SUPREME COURT OF QUEENSLAND

CITATION:	*A Top Class Turf Pty Ltd v Parfitt* [2018] QCA 127
PARTIES:	**A TOP CLASS TURF PTY LTD** ACN 108 471 049 (applicant) **v** **MICHAEL DANIEL PARFITT** (respondent)
FILE NO/S:	Appeal No 6553 of 2017 DC No 1914 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane – Unreported, 2 June 2017 (Koppenol DCJ)
DELIVERED ON:	19 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	7 November 2017
JUDGES:	Gotterson and Morrison JJA and Brown J
ORDER:	**Application refused.**
CATCHWORDS:	WORKERS' COMPENSATION – ACTIONS FOR DAMAGES AGAINST EMPLOYER – TIME FOR INSTITUTING ACTION FOR DAMAGES – where the applicant seeks leave to appeal orders of the District Court granting leave to the respondent to proceed under s 298 of the *Workers' Compensation Rehabilitation Act* 2003 (Qld) ("the Act") – where WorkCover Queensland is the insurer of the applicant – where the respondent applied to WorkCover for statutory workers' compensation out of time – where WorkCover rejected the application – where the applicant submits that the respondent is precluded from seeking damages under s 237 of the Act on the basis that the application was rejected on its merits – where the respondent submits that the application for compensation was made out of time and that there was no application made under s 131 and s 132 of the Act – whether the application for compensation was rejected by WorkCover after a consideration of its merits – whether the case of *Jacobs v*

Woolworths Limited was distinguishable or wrongly decided – whether s 132A of the Act applied – whether leave to appeal should be granted

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 131(1), s 131(5), s 132, s 132A, s 134, s 179, s 237, s 275, s 276, s 298, s 302(1)

Charlton v WorkCover Queensland [2007] 2 Qd R 421; [2006] QCA 498, cited
Jacobs v Woolworths Limited [2010] 2 Qd R 400; [2010] QSC 24, considered
Kelly v WorkCover Queensland [2002] 1 Qd R 496, cited
Watkin v GRM International Pty Ltd [2007] 1 Qd R 389; [2006] QCA 382, cited

COUNSEL: W D P Campbell for the applicant
M Forbes for the respondent

SOLICITORS: Jensen McConaghy Lawyers for the applicant
East Coast Lawyers for the respondent

[1] **GOTTERSON JA:** I agree with the order proposed by Brown J and with the reasons given by her Honour.

[2] **MORRISON JA:** I agree with the reasons of Brown J and the order her Honour proposes.

[3] **BROWN J:** The applicant seeks leave to appeal orders of the District Court made on 2 June 2017 granting leave to the respondent to proceed under s 298 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("**the Act**") notwithstanding non-compliance with s 275 of the Act, subject to conditions. WorkCover Queensland is relevantly the insurer of A Top Class Turf Pty Ltd in relation to this application. The issue is whether the respondent is precluded from seeking damages at common law on the basis that his application for statutory workers' compensation had been rejected by WorkCover Queensland, or whether in rejecting the application which was out of time, there was no application made under s 131 and s 132 of the Act at all.

[4] The question of leave turns on whether the Court is satisfied that there is a reasonable argument that there is an error to be corrected and an appeal is necessary to correct a substantial injustice to the applicant. The applicant contends that that is not the case as, *inter alia*, the decision of the Court only maintains the status quo and does not provide the respondent with any entitlement to seek damages. In order to determine the question of leave, the Court will consider the substantive grounds of appeal.

Issues on appeal

[5] The issues that fall to be determined in deciding whether the Court should grant such leave are:

(a) Whether the application for compensation made to WorkCover Queensland was rejected by WorkCover Queensland, not only on the basis that it was lodged outside of the six month period prescribed by s 131 of the Act, but whether it was also rejected after a consideration of its merits;

(b) Whether the case of *Jacobs v Woolworths Limited*,[1] relied upon by the primary judge, was distinguishable from the present case or alternatively, whether *Jacobs* was wrongly decided;

(c) Whether s 132A of the Act did not apply because the applicant had not received, a notice of assessment from WorkCover Queensland for the injury with the degree of permanent injury ("**DPI**") for the assessed injury at more than five per cent prior to expiration of the limitation period.

Circumstances leading to District Court orders

[6] The alleged injury is said to have occurred on 2 June 2014.

[7] On 20 May 2015, the respondent lodged an application for compensation pursuant to s 132 of the Act with WorkCover Queensland. The application was rejected by WorkCover Queensland on 23 June 2015 pursuant to s 134 of the Act, on the basis that it was lodged outside the period prescribed by s 131 of the Act. WorkCover Queensland in its reasons stated that the respondent had not shown "reasonable cause" for his failure to lodge the application within time. WorkCover Queensland contends that in the course of its consideration it considered the merits of the application and the application was also rejected on that basis.

[8] Following the respondent seeking a review of the WorkCover Queensland decision, the WorkCover Regulator set aside the decision of WorkCover Queensland on 8 September 2015. It found that there was insufficient evidence to determine whether or not the application was lodged within the six month period after the entitlement to compensation arose as prescribed by s 131(1) of the Act. As a result of the Regulator's decision, WorkCover Queensland sought further clarification from two medical practitioners and wrote to the respondent asking the respondent to identify which injury he was claiming for, the date of the injury and the event which had caused the injury.

[9] On 14 October 2015, the solicitors acting on behalf of the respondent stated in an email to WorkCover that, having reviewed the matter, the symptoms of which their client was complaining related to an incident on 2 June 2014, in which case the respondent should have lodged a WorkCover claim by 2 December 2014. It stated that the respondent was therefore out of time to make a claim for that injury and that they had prepared him for the fact that a claim was likely to be rejected on the basis that it was out of time. WorkCover Queensland was requested to provide its decision and reasons for the solicitors' records.

[10] On 16 October 2015, the WorkCover Queensland Review Unit again rejected the respondent's application. The letter rejecting the application stated that WorkCover

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1 [2010] 2 Qd R 400.

"has decided to not accept your application as it was lodged outside the period stated as outlined in Section 131 of the *Workers' Compensations and Rehabilitation Act* 2003". It provided reasons for the decision as it was required to do under the Act.[2] In those reasons it stated that it had reviewed all of the information gathered on the application which included medical information which was summarised insofar as it was relevant to the decision. The letter further stated:

> "The Workers Compensation Regulator also requested for you to clarify which injury you are claiming for, on which date did the injury occur and what was the event that caused the injury and then for WorkCover Queensland to make a new decision with all the information provided.
>
> WorkCover Queensland requested this information from you on 7 October 2015. A response from your lawyer Sean Delpopolo was received on 14 October 2015. In this, it is noted that the matter has been reviewed and quote 'the medical evidence that we have to hand suggests that the symptoms our client is complaining of relate to the incident on 2 June 2014'.
>
> Section 131(1) of the Act states 'an application for compensation is valid and enforceable only if the application is lodged by the claimant within 6 months after the entitlement to compensation arises'.
>
> In conclusion, based on the material submitted, you lodged a claim ten months after you sought treatment for your injury. According to your claim history, you also had two other claims with WorkCover Queensland over the years. It is therefore reasonable to assume that you are aware of your obligations with regards to lodging a WorkCover Claim. As you did not submit your claim at the time of first consulting a Doctor and delayed sending a medical certificate or lodging a claim for ten months, without a reasonable excuse, I must advise your claim is deemed to be out of time. It is the claimant's responsibility to lodge their application and given you were aware it was a WorkCover matter you do not have reasonable cause for failing to lodge a claim within the legislative timeframe of six months. As a result, I must advise that your claim is not one for acceptance." (emphasis added)

[11] On 26 May 2017, the respondent's solicitors served on WorkCover Queensland a Notice of Claim for Damages, a Form 132 Application for Assessment of Permanent Impairment executed on that date, an Accident Investigation Report Form and various medical reports. The accompanying letter requested that pursuant to s 276 of the Act, WorkCover Queensland waive non-compliance with s 275 of the Act, and requested that WorkCover Queensland arrange an assessment of the degree of permanent impairment of the respondent for those injuries listed in Form

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[2] Section 134(4).

132A sustained on 2 June 2014 in accordance with s 179 of the Act. It is uncontentious that that was one week prior to the expiration of the limitation period provided under s 302(1) of the Act. The application for the assessment under s 179 and s 132A was made on the basis that the applicant was a worker who had not made an application under s 132 of the Act.

[12] On 30 May 2017, solicitors for WorkCover Queensland replied by letter, stating that the respondent had no entitlement to seek damages under s 237(1) of the Act for any shoulder injury he alleged he had sustained as a result of an incident on 2 June 2014. It stated that s 132A did not apply because the respondent had already made an application under s 132 of the Act which had been rejected.

[13] The respondent made an application on 1 June 2017 to the District Court under s 298 of the Act. That application sought an order for the granting of leave to proceed with a damages claim for personal injuries suffered on 2 June 2014, despite non-compliance with the requirements of s 275 of the Act and subject to conditions.

Reasons of the primary judge

[14] The primary judge granted leave under s 298 of the Act despite non-compliance with s 275 of the Act on 2 June 2017 subject to conditions.

[15] In his reasons his Honour stated:

> "In the circumstances of this case, I am satisfied (based on the submissions made) that it falls within the provisions of *Jacobs v Woolworths* [2010] QSC 24, a decision of Jones J.
>
> The claim was rejected by WorkCover on the basis of its being out of time. Because of that, the application would not be regarded as an application under section 132 and, therefore, the worker would be entitled under section 132A to apply for an assessment under section 279.
>
> Section 237(1)(a)(i) refers to the only persons entitled to seek damages for an injury are if the worker has received a notice of assessment from the insurer for the injury and the DPI for the assessed injury is more than five per cent.
>
> It seems to me that there is no basis upon which the applicant is time-barred now from making an application for a notice of assessment – and therefore bringing himself within section 237.
>
> I note the comments of the Court of Appeal in *Watkin v GRM International Pty Ltd* [2006] QCA 382, and especially at paragraph [26], but that paragraph relates to an application which was rejected *on the merits*, as occurred in Atkinson J's decision in *Kelly v WorkCover Queensland* [2002] 1 Qd R 496."

Statutory framework

[16] The respondent is only entitled to claim damages if he falls within one of the descriptions of persons entitled to seek damages in s 237 of the Act.

[17] Section 237 of the Act at the relevant time[3] provided that:

> "**237 General limitation on persons entitled to seek damages**
>
> (1) The following are the only persons entitled to seek damages for an injury sustained by a worker—
>
> (a) the worker, if the worker—
>
> (i) has received a notice of assessment from the insurer for the injury and the DPI for the assessed injury is more than 5%; or
>
> (ii) has a terminal condition;
>
> (b) a dependant of the deceased worker, if the injury results in the worker's death.
>
> (2) The entitlement of a worker, or a dependant of a deceased worker, to seek damages is subject to the provisions of this chapter.
>
> (3) If a worker—
>
> (a) is required under section 239 to make an election to seek damages for an injury; and
>
> (b) has accepted an offer of payment of lump sum compensation under chapter 3, part 10, division 3 for the injury;
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> the worker is not entitled to seek damages.
>
> (4) However, subsection (3) does not prevent a worker from seeking damages under section 266.
>
> (5) To remove any doubt, it is declared that subsection (1) abolishes any entitlement of a person not mentioned in the subsection to seek damages for an injury sustained by a worker."

[18] Section 132A(2) provides for the obtaining of an assessment under s 179 of the Act to determine whether the worker's injury has resulted in a DPI. Section 132A only applies to "a worker who has not made an application under s 132".

[19] An application for compensation under s 132 of the Act must be made within the time frame provided for in s 131(1) of the Act unless the insurer waives the late lodgement under s 131(5) of the Act.

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[3] The relevant Act being the reprint current as at 21 May 2014.

[20] At the relevant time, s 131(1) and (5) of the Act provided:

> "**131 Time for applying**
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> (1) An application for compensation is valid and enforceable only if the application is lodged by the claimant within 6 months after the entitlement to compensation arises.
>
> …
>
> (5) An insurer may waive subsection (1) or (2) for a particular application if the insurer is satisfied that a claimant's failure to lodge the application was due to –
>
> (a) mistake; or
>
> (b) the claimant's absence from the State; or
>
> (c) a reasonable cause."

Contentions as to the basis of rejection

[21] The applicant submits that the primary judge erred in finding that the application for compensation was only rejected by WorkCover Queensland for it being made outside the six month period prescribed by s 131(1) of the Act. The applicant also contends that WorkCover Queensland rejected the application on 23 June 2015 and 16 October 2015 after an assessment of the merits of the application as well as having regard to the fact that the application was lodged out of time.

[22] The applicant contends that in considering the application on 16 October 2015, WorkCover Queensland's Review Unit had to consider the documentary evidence from the doctors to determine when the respondent's entitlement to compensation arose and if the application was out of time. While WorkCover does not need to determine the merits of the eventual application in considering whether to waive the time limit under s 131(5) of the Act for "reasonable cause", it may be proper for it to do so.[4] According to the applicant, the reasons for rejection provided by WorkCover Queensland demonstrated that in exercising its discretion pursuant to s 131(5), it took into account factors that made it plain that the application for compensation also failed on its merits.

[23] The respondent contends that the primary judge correctly found that the application was rejected by WorkCover Queensland on the basis that it was out of time. It relies on the reasons provided by WorkCover Queensland in that regard.

Was the application rejected on its merits?

[24] Although WorkCover Queensland contends that both the decision of 23 June 2015 and the decision of 16 October 2015 was a rejection of the application on its merits, the decision of 23 June was set aside by the WorkCover Regulator and it is the reconsideration of the application of 16 October 2015 which is the relevant decision

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4 *R v Workers' Compensation Board of Queensland; Ex parte Bowerman* [1984] 1 Qd R 64.

for this Court to consider. To the extent that the grounds of the letter of 23 June 2015 were relied upon in the decision of 16 October 2015, I do not regard those grounds as anything additional for consideration.

[25] While reference was made to the medical evidence in the reasons outlined in the letter of 16 October 2015, which the applicant submits shows that there was insufficient medical evidence to substantiate a claim that the respondent had suffered an injury as a result of his work or which arose out of his work, I consider the reasons support the respondent's contention and show that the medical evidence was only looked at in order to determine whether the claim was out of time.

[26] In particular, the references to the information provided in Dr Howard's report and Dr Shillington's report set out in the reasons of 16 October 2015 were, consistent with the decision of the Regulator of 8 September 2015 overturning the decision of 23 June 2015, specifically directed to when the injury was said to have been sustained. Further, the letter of 16 October 2015 referred to the response of the solicitors of the respondent, which identified the symptoms relating to the injury of the respondent as relating to an incident on 2 June 2014.

[27] The context of the letter of 16 October 2015 is made clear by the fact that it followed the determination of the Regulator that there was insufficient evidence to determine whether the application, which was lodged on 20 May 2015, was lodged within the six month period after the entitlement to compensation arose as prescribed by s 131(1) of the Act. In its reasons, the Regulator referred to the reports of Dr Howard, Dr Shillington and another general practitioner. In particular the report of Dr Shillington referred to a shoulder injury in May 2015. There was also reference in the Regulator's determination to the respondent advising WorkCover Queensland of different dates when the injury to his shoulder occurred. Contrary to the submission made on behalf of the applicant, the reasons of the Regulator did not make it clear that the respondent had failed to establish that he had suffered an injury on 2 June 2014, although it certainly seemed to be contemplated as a possibility. The Regulator's reasons stated: "*Your application was lodged on 20 May 2015 and after review of the documented evidence, I cannot determine when your entitlement to compensation arose*."[5] What is however clear from the Regulator's decision is that the Regulator did not determine that the applicant had not established that the injury arose out of or in the course of his employment pursuant to s 132(1) of the Act.

[28] The reasons in the letter of 16 October 2015 do not suggest that WorkCover Queensland was considering anything other than whether the time limit in s 131(1) of the Act had been complied with and whether there was any excuse under s 131(5) for the non-compliance with the time limit. The letter made reference to the fact that the respondent had lodged the claim ten months after he had sought treatment for the injury. It further stated that there was no reasonable cause for the failure to lodge the claim within time, given the fact that the respondent had lodged two

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5 AB at 65.

previous claims with WorkCover Queensland and was therefore assumed to be aware of his obligations in lodging such a claim.

[29] The lack of reasonable cause was not, in the 16 October 2015 letter, linked to any assessment of the merits of the claim. The reasons for rejecting the application do not demonstrate that WorkCover rejected the application on its merits, as was contended for on behalf of the applicant. As such, I consider that there was no error by the primary judge in his finding that the claim was rejected on the basis that it was outside of the prescribed time limit under the Act.

[30] The respondent contends, relying on *Jacobs v Woolworths Limited*,[6] that given the application was out of time under s 131(1) of the Act and there was no waiver of that time requirement for lodgement under s 131(5), there was no application made for the purposes of s 132 of the Act.

Did *Jacobs* apply?

[31] The respondent relies upon *Jacobs v Woolworths Limited*,[7] as authority for the proposition that an application lodged out of time as prescribed by the Act is not an application for compensation for the purposes of the Act and particularly within the meaning of s 132 of the Act. WorkCover Queensland originally sought to distinguish *Jacobs Case* on the basis that WorkCover Queensland had considered and rejected the application for compensation on its merits, not simply on the basis it was out of time. For the reasons outlined above, that argument has not been accepted. In the alternative, it was contended on behalf of the applicant that *Jacobs* was wrongly decided.

[32] In *Jacobs*, the applicant had lodged an application for compensation out of time under s 131(1) of the Act. The respondent had rejected the application on the basis it was out of time and would not waive the non-compliance. The applicant sought a declaration that she was entitled to seek damages under s 237 on the basis that she fell within the class of persons to whom s 237(1)(d) applied, namely that she was a "worker [who] has not lodged an application for compensation for the injury". Section 237(1)(d) was repealed from the Act prior to the consideration of the present application, however the respondent contends that that does not weaken the application of *Jacobs* to the present case.

[33] The applicant in *Jacobs* had, prior to making an application for a declaration in relation to s 237(1)(d), sought a review of the decision by the insurer to reject the application on the basis that it was out of time. The applicant was still awaiting determination of the review when the application for the declaration was made.[8] The fact that a review of the decision to reject the application had been sought, opened up the possibility that s 237(1)(c) could have permitted the applicant to

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6 [2010] 2 Qd R 400.

7 [2010] 2 Qd R 400, as well as the decision of *Thompson v WorkCover Queensland* [2002] 1 Qd R 461 under similar legislation which was referred to by Jones J in *Jacobs*.

8 [2010] 2 Qd R 400 at [4].

bring a claim for common law damages. The Court in *Jacobs* acknowledged that it remained "as a fallback position for the applicant should this application not succeed".

[34] Jones J considered that the differing outcomes contended for by the parties as to whether an application had been made for the purposes of s 237(1)(d) of the Act depended on whether the focus of s 131(1) was upon the physical act of lodging a document which might be regarded as an application for compensation, or whether the focus was upon the validity or efficacy of the document as an application.[9] His Honour determined that the focus of the section is the latter. His Honour considered correctly that the question of whether s 237(1)(d) only applies to a valid and enforceable application had not been considered in *Kelly*, *Watkin* or another case of *Charlton v WorkCover Queensland*.[10] Relevantly, his Honour noted at [17] that:

> "The requirements for an application for statutory compensation are set out in ss 131 and 132 of the Act and this must be accepted as being relevant to the purposes of s 237(1). The emphatic words in s 131, by which validity of the application is achieved "**only if**" the application is lodged within the prescribed time, suggests that an application lodged otherwise has no validity. It is not within the power of a court or tribunal to extend the time for lodgement. The insurer, in limited circumstances, may waive such invalidity for a "**particular application**". The insurer's power to waive is entirely discretionary. The Authority may, under ch 13 of the Act review a decision "to waive or not to waive", though it is difficult to see who would be interested in reviewing a decision to waive compliance. At the same time a review of a failure by WorkCover or an insurer to make a decision at all is available only where the application for compensation is within time. This, to my mind, again places emphasis upon validity of the application rather than the act of lodgement. Such a waiver read in conjunction with s 134 does not reduce the force of the suggestion of invalidity inherent in s 131. There appears to be no capacity to review the failure by a self-insurer to comply with s 134 if the application for compensation is out of time." (emphasis added, footnotes omitted)

[35] His Honour noted that the construction contended for by the insurer in *Jacobs* would mean that all gateways to making a claim for damages would be closed without any consideration of the relationship between the worker's injury and his or her work in relation to all applications lodged out of time where there was no waiver of the non-compliance.[11] His Honour considered that the preferable construction was that an application under s 237(1)(d) of the Act depended on the

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9 At [8].

10 [2007] 2 Qd R 421, the reasoning of which supported the decision made by Jones J.

11 At [22].

validity or efficacy of the application made under s 131 of the Act. That construction best achieved the purpose of s 237 of the Act.[12]

[36] His Honour found that the terms of s 131 of the Act conditioned the essential validity of the application upon it being lodged within time. This was supported by the use of the words, "only if" in s 131(1) in relation to whether an application for compensation is valid and enforceable.[13] His Honour further found that the encouragement to lodge an application out of time on the basis that the non-compliance may be waived by the exercise of a discretion under s 131(5) by WorkCover Queensland would be undermined if accompanied by the penalty of precluding a claim for damages under s 237 if unsuccessful.[14] It would be, as his Honour stated, "a huge gamble for a worker to make the application if, in doing so, his/her entitlement to claim damages was lost".[15] His Honour's reasoning in this regard is sound and supported by the language of the provision.

[37] It was contended on behalf of the applicant that the decision in *Jacobs* was wrongly decided because the applicant could have relied on s 237(1)(c) of the Act and did not need to ground her entitlement to damages on s 237(1)(d) of the Act. While it appears that the argument raised on behalf of the applicant may well be correct, that was not the issue in dispute in *Jacobs* which had to be determined by the Court. As such, the contention that the decision as to the meaning of "application" was wrong on that basis, cannot be sustained.

[38] As there was no determination of the application on the basis of its merits by WorkCover Queensland, the cases of *Kelly v WorkCover Queensland*,[16] and *Watkin v GRM International Pty Ltd*,[17] relied upon by the applicant, have no application to the present case. In both of those cases, it was accepted that a valid application had been made and that the insurer had made a determination of the application for compensation based on its merits.

[39] In *Kelly*, Atkinson J found that the compensation application had been made under s 158 and 159[18] of the *WorkCover Queensland Act* 1996 (Qld), and therefore that

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12 At [23].

13 His Honour drew some support from a decision of Helman J in *Thompson v WorkCover Queensland* [2002] 1 Qd R 461 at 462 dealing with precursor legislation in this regard.

14 At [26].

15 At [24].

16 [2002] 1 Qd R 496.

17 [2007] 1 Qd R 389.

18 Prior to the Act, s 158 of the *WorkCover Queensland Act* 1996 (Qld) was in relevantly identical terms to s 131.

the applicant was excluded from claiming damages at common law under s 253 of that Act.[19]

[40] In *Watkin*, the Court of Appeal held that the respondent did not satisfy any of the categories provided for in s 237(1) of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), so as to permit the respondent in that case to claim damages. The respondent had lodged an application which was rejected by WorkCover Queensland because he was not entitled to be paid compensation because his injury was suffered in another country and Queensland was not his principal place of employment. The application could not succeed because of the statutory limitations, on the availability of compensation. Keane JA considered that if a claimant in the respondent's position was so ill-advised as to make such an application which could not succeed, having made such an application, such a claimant was precluded by s 237(1)(d) from making a claim for damages.[20]

[41] The decision in *Jacobs* is not in conflict with the decision in *Watkin* or its reasoning as was submitted on behalf of the applicant. In *Watkin* there was no issue that an application for compensation within the meaning of the relevant Act had been made.

[42] For the reasons outline above, I also consider that the primary judge correctly found that the present case was not governed by the decisions of *Kelly* and *Watkin*, which were properly distinguishable given the question of whether there was a valid application made was not in issue in those cases.[21]

[43] I consider that the primary judge did not err in regarding the circumstances of the present case as being substantively similar to those considered in *Jacobs*. While s 237(1)(d) of the Act had been repealed from the Act considered by the primary judge, the reasoning in *Jacobs* was still applicable to the interpretation of s 132A of the Act. The wording of s 131 of the Act considered in *Jacobs* was not materially different from the wording of s 131 of the Act relevant to this application. The reference to an "application under s 132" in s 132A of the Act clearly refers to an application made pursuant to s 132 of the Act which is conditioned on an application for compensation having been made under s 131 of the Act. An "application" under s 132 is one which complies with the requirements under s 131. An application under s 131 is conditioned, *inter alia*, on the application being lodged within time unless the insurer waives non-compliance pursuant to s 131(5). The removal of s 237(1)(d) of the Act, which was the subject of the *Jacobs* decision, does not support any legislative intention that the reference to "application under s

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19 At 497, which was upheld by the Court of Appeal in *Kelly v WorkCover Queensland* [2000] QCA 363. At the hearing at first instance, it was common ground that an application for compensation had been lodged. The Court of Appeal did not permit submissions otherwise. The relevant section in that case was a predecessor to s 237 of the Act.

20 At 395. McMurdo P and Cullinane J agreed. Section 237(1)(d) permitted a worker to seek damages "if the worker has not lodged an application for compensation for the injury".

21 AB at 129.

132" in s 132A should be construed differently from *Jacobs* case, given the inter-relationship between it and s 131 and s 132 of the Act. In the absence of compliance with the time limit prescribed by s 131(1) of the Act and any waiver under s 131(5) of the Act, there was no valid and enforceable application for compensation under s 132 and his Honour did not err in finding that no application had been made for the purposes of s 132A(1) of the Act.

Did s 132A of the Act apply?

[44] The applicant contends that s 132A does not purport to extend the categories of workers entitled to seek damages pursuant to s 237(1) to include those workers who have had their applications for statutory compensation rejected, whether on the basis of late lodgement or on the merits of the application. Given the reasoning above, I consider this is incorrect, as no application under s 132 has been made. Further, the respondent contends that that s 132A does not provide any entitlement to damages but rather is merely a mechanism whereby a person can apply for an assessment of the injury where they have not made an application for compensation under s 132 of the Act.[22] Thus, construing "application" in s 132A consistently with the decision in *Jacobs* does not, in the respondent's submission, extend the categories of workers to which s 237(1) applies. That, in my view, is correct.

[45] Section 237(1)(a), which relevantly would apply in this case, will only apply in the event that the respondent obtains an assessment of the injury and the DPI for the assessed injury is more than five per cent. As was correctly conceded by the respondent, if such an assessment is not obtained, the respondent has no entitlement to pursue a claim for damages.

[46] The applicant raised an additional argument that s 237(1)(a) did not apply to the respondent because the respondent had not received a notice of assessment from the insurer for the injury with a DPI for the assessed injury of more than five per cent and therefore the provision was not satisfied at the time leave was given and he had no entitlement to seek damages. The applicant relied, in particular, upon the heading of s 132A which is "Applying for assessment of DPI before applying for compensation" (emphasis added). However, the requirement to apply for assessment prior to an application for compensation is not reflected in the wording of s 132A, nor of s 237(1)(a) of the Act. Section 132A is an enabling provision which provides for a party to make a request for an assessment under s 179 of the Act where no application for compensation has been made. It does not impose a timeframe for such an application nor does s 237(1)(a). The effect of section 302(1) is that a proceeding for damages must be commenced within three years, unless there are circumstances by which the limitation period may be enlarged. As was submitted by the respondent, the construction of s 132A propounded by the applicant would curtail that time period to a shorter period if the assessment under s 179 had to be applied for first.

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22 T1-32/31-38.

[47] There is no basis for reading additional words into s 237(1)(a) requiring that the notice of assessment must be received prior to the expiry of the limitation period.

[48] The decision of the primary judge did not extend the categories of persons to whom s 237 of the Act applies. It merely preserved the status quo and stopped time running so the respondent could seek the assessment to satisfy s 237(1)(a) of the Act.[23] The respondent must still receive an assessment such that the DPI for the assessed injury must be more than five per cent before he is entitled to seek damages to satisfy s 237(1)(a) of the Act. There is no error by the primary judge in this regard.

[49] In all of the circumstances, having considered the grounds of appeal proposed to be raised if leave to appeal was granted and finding that there is no error by the primary judge, I would refuse the application for leave to appeal.

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[23] Which accords with the course suggested by McMurdo J (as his Honour then was) in *Phipps v Australian Leisure and Hospitality Group Ltd* [2007] 2 Qd R 555 at [70]-[72]; See also Keane JA (as his Honour then was) at [30] and Muir J at [42] where leave under s 298 had not been sought and proceedings had been issued prior to a notice of assessment being obtained under s 275 of the Act.