(1) establishes the general proposition that a claim is to be in force for the purpose of service for one year. The

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94 *Sproule v Long* [2001] 2 Qd R 335, [6] – [8]; *Re Criminal Proceeds Confiscation Act* 2002 [2004] 1 Qd R 40, [13].

95 *Major v Australian Sports Commission* [2001] QSC 320, [58]-[60]; *Sailorchard Pty Ltd (Administrators Appointed) v Thrifty (Australia) Pty Ltd* [2003] QSC 41, [33]; *Babcock & Brown Pty Ltd v Andersen* [2010] QSC 287, [54].

96 *Babcock & Brown Pty Ltd v Andersen* [2010] QSC 287, [55].

97 [1999] QCA 513.

98 (1981) 180 CLR 337, 343-346.

99 [1999] QCA 513, [4]. And see *Crompton v Buchanan & Ors* [2010] QCA 250, [7].

100 [2007] 1 Qd R 148.

> principal purpose of r. 24(1) is obviously to afford a plaintiff ample opportunity to effect service upon the defendant. Rule 24(2) makes provision for renewal in cases where there is good reason for renewing the claim even though it has not yet been served on the defendant. Rule 24(2), in turn, is subject to the qualifications in r. 24(4) and r. 24(5).
>
> [27] Importantly for the present case, it must be borne in mind that the discretion conferred by r. 24(2) of the UCPR falls to be exercised in a context which includes r. 5 which states the philosophy of the UCPR. Rule 5 of the UCPR provides:
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> …
>
> (3) In a proceeding in a court, a party impliedly undertakes to the court and to the other parties to proceed in an expeditious way.
>
> …
>
> [53] Rule 24(2) facilitates the preservation of proceedings which might otherwise become stale through no fault of the plaintiffs. A party who deliberately chooses to refrain from serving a claim will rarely be able to show good reason to warrant the renewal of the claim.
>
> [54] No case was cited to this Court in which r. 24(2) or its analogues has been held to authorise a renewal of a claim in favour of a party who deliberately chooses not to serve a claim where the facts of the case sufficient to enable the case to be pleaded are known to the plaintiff. Whatever the position may have been in that regard in the absence of a provision such as r. 5(3) of the UCPR, the presence of r 5(3) means that the approach pursued by the plaintiffs in the present case should not be vindicated by the court."

[71] Subsequently, in *Hightop Pty Ltd & Anor v Kay Sheila Lawrence trading as 'Kay Lawrence Accountancy'*,[101] White JA (Chesterman JA agreeing) made the following observations about the interaction between rr 5 and 24 UCPR and the relevance of the expiration of the limitation period to the exercise of the discretion:

> "The primary source of power to renew a claim is plainly r 24. It confers a discretion to renew if 'good reason' is shown. While such a discretion is undoubtedly wide, it is not 'at large' and must 'be exercised in the context of and by reference to' the legislative framework in which it appears. …
>
> It is by reference to authoritative decisions expounding the discretion that meaning may be given to the expression 'good reason' where it appears in r 24(2) … As to the requirement that r 24 must be considered in its legislative context, in *The IMB Group Pty Ltd (in liq) v Australian Competition and*

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101 [2010] QCA 270.

Consumer Commission, Keane JA (as his Honour then was) observed that r 24(2) must be read, and the discretion exercised, in a context which includes r 5. Rule 5 states the philosophy of the UCPR, requiring parties to proceed expeditiously and, amongst other things, to avoid undue delay. Thus any conduct of proceedings by a party which entails unexplained or inexcusable delay cannot expect to be vindicated by a court (or the registrar) exercising the discretion granted in r 24(2).

The reasoning of Bray CJ in *Victa Limited v Johnson*, approved by Stephen J in *Van Leer Australia Pty Ltd v Palace Shipping KK* and Mason J in *Foxe v Brown*, expresses the appropriate understanding of a procedural rule which permits renewal of originating process after the expiration of the limitation period. Bray CJ said:

> 'Once the writ is issued within the period, the Statute of Limitations is ousted or rather never comes into operation. It is not the statute, which the court must obey on what it thinks is its proper interpretation, but the rule of court which takes over then. That rule has the discretion built into it and that discretion is to be exercised judicially, indeed, but not fettered by inflexible prescriptions. … What has expired is in reality not the limitation period but the period which would have been the limitation period if no writ had ever been issued. What the failure to serve a writ within twelve months gives the defendant is no more than a right to contend that the Court in the exercise of its discretion should not renew the writ. The efficacy of the writ does not expire absolutely at the end of the twelve months, it only expires if and in so far as the Court sees fit not to renew it. …
>
> I will not attempt an exhaustive category of [good] reasons. That would probably be impossible and would certainly be undesirable. Prominent, however, amongst the matters for the consideration of the Court, apart from whatever attempts have been made at service, will be the length of the delay, the reasons for the delay, the conduct of the parties and the hardship or prejudice caused to the plaintiff by refusing the renewal or to the defendant by granting it."

In *Van Leer* Stephen J also approved the similar reasoning of Culliton CJ in *Simpson v Saskatchewan Government Insurance Office* who concluded that 'the words, for other good reason' … should be given a broad and liberal interpretation' and that there is 'no better reason for granting relief than to see that justice is done'."[102] [Citations omitted]

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102 [2010] QCA 270, [35]-[37].

[72] More recently, in *McIntosh & Anor v Maitland & Ors*,[103] Jackson J undertook a comprehensive review of the history of provisions such as r 24 UCPR before saying this:

> "Subsequent developments in statute and case law and the nature of courts' civil jurisdiction and civil lists have undercut some of the conditions that informed the thinking in 1975 that there was a tendency to relax rigid time limits where legally possible.
>
> The rules of court and practice directions of this court now mandate the progress of a proceeding when it is started by claim. The "philosophy" is contained in r 5 of the UCPR, that the purpose of the rules is to facilitate the just and expeditious resolution of the real issues at a minimum of expense, that the rules are to be applied with cognate objectives and that a party impliedly undertakes **to the court** and to the other parties to proceed in an expeditious way."[104] [Emphasis in original]

[73] Then, after referring to a number of ways in which cases coming before the court are now managed and expressing considerable doubt as to whether *Birkett v James*[105] may still be "taken as a reliable statement of the law as to the approach of the court to want of prosecution",[106] his Honour continued:

> "In my view, it can no longer be said in this court that, in cognate branches of the procedural law, there is a tendency to relax rigid time limits where that is legally possible and where it can be done without prejudice or injustice to other parties. That would be inconsistent with a number of the statutory rules, concepts, principles and practices that are now recognised and incorporated into our modern laws of civil procedure.
>
> Courts nowadays adopt many measures to make civil proceedings faster, less expensive and more efficient, even though they are not always attended with success. The community pays for the due administration of justice through the provision of the courts to decide cases according to law. Delay itself presents several challenges to that due administration.
>
> In expressing these reasons I have not referred to all the cases relied upon by the plaintiffs (or for that matter by the defendants). However, in my view, the expiry of the limitation period is an important circumstance when considering an application to renew a claim under r 24(2). That is because a plaintiff who starts a claim in the last days before the expiration of a limitation period, but does not serve it so as to avoid having to proceed in an expeditious way, and then seeks to renew the claim after one year without

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103 [2016] QSC 203.

104 Ibid, [28]-[29].

105 [1978] AC 297.

106 *McIntosh & Anor v Maitland & Ors*, supra, [33].

> making reasonable efforts to serve seeks, in effect, to extend the maximum limited time to proceed as of right.
>
> For most claims at common law, s 10 of the *Limitation of Actions Act* 1974 (Qld) and r 5 seek to prevent delay of that kind. On an application under r 24(2), a plaintiff who proceeds in that way must show that there is a good reason for doing so. The plaintiff is, after all, seeking the court's blessing so as to be able to proceed contrary to the requirements otherwise imposed by statute."[107]

[74] Lastly, on the issue of prejudice, it is for the plaintiffs to exclude the possibility of material prejudice arising from renewal of the claim.[108] As to this, where the period between the date when the cause of action arose and the date of the application for renewal is significant, general prejudice may be presumed to flow from the effluxion of time.[109] There may, in addition, also be identifiable and specific prejudice to the defendant if the claim is renewed. Each case will be different. In all cases, however, it is important to keep in mind the following observations by Keane JA in *The IMB Group*:

> "It is to be emphasised that the ultimate objective of the UCPR is the facilitation of a judicial determination of a dispute fairly and justly on its merits. This objective cannot be achieved if, by reason of the lapse of time, it is no longer possible for each party to have a fair opportunity to present its case. If there is reason for concern that the lapse of time is a real impediment to the fair presentation of a party's case, that is a deficit in the case of an applicant for the grant of an indulgence in the form of an exemption from the operation of the general rule that a court will not exercise its discretion in favour of renewal."[110]

Analysis

[75] It is useful to commence with the question of prejudice.

[76] The defendants submitted that they will suffer real prejudice if the renewal is allowed to stand. Although they conceded that Mr Gunthorpe will be their primary witness, it was contended that Mr Milham, as the senior officer in the company, would also have been a material witness of fact, at least to meet the allegation that the second defendant "failed to ensure that financial advice provided to Mr and Mrs King was rendered with due skill and care".[111]That was likely because, it was submitted, the two non-executive directors

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107 *McIntosh & Anor v Maitland & Ors*, supra, [34]-[37].

108 *Muirhead v The Uniting Church in Australia Property Trust (Q)*, supra, [31].

109 *The IMB Group Pty Ltd (in liq) v Australian Competition and Consumer* Commission, supra, [51]; *Crompton v Buchanan*, supra, [59]; *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, 556.

110 *The IMB Group Pty Ltd (in liq) v Australian Competition and Consumer Commission*, supra, [51].

111 Further Amended Statement Claim, pars 28(n) and 29(p).

– Mr Reeves and Mr Jones – were not involved in the company's operations and have no direct knowledge of the facts whereas Mr Milham could have given evidence about the nature and range of financial products offered by the second defendant, the particular compliance processes that were followed in relation to agribusiness investment recommendations[112] and the assessment he undertook regarding the recommendations which were made to Mr King Snr.[113] It was also submitted that Mr Milham "could have provided context for the allegedly negligent financial advice that was given"[114] and would have been a "key person providing instructions as to the disclosure of documents".[115] The defendants also made the point that, had the claim been served prior to 22 April 2016, they would have been obliged to put in their defence within 28 days and "might have been expected to take at least an initial statement from Mr Milham for that purpose".[116]

[77] The defendants argued that "the fact that many allegations made by the plaintiffs may be evidenced by documents does not mean that there is no prejudice flowing from Mr Milham's death",[117] and relied on what was said by Jackson J in *McIntosh v Maitland* to the effect that, even where many of the facts on which a claim is based may be evidenced by existing documents, that does "not exhaust the universe of possibilities as to the relevant or decisive evidence".[118] As such, it was argued that Mr Milham's death means the plaintiffs "cannot demonstrate that the defendants will not be materially prejudiced by the renewal of the claim" and that this is "an important factor which weighs in favour of the exercise of the court's discretion to set aside the renewal".[119]

[78] The plaintiffs submitted that the evidence contained in the affidavit Mr Reeves is not convincing as to why, and in what respects, Mr Milham would have been a witness in respect of "any material and controversial issue of primary fact"[120] or how his death causes material prejudice to the defendants such that a fair trial is not possible. They pointed out that the statements of advice which are the subject of the claim were in writing and set out the information gathered by Mr Gunthorpe concerning Mr and Mrs King, the advice given and the basis for it, and the feature that the defendants had not sought to identify any material fact in issue outside the scope of those documents. The plaintiffs also submitted that, on the available evidence, Mr Milham did not have any contact with Mrs King or her son and, to the extent that Mr Reeves' affidavit contains a

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112 Supplementary submissions for the defendants, par 5.

113 Ibid, par 9.

114 Supplementary submissions for the defendants, par 5.

115 Ibid, par 6.

116 Ibid, par 7.

117 Ibid, par 8.

118 *McIntosh v Maitland*, supra, [87]-[88].

119 Supplementary submissions for the defendants, par 10.

120 Supplementary submissions for the plaintiffs, par 6.

hearsay account from Mr Gunthorpe as to the involvement of Mr Milham in the assessment of the financial products recommended to the plaintiffs as well as the mentoring of Mr Gunthorpe to discuss with Mr King Snr his financial affairs and appropriate advice, it was submitted that Mr Reeves did not go on to explain how Mr Milham's involvement in either of these respects bears upon any fact in issue. The plaintiffs also pointed out that the defendants had sought, and were granted, extensions to file defences after being served with the claim[121] and, over that period, had the opportunity to conduct investigations including the taking of at least an initial statement from Mr Milham but did not do so.

[79] As to the defendants' submission that Mr Milham would likely have been called to meet the allegation that the defendants failed to ensure that the financial advice provided to Mr and Mrs King was rendered with due skill and care, the plaintiffs submitted that it is not explained how the second defendant's internal compliance procedures would have any material bearing on the case and that, in any event, as a director of the second defendant and the person who gave the relevant advice, Mr Gunthorpe will be able to give evidence of such matters. Furthermore, the plaintiffs submitted that it would be expected that the compliance procedures would be reflected in documents and, in that regard, it has not been suggested by the defendants that any relevant document has been lost or destroyed. As to the disclosure task, the plaintiffs argued that, given the modest size of the company, disclosure could not be expected to be onerous but, even if it was, Mr Gunthorpe will be able to provide adequate instructions.

[80] Although there is much force in the plaintiffs' submissions, the possibility that Mr Milham might have assisted the defence of the claim in one or more of the respects contended by the defendants cannot be entirely discounted. True it is that the claim is founded on written statements of advice that incorporate the information gathered by Mr Gunthorpe, the advice given by him and the basis for it, but Mr Milham appears to have occupied something of a supervisory role in relation to Mr Gunthorpe despite the latter's independent status as a director. As such, it is possible that Mr Milham might have been required to give some evidence at the trial to establish what compliance processes were followed in relation to the advice in question as well as the role he played in connection with those processes. It is also possible that he might have been able to give evidence about what he did to assess the investments recommended to the plaintiffs and to "mentor" Mr Gunthorpe to discuss with Mr King Snr his financial affairs and provide appropriate advice.[122] He might also have been able to assist with disclosure. It is, however, to be observed that the defendants have not attempted to explain why Mr Gunthorpe could not give the same evidence or alone provide all of the assistance required for the disclosure of documents. Indeed, my overall impression is that the risk of material prejudice arising from renewal of the claim is slight but, despite that, the possibility remains that the defendants will be disadvantaged in one or more of the respects just mentioned. I therefore proceed on that basis.

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121 See Blurton 2, pars 104-115.

122 See Reeves, par 18.

[81] I also proceed on the basis that the defendants may very well be deprived of a limitation defence, at least so far as one of the investments is concerned.[123]

[82] It must also be kept in mind that a degree of general prejudice is to be presumed due to the lapse of time between when the advice was given in 2005 and 2006 and when the claim was served (August 2016), that is to say, periods of around 10 and 11 years respectively. Had the claim been served after it was filed (22 April 2015) those periods would have been reduced by about 16 months, although the defendants were of course placed on notice about the claim in January 2016. Even though the defendants accept that "this is a case in which many factual allegations will be evidenced by documents",[124] that is not to say that the documents which do exist constitute a complete record or that the recollection of witnesses will be unimportant.[125] At least one meeting of relevance took place in May 2006 involving Mr Gunthorpe, Mr King Snr and Mr Nutter, and there may well have been others. So, to the extent that the recollection of witnesses might assume importance to the outcome of the trial, there will almost certainly have been a fading of the memory on the part of those witnesses because of the time that has elapsed since the giving of the advice. Of course, their recollections may be capable of being refreshed if contemporaneous notes were made but, beyond the notes Mr Nutter has produced in relation to the May 2006 meeting,[126] the evidence does not assist, one way or the other, as to whether any such notes still exist.

[83] None of this is to say, however, that it is no longer possible because of the lapse of time for the parties to have a fair opportunity to present the respective cases, and I did not understand the defendants to make that submission. The case remains one that will depend to a substantial extent on documents that are still in existence, and no complaint was made on behalf of the defendants that a relevant document or category of documents has been lost or destroyed.[127]

[84] Each of the factors just discussed – specific prejudice (at [76]-[80]), general prejudice (at [82]) and the possible expiration of the limitation period (at [81]) – weigh in favour of an order setting aside the renewal. As against those factors, the claim is apparently worthwhile[128] and there is a real prospect that hardship will be caused to Mrs King, in particular, if the plaintiffs are not allowed to pursue it.

[85] That said, the real focus of the defendants' applications was on what was said to be an

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123 Timbercorp. See the exchange at T.1-7 to T.1-8.

124 Written Outline of Argument for the Defendants, par 41.

125 See *Gillies v Dibbetts* [2001] 1 Qd R 596, [23].

126 Nutter, Exhibit PN-02.

127 See T.1-50.

128 The defendants concede that the claim is "arguable on its face": Written Outline of Argument for the Defendants, par 42. And see Outline of Submissions for the Plaintiffs, pars 5 and 45-46.

absence of "good reason" to renew the claim. In that regard, it was submitted that, by delaying service until satisfied as to the claim's prospects of success, the "plaintiffs arrogated to themselves the decision of how and when the matter should progress, to suit their own needs and timing".[129] The point was made that the plaintiffs were always in a position to serve a statement of claim capable of surviving a strike out application, and had done so on 22 April 2015 and then again on 10 December 2015. There was never any suggestion that either pleading failed to disclose an arguable cause of action, so the delay in service of the claim was never necessary to enable the plaintiffs to comply with the UCPR. It was submitted that "a forensic choice to delay service for the plaintiffs' benefit is the antithesis of a 'good reason' to permit renewal under r 24".[130]

[86] In support of this argument, the defendants placed considerable reliance on what was said by Keane JA in *The IMB Group*.[131] As earlier discussed (at [70]), his Honour observed that a party who "deliberately chooses to refrain from serving a claim will rarely be able to show good reason to warrant the renewal of the claim" and went on to record that no case had been cited to the Court in which r 24 or its analogues had been held to authorise the renewal of a claim in favour of a party who deliberately chooses not to serve it "where the facts of the case sufficient to enable the case to be pleaded are known to the plaintiff". Importantly, his Honour then said:

> "Whatever the position may have been in that regard in the absence of a provision such as r 5(3) of the UCPR, the presence of r 5(3) means that the approach pursued by the plaintiffs in the present case should not be vindicated by the court."[132]

[87] Similar remarks were of course made by White JA in *Hightop* where her Honour said:

> "Thus any conduct of proceedings by a party which entails unexplained or inexcusable delay cannot expect to be vindicated by a court (or the registrar) exercising the discretion granted in r 24(2)."[133]

[88] The premise for the remarks made by both justices was an established breach by the party seeking renewal of their implied undertaking to the court and the other parties to "proceed in an expeditious way", but the same premise is not present here. To the contrary, as appears from the steps that were taken over the period in question which I earlier summarised at some length (at [17]-[58]), the plaintiffs did proceed in an expeditious way. The investigation undertaken by the plaintiffs' solicitors to determine whether the claim was a viable one was by no means straight-forward. Mr King had no direct knowledge of, or involvement with, his father's financial affairs prior to his death

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129 Written Outline of Argument for the Defendants, par 5(a).

130 Ibid, 5(c).

131 *The IMB Group Pty Ltd (in liq) v Australian Competition and Consumer Commission*, supra, [53]-[54].

132 Ibid, [54].

133 *Hightop Pty Ltd & Anor v Kay Sheila Lawrence trading as 'Kay Lawrence Accountancy'*, supra, [36].

and the same may be said of Mrs King. Mr King was particularly reliant on Mr McCormack and Mr Nutter to meet his solicitors' requests for relevant information and documents and, then, on Mr Green as well as the counsel retained by his solicitors to come to a concluded view about prospects. That all took some time and, although some steps along the way might have been taken more quickly,[134] and some may have been strictly unnecessary,[135] my overall impression of this case is not one of "calculated inactivity", to borrow a phrase from Byrne J in *MacDonnell v Rolley*.[136] Nor is this a case where a deliberate choice was made not to serve the claim, such as was seen to have been made by the plaintiffs in *The IMB Group,* the investment group in *Babcock & Brown* and the trustees in *McIntosh*. In the first place, the plaintiffs here at all times acted in accordance with the legal advice that was provided to them[137] and, secondly, the pace at which the plaintiffs were able to proceed was dependent on the successful gathering of a considerable body of information and documents as well as the receipt of the opinions to which I have referred. Once the long-awaited, and pursued, opinions from Mr Green were received on 28 July 2016, the revised claim and statement of claim that had been finalised on the previous day was promptly filed and served. As it was, that all occurred within four months of the claim becoming stale and within one month of the claim being renewed. As Keane JA said in *The IMB Group*, r 24 UCPR "facilitates the preservation of proceedings which might otherwise become stale through no fault of the plaintiffs".[138] I think that is the position here; the claim became stale through no fault of the plaintiffs.

[89] Furthermore, I do not understand from what Keane JA otherwise said in *The IMB Group* that his Honour was laying down a prescriptive test. Although his Honour observed that it had been accepted in *Major v Australian Sports Commission*[139] to be a "legitimate reason" to defer service where "the imminent expiry of a limitation period necessitates the commencement of proceedings, but further investigation of the circumstances of the claim is necessary to be able to properly plead so that the action would not be vulnerable to a strike out application",[140] his Honour did not hold that the *only* good reason for the renewal of a claim is that the delay in question had come about because of the need for the claim to be properly pleaded. Rule 24 of course does not say that. Instead, what the court must determine is whether there is "good reason" for the renewal and, given what has been said by Keane JA in *The IMB Group* and White JA in *Hightop* (and further explained by Jackson J in *McIntosh*), the court's assessment will

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134 Such as the briefing of senior counsel to provide an opinion on prospects. See Written Outline of Argument for the Defendants, par 20.

135 For example, the steps criticised by the defendants in their written submissions: par 17(b).

136 [2000] QSC 58, [12].

137 As to which, see the observations of P Lyons J in *Hightop Pty Ltd & Anor v Caffe Pty Ltd & Ors* [2009] QSC 402, [40].

138 *The IMB Group Pty Ltd (in liq) v Australian Competition and Consumer Commission*, supra, [53].

139 [2001] QSC 320, [71].

140 *The IMB Group Pty Ltd (in liq) v Australian Competition and Consumer Commission*, supra, [55].

be vitally concerned with the extent to which the plaintiff has complied with the implied obligation to proceed in an expeditious way.

[90] A thorough investigation of the claim was important to the plaintiffs and, particularly, to Mrs King. The service of a claim that could not be substantiated, or even one that was not worthwhile, might have put at risk her financial security. It is therefore understandable why the claim was not served until a definitive opinion on, particularly, the question of loss was received from Mr Green. The plaintiffs were entitled to investigate and take advice on the claim before serving it, provided they did so in an expeditious way and, in my opinion, they did.

[91] There can be "no better reason for granting relief than to see that justice is done".[141] I am satisfied that there was good reason for renewing the claim. The delay in serving it has been satisfactorily explained. The implied undertaking to proceed expeditiously has not been breached and the plaintiffs are not otherwise at fault. The claim is apparently worthwhile and hardship might result if the plaintiffs are shut out from their pursuit of it. These factors, supporting as they do the renewal of the claim, outweigh those that are in favour of setting aside the renewal, that is to say, the specific and general prejudice earlier identified and the likelihood that the defendants will be deprived of a limitation defence.

Conclusion

[92] For these reasons, I am satisfied that good reason exists for the renewal of the claim.

[93] It follows that the applications must be dismissed.

[94] The defendants will be ordered to pay the plaintiffs' costs of and incidental to the applications calculated on the standard basis unless one or more of the parties contend for the making of a different order.

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[141] *Simpson v Saskatchewan Government Insurance Office* (1967) 65 DLR (2d) 324, 332 per Culliton J; *Van Leer Australia Pty Ltd v Palace Shipping KK*, supra, 343-346; *Muirhead v The Uniting Church in Australia Property Trust (Q)*, supra, [4]; *Hightop Pty Ltd & Anor v Kay Sheila Lawrence trading as 'Kay Lawrence Accountancy'*, supra, [37].