SUPREME COURT OF QUEENSLAND

CITATION:	*Cumner v Rea & Ors* [2018] QSC 159
PARTIES:	**JENNIFER ALIX CUMNER** (applicant) **v** **RICHARD ALLEN REA** (first respondent) and **A & K INVESTMENTS PTY LTD** (second respondent) and **WORKCOVER QUEENSLAND** (third respondent)
FILE NO:	9167 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	24 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	3 October 2017
JUDGE:	Daubney J
ORDER:	**I will hear the parties as to the necessary form of order.**
CATCHWORDS:	WORKERS COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – PRELIMINARY REQUIREMENTS – CLAIMS FOR COMPENSATION – TIME FOR CLAIM – whether the limitation period had passed in respect of a wrongful death claim against second respondent – where applicant contends she was not aware her late husband was an employee – whether applicant had knowledge her late husband was an employee of the second respondent prior to lodging wrongful death claim – whether there is sufficient evidence for a claim to be brought against the second respondent *Limitation of Actions Act* 1974 (Qld) *Personal Injuries Proceedings Act* 2002 (Qld) *Workers Compensation and Rehabilitation Act* 2003 (Qld)

Workplace Health and Safety Act 2011 (Qld)

Do Carmo v Ford Excavations Pty Ltd (1984) 154 CLR 234
NF v State of Queensland [2005] QCA 110
Randel v Brisbane City Council [1984] 2 Qd R 276.
Weis Restaurant Toowoomba v Gillogly [2013] QCA 21
Wood v Glaxo Australia Pty Ltd [1994] 2 Qd R 431

COUNSEL: M Grant-Taylor QC with PB DePlater for the Applicant
J O McClymont for the Third Respondent

SOLICITORS: Slater & Gordon Lawyers for the Applicant
J F Connolly of HBM Lawyers for the First Respondent
BT Lawyers for the Third Respondent

[1] The applicant is the widow of David Bryan Cumner, who died on 15 January 2014. On that day, the deceased and his friend, Richard Allen Rea, who is the first respondent, were pulling scrub, i.e. clearing vegetation on rural land. Each was driving a bulldozer, and the bulldozers were linked by a chain. While performing this scrub pulling, an incident occurred which resulted in the deceased suffering fatal crush injuries.

[2] On 14 December 2016, the applicant's solicitor caused a Part 1 Notice of Claim under the *Personal Injuries Proceedings Act* 2002 ("*PIPA*") to be served on the first respondent.

[3] On 16 December 2016, the applicant's solicitor caused a Notice of Claim for Damages under s 275 of the *Workers Compensation and Rehabilitation Act* 2003 ("*WCRA*") to be served on the third respondent, WorkCover Queensland ("WorkCover"). This notice identified the first respondent as the deceased's employer. The solicitor who prepared this notice, Mr Michael Callow, has deposed that he served this notice "out of an abundance of caution and with the third anniversary of the deceased's death approaching, in order to protect any claim that may exist under the [WCRA] in lieu of a potential claim under [PIPA]".[1] That notice was also served on the first respondent under cover of a letter from the applicant's solicitors dated 21 December 2016.

[4] On 23 December 2016, an order was made in this Court by consent which had the effect of giving the applicant leave pursuant to s 43 of *PIPA* to commence proceedings for damages against the first respondent despite non-compliance with the pre-litigation requirements of *PIPA*. As a consequence, on 13 January 2017 a claim and statement of claim were filed in this Court by which the applicant made claim against the first respondent for damages for loss of dependency consequent upon the death of the deceased which, it was alleged, was caused by the negligence of the first respondent.

[5] Then, on 14 March 2017, the applicant's solicitors served on WorkCover's solicitors a fresh Notice of Claim for Damages under s 275 of the *WCRA*, this time naming the

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[1] Affidavit of M W Callow filed 12 September 2017, para 11.

second respondent, A & K Investments Pty Ltd, as the deceased's employer at the time of the fatal incident.

[6] On 20 March 2017, WorkCover's solicitors responded to the service of that fresh notice by noting that it named the second respondent as the relevant employer and that the primary limitation period had expired. The letter continued:

> "Your client has failed to serve a Notice of Claim for Damages on A & K Investments Pty Ltd and achieve compliance or waiver of compliance pursuant to Sections 276 and 278 *WCRA* within the limitation period. Your client's claim against A & K Investments is therefore statute barred.
>
> Our client is not required to provide a response pursuant to section 278 of the *WCRA* in respect to your client's '*fresh*' Notice of Claim for Damages as your client's claim is lodged outside of the limitation period and is therefore invalid."

[7] The applicant has now applied, pursuant to s 31(2) of the *Limitation of Actions Act* 1974 ("*LAA*"), for an order that the period of limitation for the applicant's wrongful death action be extended.

[8] There was no issue that any cause of action by the applicant against the second respondent, insofar as it relates to a claim for damages for the wrongful death of the deceased, is statute-barred by reason of the operation of the three year limitation period prescribed by s 11 of the *LAA*.

[9] Before turning to the merits of the present application, it is necessary to set out much more detail of the background.

Background

[10] It is convenient to recite matters deposed to by the applicant in the present application. She was cross-examined before me, but not challenged on these matters.

[11] The applicant said:

> "6. At the time of my late husband's death, and in the years preceding his death, I was aware that my late husband visited and spent time with one of his old Army friend's (sic), Richard Allen Rea, the abovenamed First Respondent, on Mr Rea's property in Central Queensland. I understood that they went fishing and shooting on Mr Rea's property and that they would share meals and drink at hotels together. I understood that Mr Rea had some tractors, bulldozers and similar machinery and that my late husband would repair and service and drive the machines. My late husband had worked as a mechanic in the Army and he enjoyed working with vehicles, especially big ones.
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> 7. I believed that when my husband went away to Mr Rea's property, it was just my late husband helping a friend, having a good time and bonding with a mate. I was never aware that there was any payment

in the form of wages from Mr Rea or his company, A & K Investments Pty Ltd, to my late husband for the work that he did.

8. I never questioned my late husband when he said he was going up to Mr Rea's property to help him out. He would just tell me that he was going up there. Sometimes he would tell me why he was going up to help out Mr Rea, but he would just tell me basic details about what they would be doing such as felling trees or making dams.

9. I was aware that Mr Rea used to pay for my late husband's beer and provide accommodation while he was up working with him. I also was aware that Mr Rea took my late husband to golf on occasions. I was also aware that Mr Rea paid for the air-conditioning in our caravan which I called 'being paid in kind'. ...

10. I knew that Mr Rea's company was called A & K Investments Pty Ltd. I knew its name because Mr Rea had given me and my late husband the bank account details of A & K Investments Pty Ltd so that we could transfer some money into that account when we had to pay some money to Mr Rea. In or around late 2010, Mr Rea had lent us some money to buy a caravan because our money was going to take too long to come through. We paid the money back to him. However, he wanted the money to be paid to his company which was called A & K Investments Pty Ltd.

11. Apart from the air-conditioning in our caravan being paid for by Mr Rea, I was unaware of any other payments of cash or otherwise being paid to my late husband by Mr Rea or A & K Investments Pty Ltd."

[12] The applicant then referred to consulting with her solicitors and the lodgement of the *PIPA* Notice of Claim and the *WCRA* Notice of Claim for Damages in December 2016. She said that at the time she completed the *WCRA* Notice of Claim for Damages she was unaware of the precise circumstances of her husband's fatal accident and also unaware of any potential employment relationship between her husband and the second respondent. She said:

"13. At the time that I completed the WorkCover Notice of Claim on 16 December 2016, I was aware that there was a Workplace Health and Safety Queensland ongoing prosecution. However, I had been unable to obtain any records from the prosecuting authority and I had been informed by my solicitors that they had also been unable to obtain any such records and that those records would not be made available until after the scheduled completion of the prosecution on 21 February 2017. ..."

[13] The applicant said that on or shortly after 10 February 2017 her solicitors made her aware that "they had been provided with some documentation from some solicitors involved in the matter which indicated that there may have been a potential employment relationship between" her husband and the second respondent. She said:

> "Up until that time, I was unaware of any sort of employment relationship between my late husband and A & K Investments Pty Ltd or Mr Rea."

[14] Under cross-examination, the applicant said that, as far as she knew, her husband visited and stayed with the first respondent as a friend, that her husband was otherwise retired and this kept him occupied and that he had done this about twice a year for seven to 10 years. She described talking to her husband on the phone, and him telling her what he was doing, which included social activities as well as work on the first respondent's property, such as fixing machinery and clearing scrub.

[15] She confirmed that her husband went on these trips when it suited him, and not on the first respondent's insistence. She told of the first respondent "shouting" drinks and meals and paying various expenses for the deceased. She said that her husband never told her that he had insisted that these things be paid for by the first respondent, and that this "wasn't the nature of their relationship".

[16] The applicant was directed to a letter, dated 1 February 2016, which she had received from the Office of Industrial Relations ("OIR"). It was the receipt of this letter which prompted her to seek further legal advice – she said she wanted to find out what the letter was "because I never knew what it was to start with".[2]

[17] This letter[3] dated 1 February 2016 was addressed to the applicant, and amongst other things said:

> "Following an investigation by inspectors from Workplace Health and Safety Queensland (WHSQ), prosecution action against A & K Investments Pty. Ltd. (A & K) was commenced in the Rockhampton Magistrates Court, in which it is alleged that the company contravened the *Work Health & Safety Act 2011*.
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> As an alternative to prosecution, A & K has applied for a WHS Undertaking, commonly called an enforceable undertaking (EU). This is an option available under Part 11 of the *Work Health & Safety Act 2011*."

The letter then went on to offer the applicant the opportunity to provide a statement as to whether the Enforceable Undertaking should be accepted in lieu of prosecution.

[18] In evidence before me, the applicant confirmed that she had known that A & K Investments Pty Ltd was the first respondent's company, and she knew this because she had to pay some money to that company in repayment of a loan which had been given to her and her husband by the first respondent. She was aware that this company was operated by the first respondent and, from the letter, that a prosecution had been commenced against the company and that an enforceable undertaking was being proposed.

[19] Mr Michael Callow was the solicitor at the firm whom the applicant consulted after she received the letter from OIR. He is no longer with that firm. Mr Callow swore an

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[2] T 1-6.

[3] Part of Exhibit THH6 to the affidavit of T H Hilliard filed 12 September 2017.

affidavit in support of this application. He was not required for cross-examination, and his evidence was not challenged.

[20] Mr Callow described first meeting with the applicant on 19 February 2016. He said that when the meeting was first arranged, the applicant wanted to discuss a workplace health and safety matter involving her husband and the notification she had received regarding an enforceable undertaking by the second respondent. She told Mr Callow that she knew that the second respondent was the first respondent's company, and that her husband had been killed in an incident which occurred when the deceased was assisting the first respondent by driving a bulldozer. By the time of the meeting on 19 February 2016, the applicant told Mr Callow that the proposal for the enforceable undertaking had been withdrawn.

[21] Mr Callow said that at the time of the meeting on 19 February 2016, the applicant was not a client of the firm and she had not given instructions for the firm to act on her behalf, although Mr Callow was, or subsequently became, aware that the applicant had previously seen another lawyer in the firm.

[22] Mr Callow said that at no time during the meeting was there any suggestion of an employment relationship between the deceased and either the first respondent or the second respondent. The discussion revolved around the deceased's death and the workplace health and safety investigation. The applicant "had no interest at that stage in pursuing any claim for damages".

[23] Mr Callow had further intermittent contact with the applicant, when they would discuss the progress of the investigation.

[24] On 31 May 2016, after having been told by the applicant about difficulties she was having in obtaining information about the prosecution in relation to her husband's death, Mr Callow proposed a Right to Information request.

[25] Under cover of a letter dated 21 July 2016 to the Freedom of Information Officer of Workplace Health and Safety Queensland ("WHSQ"), Mr Callow submitted the RTI request. That letter commenced:

> "We have received instructions to act on behalf of [the applicant] to investigate a possible dependency claim arising out of a fatal accident her husband, David Cumner, was involved in on 15 January 2014 at a property in Marlborough."

[26] The RTI request was accompanied by an authority signed by the applicant which was headed "Re: Dependency claim – David Cumner".

[27] On 14 September 2016, Mr Callow received a letter from the WHSQ Right to Information Unit advising that the due date for its response was 19 October 2016. On 30 September 2016, Mr Callow received advice in a phone call from an officer in the WHSQ Right to Information Unit, the effect of which was that the response would be further delayed because the matter was listed for a prospective unspecified hearing.

[28] On 25 November 2016, Mr Callow received a further telephone call from the WHSQ Right to Information Unit, with advice to the effect that the response would be further

delayed and would not be actioned before Christmas 2016 because of a mention date for the prosecution on 15 December 2016.

[29] Mr Callow said that he telephoned the applicant on 26 November 2016, that he sent her an email seeking instructions on 6 December 2016, and that on 8 December 2016 the applicant gave him instructions that she wished to pursue a claim for damages for loss of dependency for the wrongful death of her husband. Mr Callow's unchallenged evidence was:

> "9. It was not until the Applicant provided me with her instructions on 8 December 2016 that my and my firm's involvement in this matter changed from investigating the deceased's death with a view to a possible loss of dependency claim to the advancing of the proposed claim for such loss."

[30] In his affidavit, Mr Callow then describes causing the *PIPA* Notice of Claim to be served on 14 December 2016 and serving the *WCRA* Notice of Claim for Damages on 16 December 2016. As noted above, he said he took this latter step "out of an abundance of caution and with the third anniversary of the deceased's death approaching" in order to protect any claim that may exist under the *WCRA*.

[31] At about this time, Mr Callow handed day-to-day conduct of the matter to another solicitor in the firm, Ms Tabetha Hilliard. An affidavit by Ms Hilliard was filed in support of the application, and she was cross-examined before me.

[32] To resume the chronology from the point of the service of the *WCRA* Notice of Claim for Damages on 16 December 2016, Ms Hilliard said that on 20 December 2016 her firm received a letter from BT Lawyers, acting for WorkCover. The letter was headed "Employer: Richard Allen Rea". The letter advised that the Notice of Claim for Damages did not comply with the requirements of s 275 of the *WCRA*, and it set out conditions of waiver which were due by 5 pm on 15 January 2017.

[33] On 21 December 2016, the applicant's solicitors inquired as to the progress of the RTI request, and were advised by the WHSQ Right to Information Unit that there had been a mention of the prosecution on 15 December 2016 but no hearing date set, and that they should call back in mid-January 2017 for an update.

[34] On 21 December 2016, the *WCRA* Notice of Claim for Damages was served on Mr Rea. Then, on 23 December 2016, a consent order was made in this Court granting the applicant leave to commence proceedings notwithstanding non-compliance with the pre-litigation requirements of *PIPA*.

[35] On 11 January 2017, Mr Chris Bodenstein of HBM Lawyers, acting for the first respondent, called the applicant's solicitors and advised, amongst other things, that the first respondent had told Mr Bodenstein that on the day of the accident the first respondent had paid the deceased. Ms Hilliard said, however, that this assertion by Mr Bodenstein was not, at that stage, supported by any documentation and the applicant's solicitors had no objective evidence that the deceased was in an employment relationship at the time of his death.

[36] On 13 January 2017, the claim and statement of claim against the first respondent were filed in this Court.

[37] On 31 January 2017, the relevant officer in the WHSQ Right to Information Unit sent an email to Ms Hilliard confirming that the prosecution was to be mentioned on 21 February 2017, and further stating:

> "Further to this, there is provision within the RTI Act that directs that documents that relate to an ongoing investigation are exempt from being released in order not to prejudice any outcomes of that ongoing investigation. As this matter is still before the courts it is considered ongoing and as such the only information that could be considered for release would [be] administrative in nature."

The email went on to request an extension of the "decision due date" for the RTI request to 28 February 2017.

[38] On 2 February 2017, Ms Hilliard wrote to WorkCover's lawyers advising that the applicant needed access to the RTI documents in order to satisfy the conditions of waiver which had been outlined on 20 December 2016, and explained the delay in obtaining the RTI documents. Ms Hilliard asked for an extension of the condition of waiver until 17 March 2017 to enable the RTI documents to be obtained.

[39] Over the ensuing week or so, there were numerous communications between Ms Hilliard, the solicitors for Mr Rea and the solicitors for WorkCover respectively. The solicitors for WorkCover challenged the applicant's entitlement to claim damages and sought the provision of evidence that the deceased was a "worker", within the relevant statutory definition. Ms Hilliard referred them to the difficulties encountered in obtaining the WHSQ records until the prosecution was finalised. On 7 February 2017, the solicitors for WorkCover granted an extension until 17 March 2017 for the applicant to provide compliance waiver information.

[40] Then, on 10 February 2017, the applicant's solicitors received from Mr Rea's solicitor an electronic copy of the WHSQ evidence brief for the prosecution.

[41] In her affidavit, Ms Hilliard deposed to the following:

> "34. In the Workplace Health & Safety Queensland evidence brief, there was a transcript of an interview with Mr Rea, dated 12 May 2014. This transcript was first received by my office as part of the evidence brief which was provided under cover of the letter dated 8 February 2017, which was received by our office on 10 February 2017. In that interview, at page 396, Mr Rea, who had described himself in the interview as the sole director of A & K Investments Pty Ltd, was asked to explain the cash/barter system of payment relating to the deceased. He said:
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> > *'It's a cash/barter system. I give him some cash and I work him and I, you know, when we went to golf I shouted the golf. When we went to the bar I shouted, I shouted him at the bar. When we did something I looked after him. When he needed*

something for his caravan I got it you know. He wanted to buy another caravan, he didn't have enough cash, so I, loaned him the cash.'

Exhibited hereto and marked '**THH-26**' is a true copy of the transcript.

35. I am informed by the Applicant and verily believe that prior to 10 February 2017, she had been of the understanding there was no employment relationship whatsoever with respect to work being undertaken by her husband with Mr Rea. Statements provided by her to the police and to Workplace Health and Safety Queensland are consistent with that belief. Exhibited hereto and marked '**THH-27**' are true copies of the Applicant's statements dated 30 January 2014 (signed 4 February 2014) and dated (and signed) 5 February 2014.

36. On 24 February 2017, I wrote to Ms Wilton of BT Lawyers disclosing the CD that had been received from HBM Lawyers containing the brief of evidence of the Workplace Health & Safety Queensland investigation of A & K Investments Pty Ltd. I drew attention to the pages of the brief, in particular page 46, where, under the heading 'Findings' it stated that A & K Investments Pty Ltd employed by means of cash or barter system the deceased worker, David Bryan Cumner. I also drew attention to page 27 the witness statement of Richard Allen Rea's Record of Interview and page 332 of the Transcript of Interview with Richard Allen Rea and where at page 396 Mr Rea stated that he gave Mr Cumner cash to work for him. Exhibited hereto and marked '**THH-28**' is a true copy of the letter with the documents referred to in the letter from the brief of evidence of the Workplace Health & Safety Queensland investigation of A & K Investments Pty Ltd.

37. On 8 March 2017, our office received a letter dated 2 March 2017 from the Office of Industrial Relations wherein it released documents from the Workplace Health & Safety prosecution file. Those documents confirmed that only A & K Investments Pty Ltd had been prosecuted in relation to the death of the deceased and that, on 21 February 2017, the company had pleaded guilty in the Industrial Magistrates Court. The released documents included an email dated 21 February 2017, agreed facts, particulars of breach, complaint and summons, internal memoranda, death certificate, certificate of analysis and photographs. Exhibited hereto and marked '**THH-29**' is a true copy of that letter and enclosures (omitting the photographs).

38. The documents received on 8 March 2017 confirmed that, on 21 February 2017, A & K Investments Pty Ltd pleaded guilty in the Court to a charge under Section 32 of the *Work Health and Safety Act* 2011 and had been fined $70,000.00. Exhibited hereto and marked '**THH-30**' is a true copy of the Verdict and Judgment Record.

> 39. On 14 March 2017, our office served on BT Lawyers a fresh Notice of Claim for Damages dated on 13 March 2017. The fresh Notice of Claim for Damages identified A & K Investments Pty Ltd as the employer. Exhibited hereto and marked '**THH-31**' are true copies of that Notice of Claim for Damages and its accompanying letter."

[42] On 20 March 2017, the solicitors for WorkCover advised that the applicant had failed to satisfy the requirements to provide a fresh Notice of Claim for Damages against the first respondent. That letter also took the point that the fresh Notice of Claim for Damages was against the second respondent, and that the limitation period against the second respondent had expired on 15 January 2017.

[43] In her affidavit, Ms Hilliard said:

> "42. I am informed by the Applicant and verily believe that until she became aware of the information in the evidence brief which was forwarded to our office on 10 February 2017, she maintained that the deceased was not paid by Mr Rea or A & K Investments Pty Ltd for work that he performed with Mr Rea and that she was of the belief that her late husband was just helping out his friend.
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> 43. It was not until our office received the evidence brief from HBM Lawyers on 10 February 2017 that we had objective evidence that there was an employment relationship between the deceased and A & K Investments Pty Ltd. Up until that point, aside from the assertion which was not supported by documentation made by Mr Bowdenstein of HBM Lawyers on 11 January 2017, neither us, or as far as we were aware, our client, were aware that there was an employment relationship between A & K Investments Pty Ltd and the deceased.
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> 44. It was not until our office received the prosecution file from Workplace Health and Safety on 10 March 2017, were we, or as far as we were aware, our client, aware that particulars of the charge against A & K Investments Pty Ltd asserted that the deceased was a worker and that on 21 February 2017 A & K Investments Pty Ltd had pleaded guilty to the charge as particularised."

[44] Under cross-examination, Ms Hilliard was referred to the letter dated 1 February 2016 which the applicant had received from the OIR, and that her review of the file indicated that, after receipt of that letter, her firm had not attempted to obtain a copy of the relevant complaint against the second respondent from the Rockhampton Magistrates Court. She was then referred to the copy of the complaint which was exhibited to her affidavit. That complaint against the second respondent particularised, amongst other things, that the second respondent engaged the deceased as a worker to carry out vegetation clearing work. I note, however, that this copy of the complaint was first provided to the applicant's solicitors under cover of the letter dated 2 March 2017 from OIR by which it provided WHSQ documentation in response to the RTI request. That this was the first date on which the complaint was provided to the applicant's solicitors was not challenged.

[45] In re-examination, Ms Hilliard confirmed that, apart from what was set out in the letter to the applicant from OIR dated 1 February 2016, at no time prior to the receipt of the RTI documents did the applicant's solicitors have any knowledge at all of the particular type of charge that had been proffered against A & K Investments Pty Ltd.

[46] It was also unchallenged that the evidence brief which was first provided to the applicant's solicitors by Mr Rea's solicitors on 10 February 2017 contained, amongst other things, the following:

> "A copy of the Workplace Health & Safety report and findings which made a finding that:
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> (a) 'A & K Investments Pty Ltd employed (by means of either a cash or barter system) the deceased worker – David Bryan Cumner';
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> (b) A copy of a witness statement given by the first respondent in which he explained that the deceased did work for him under what he described as a 'cash barter system'.
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> (c) A report by a Workplace Health & Safety legal officer following the prosecution which referred to the second respondent pleading guilty to a charge under section 32 of the Workplace Health and Safety Act and providing the following observations:
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> > 'The deceased and the sole director of the defendant company had been friends for more than 30 years. The deceased worked for the defendant company from time to time under a "mates arrangement" whereby the deceased was provided with accommodation, food, drink and cash as required. Essentially, working for the defendant company on an ad hoc basis created an opportunity for the deceased and the defendant's director to socialise.'"

Extension of the limitation period

[47] Sections 30 and 31 of the *LAA* provide:

> "**30 Interpretation**
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> (1) For the purposes of this section and sections 31, 32, 33 and 34 –
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> (a) the material facts relating to a right of action include the following –
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> (i) the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;
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> (ii) the identity of the person against whom the right of action lies;

(iii) the fact that the negligence, trespass, nuisance or breach of duty causes personal injury;

(iv) the nature and extent of the personal injury so caused;

(v) the extent to which the personal injury is caused by the negligence, trespass, nuisance or breach of duty;

(b) material facts relating to a right of action are of a decisive character if but only if a reasonable person knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing –

(i) that an action on the right of action would (apart from the effect of the expiration of a period of limitation) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and

(ii) that the person whose means of knowledge is in question ought in the person's own interests and taking the person's circumstances into account to bring an action on the right of action;

(c) a fact is not within the means of knowledge of a person at a particular time if, but only if –

(i) the person does not know the fact at that time; and

(ii) as far as the fact is able to be found out by the person – the person has taken all reasonable steps to find out the fact before that time.

(2) In this section –

appropriate advice, in relation to facts, means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts.

31 Ordinary actions

(1) This section applies to actions for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) where the damages claimed by the plaintiff for the negligence, trespass, nuisance or breach of duty consist of or include damages in

respect of personal injury to any person or damages in respect of injury resulting from the death of any person.

(2) Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court –

(a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and

(b) that there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation;

the court may order that the period of limitation for the action be extended so that it expires at the end of 1 year after that date and thereupon, for the purposes of the action brought by the applicant in that court, the period of limitation is extended accordingly.

(3) This section applies to an action whether or not the period of limitation for the action has expired –

(a) before the commencement of this Act; or

(b) before an application is made under this section in respect of the right of action."

[48] In order to obtain an extension of the limitation period against the second respondent, the applicant must show:

(a) that a material fact of a decisive nature relating to the right of action against the second respondent was not within her means of knowledge until a date after 15 January 2016, and

(b) there is evidence to establish the right of action apart from a defence founded on the expiration of the limitation period.

[49] In relation to the first matter, it is convenient to repeat my observations in *Weis Restaurant Toowoomba v Gillogly*:[4]

"[37] Section 31(2) of the *LAA* confers on the Court a discretion to extend the limitation period for a personal injuries action when, relevantly, it appears to the Court, *inter alia*, 'that a material fact of a decisive character relating to the right of action was not within

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[4] [2013] QCA 21 at [37] – [41], McMurdo P and Fraser JA concurring.

the means of knowledge of the applicant' until the date specified in s 31(2)(a).

[38] By subsection 30(1)(a)(ii), the 'material facts relating to a right of action' include the identity of the person against whom the right of action lies.

[39] Subsections 30(1)(b) and (c) provide:

> '(b) material facts relating to a right of action are of a decisive character if but only if a reasonable person knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing –
>
> (i) that an action on the right of action would (apart from the effect of the expiration of a period of limitation) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and
>
> (ii) that the person whose means of knowledge is in question ought in the person's own interests and taking the person's circumstances into account to bring an action on the right of action;
>
> (c) a fact is not within the mans (sic) of knowledge of a person at a particular time if, but only if –
>
> (i) the person does not know the fact at that time; and
>
> (ii) as far as the fact is able to be found out by the person – the person has taken all reasonable steps to find out the fact before that time.

[40] In *Randel v Brisbane City Council*,[5] McPherson J (as he then was) explained:[6]

> 'In determining whether time should under s. 31(2) be extended there are three matters to be considered under subsecs. (a), (b) and (d) of s. 30. Essentially these are: (a) whether the unknown fact relating to the right of action is a "material" fact within the meaning of that subsection; (b) whether the material facts relating to a right of action are "of a decisive character" and (d) whether the fact in question was not within the means of knowledge of the plaintiff. Of these, the standard to be applied in determining the second of these matters, involving as it does

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5 [1984] 2 Qd R 276.

6 At 277-278.

> the behaviour of a reasonable man, is not related to the mentality, personal idiosyncracies, or behaviour of the particular plaintiff in question. The assessment required by this provision is entirely objective. On the other hand, the background and situation of the plaintiff are relevant to the determination whether he has under s. 30(d)(ii) taken "all reasonable steps" to ascertain a fact: see *Castlemaine Perkins Limited v. McPhee* [1979] Qd.R. 469, 473. The questions to be asked and answered under each of subsections (b) and (d) are however quite distinct and independent. With great respect to what was said to by Wanstall C.J. in *Re Sihvola* [1979] Qd.R. 458, 466E, it is not legitimate to import into the inquiry under s. 30(d) the reference to be found in s. 30(b) to the phrase "the reasonable man".'

> [41] It is clear enough that the discretion under s 31(2) only arises if an applicant satisfies the Court that a 'material fact of a decisive character' was not within his or means of knowledge. It is also clear enough that not every material fact is one 'of a decisive character'. An applicant may be ignorant of a material fact (as, for example in this case, the precise legal identity of the person against whom a right of action lies) but 'it will not be a material fact of a decisive character if the reasonable man, having taken appropriate advice on the facts of which the [applicant] did have knowledge, would regard those facts as showing that an action would have a reasonable prospect of success and ought to be taken'.[7]"

[50] Counsel for the applicant pointed to the following:

(a) The applicant's solicitors being told by the first respondent's solicitor on 11 January 2017 that Mr Rea had told him that Mr Rea had paid the deceased on the day of the accident;

(b) The provision to the applicant's solicitors by the first respondent's solicitor of the Workplace Health and Safety brief of evidence on 10 February 2017; and

(c) The provision to the applicant's solicitors of the RTI documents by OIR on 8 March 2017, which included the complaint and summons, the particulars of breach by the second respondent, and confirmation that the second respondent had pleaded guilty to the breach.

[51] In relation to the information given by the first respondent's solicitor on 11 January 2017, counsel for the applicant submitted that prior to that date, the applicant did not know, nor had she any reason to suspect, that her husband was a "worker".

[52] Counsel for the third respondent argued that there was nothing in the information provided by the first respondent's solicitor which was of a decisive character, that the only new information was that the first respondent had paid the deceased some money

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[7] *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234, per Wilson J at 248; see also Deane J at 251.

for the work being performed on the day, and the applicant already knew that the deceased received benefits from the first respondent.

[53] I do not accept the third respondent's arguments on this point. The unchallenged evidence of the applicant was that, prior to this point in time, she was never aware of payment by the first respondent or the second respondent to her husband of money for work performed or to be performed. It is quite clear on the evidence that, so far as the applicant was aware, the relationship between her husband and the first respondent was purely social, that the trips for her husband were, in effect, a form of recreation, and that the first respondent's conduct in paying for various social expenses was the first respondent's way of expressing gratitude for the assistance which the deceased was providing the first respondent. The information provided by the first respondent's solicitor on 11 January 2017 cast the relationship in a different light. The information was not of payment for social expenses, or of the first respondent making a personal loan to a friend. This information, for the first time, was indicative of the deceased actually being paid for performing services. That was information which the applicant never previously had.

[54] The copy of the brief of evidence provided by the first respondent's solicitors in February 2017 also contained information of which the applicant was clearly not aware prior to that point in time. In particular, information was provided in the WHSQ investigation report which pointed to the second respondent as being the deceased's employer, and elucidation of the "cash/barter system" under which the first respondent himself said the deceased worked for him. Contrary to the submissions for the third respondent, on the evidence which I have outlined above, this was not information which was within the knowledge of the applicant at any time prior to the first respondent's solicitor providing the brief of evidence. Nor do I consider that these were facts which were within her means of knowledge before that time. True it is that these facts were ascertainable from the WHSQ prosecution file. But, as the evidence demonstrates, the applicant had sought information from the prosecution file by means of the RTI process, and had been rebuffed and delayed. She only received the information in February 2017 through the intervention and action of the first respondent's solicitor. Otherwise, it is clear enough that the information would not have been provided to her until the response to the RTI request eventually came in March 2017. I do not, by these observations, mean to be in any way critical of those who were handling the response to the RTI request. The point, however, is that this information could only come from the WHSQ file. In my view, the applicant by engaging appropriately, as she did, in the RTI process took all reasonable steps to find out this information before it was effectively volunteered by the first respondent's solicitor on 10 February 2017.

[55] In contending that the applicant had not taken all reasonable steps to ascertain the facts about her husband's employment, the third respondent referred to the fact that the applicant's solicitors had not sought a copy of the complaint from the Magistrates Court registry after the applicant had been informed of the prosecution by the letter of 1 February 2016. Whether making such an enquiry would have been a reasonable step for the purposes of s 30(1)(c) of the *LAA* requires reference to "what can reasonably be

expected from the actual person in the circumstances of the applicant".[8] The letter of 1 February 2016, the relevant parts of which are set out above, did not in any way alert the applicant to the proposition that the second respondent was being prosecuted in the capacity of an employer. As counsel for the applicant pointed out, there were many offences for which the prosecution may have been brought, including prosecutions relating to the plant being operated at the time of the incident. The uncontroverted evidence was that at the time this letter was received, the bringing of a dependency claim was not at all within the applicant's contemplation. She just wanted to find out what had happened to her husband, and to this end the RTI process was pursued. In all of those circumstances in which the applicant actually was at the time, I do not think that obtaining a copy of the complaint was something to be reasonably expected of the applicant.

[56] It is clear enough that the identity of the entity against which the applicant's putative cause of action for loss of dependency lay was a "material fact".[9] It is also, in my opinion, clear in the circumstances of this case that the information supporting the identity of the second respondent as a material fact was also of the necessarily "decisive character". In the absence of that information, the applicant did not have a potential claim for damages against the second respondent, nor did she have reasonable prospects of success on any such action. Conversely, and to adopt the formulation set out in s 30(b) of the *LAA*, a reasonable person knowing the information conveyed on 10 February 2017 would have regarded those facts concerning the identity of the second respondent as showing that the applicant's putative action for loss of dependency against her husband's employer had sufficient prospects of success as to justify bringing the action against the second respondent.

[57] I conclude, therefore, for the purposes of s 31(2)(a) that a material fact of a decisive character, namely the identity of the second respondent as the employer of the deceased, was not within the applicant's means of knowledge until 10 February 2017.

[58] As to the requirement of s 31(2)(b), counsel for the third respondent submitted that the applicant cannot establish on the current or expected evidence that there was a contract of employment between the deceased and either the first respondent or the second respondent. It was said that the relationship was properly characterised as a social relationship without an intention to create legal relations. In that regard, the third respondent pointed to evidence, including evidence of the applicant of the friendship between the deceased and the first respondent, the applicant's understanding of the activities the deceased and the first respondent engaged in, the infrequency of the deceased's visits to the first respondent, statements made by the first respondent to WHSQ investigators in May 2014 about having a "mates arrangement", the fact that the applicant's *WCRA* Notice of Claim for Damages did not refer to the deceased receiving income from either the first respondent or the second respondent, and a statement made by the first respondent to WorkCover less than two weeks prior to the accident that the second respondent had no employees. Further, it was submitted that a finding that the deceased was a "worker" for the purposes of the WHSQ prosecution was immaterial because the definition of "worker" in s 7 of the *Workplace Health and Safety Act* 2011 extends to persons carrying on work as volunteers. It was argued that the social

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[8] *NF v State of Queensland* [2005] QCA 110, per Keane JA at [29].

[9] See *LAA* s 30(1)(a)(ii).

arrangement such as existed between the deceased and the first respondent did not give rise to a binding contract of employment because of a lack of necessary intention to create legal relations and accordingly, in the absence of a legally binding contract of service, the deceased could not be regarded as a "worker" for the purposes of the *WCRA* because he did not work "under a contract".[10] In those circumstances, it was submitted, the applicant does not have a viable cause of action governed by the *WCRA*.

[59] Section 31(2)(b) of the *LAA*, however, does not invite an approach by which one analyses evidence to disprove the existence of a cause of action. Rather, it inquires whether "there is evidence to establish the right of action" in the absence of the limitation defence.

[60] In *Wood v Glaxo Australia Pty Ltd*[11], Macrossan CJ said[12]:

> "If a general observation is permissible at this point it can be said that applicants for extension of limitation periods are not intended by the legislation to be placed in the position where they must establish an entitlement to recover on two occasions, first on the hearing of the application and once more at the trial of the action. Although the requirements of the legislation must be complied with if an extension is to be granted, the extent to which an applicant must show a case on the hearing of the application to extend time will frequently depend on the impression on the judge's mind of the material which the applicant presents or the existence of which he demonstrates or points to. **It is nevertheless recognised as wrong to place potential plaintiffs in anything like a situation where they must on the probabilities show that it is likely they will succeed in their actions. A judge may harbour a feeling that there is a strong chance that particular applicants will fail at trial but, in my opinion, he should not act on the basis of this impression both because that is a question reserved for another occasion and because he cannot know and should not insist on being able to see in all of its ramifications the full strength of the case which will eventually be presented at trial**. There are some resemblances in this to the situation of a defendant who resists a summary judgment application. **The Court should be cautious in shutting out a party from the opportunity to make his case at the appropriate time**. In any situation where proof of a case is difficult and very far from straightforward, it would be very expensive to require a party applying to extend time to demonstrate his case with any high degree of elaboration. **Fundamentally, the standard required on an application for extension of time under the Act comes from the literal words of s. 31(2)(b): 'evidence to establish the right of action'. These words will be construed according to the evident policy of the legislation**.
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[10] *WCRA*, s 11.

[11] [1994] 2 Qd R 431.

[12] At 434-435.

> The evidence need not at the stage at which the application is brought be in a form which would be admissible at trial and it may indeed be hearsay. It will not be possible to predict whether the plaintiff's evidence will prevail at trial when it will be subjected to challenge and forced to confront the opposing evidence of the defendant, but **it is probably accurate enough to say that an applicant will meet the requirement imposed by s. 31(2)(b) if he can point to the existence of evidence which it can reasonably be expected will be available at the trial and which will, if unopposed by other evidence, be sufficient to prove his case**." (emphasis added)

[61] At the very least, the applicant can point to evidence from, or attributed to, the first respondent that he paid the deceased for services performed by the deceased. That is a fairly available inference from the information provided by the first respondent's solicitor on 11 January 2017. Moreover, in the interview with WHSQ investigators on 12 May 2014, the first respondent described the "cash barter system" in the following terms:

> "I give him some cash and I work him and I, you know, when we went to golf I shouted the golf. When we went to the bar I shouted, I shouted him at the bar. When we did something I looked after him. When he needed something for his caravan I got it you know. He wanted to buy another caravan, he didn't have enough cash, so I, I loan him the cash."

The first respondent then confirmed that he was not paying a "formal wage", but he had an "arrangement" with the deceased so that the deceased "wasn't left short".

[62] To adopt the formulation propounded by Macrossan CJ, there is, I think, enough in this evidence alone, which it could reasonably be expected will be available at the trial, from which, if unopposed by other evidence, it could be found that the arrangement between the deceased and the first respondent (either on his own behalf or on behalf of the second respondent) was something more than merely a "social arrangement" and amounted to evidence of an agreement for the deceased to provide his services as a worker.

[63] That is not to say, of course, that such a conclusion may not be opposed, if not strenuously opposed, by reference to the evidence referred to by the third respondent which tends to disprove the existence of an employment relationship. But, as I have said, that is not the question for present purposes.

[64] In my view, the applicant has pointed to sufficient evidence to establish the right of action against the second respondent.

Conclusion

[65] For the reasons I have given, I am satisfied that the requirements of s 31(2)(a) and (b) of the *LAA* have been satisfied, and that the period of limitation for the applicant's loss of dependency action against the second respondent ought be extended to 10 February 2018.

[66] I note for completion that the third respondent did not raise any issue of prejudice or likely prejudice.

[67] I will hear the parties as to the necessary form of order.