

# SUPREME COURT OF QUEENSLAND

CITATION: *EDIS Service Logistics Pty Ltd v PKF East Coast Practice & ors; Kleenmaid Customer Solutions Pty Ltd v PKF East Coast Practice & ors; Kleenmaid Corporate Pty Ltd v PKF East Coast Practice & ors* [2018] QSC 262

PARTIES: **In BS 7214 of 2014:**  
**EDIS SERVICE LOGISTICS PTY LTD (IN LIQUIDATION)**  
ACN 077 845 151  
(plaintiff)  
v  
**PKF EAST COAST PRACTICE (A PARTNERSHIP)**  
(first defendant)  
**WAYNE WESSELS**  
(second defendant)  
**THOSE PERSONS SET OUT IN THE SCHEDULE**  
(third defendant)

**In BS 9206 of 2014:**  
**KLEENMAID CUSTOMER SOLUTIONS PTY LTD (IN LIQUIDATION)**  
ACN 115 837 726  
(plaintiff)  
v  
**PKF EAST COAST PRACTICE (A PARTNERSHIP)**  
(first defendant)  
**WAYNE WESSELS**  
(second defendant)  
**THOSE PERSONS SET OUT IN THE SCHEDULE**  
(third defendant)

**In BS 11436 of 2014:**  
**KLEENMAID CORPORATE PTY LTD (IN LIQUIDATION)**  
ACN 125 837 943  
(plaintiff)  
v  
**PKF EAST COAST PRACTICE (A PARTNERSHIP)**  
(first defendant)  
**WAYNE WESSELS**  
(second defendant)  
**THOSE PERSONS SET OUT IN THE SCHEDULE**  
(third defendant)

FILE NOS: BS No 7214 of 2014  
BS No 9206 of 2014  
BS No 11436 of 2014

DIVISION: Trial Division  
PROCEEDING: Claim  
DELIVERED ON: 16 July 2018 (*ex tempore*)  
DELIVERED AT: Brisbane  
HEARING DATE: 16 July 2018  
JUDGE: Atkinson J  
ORDER: **In BS No 7214 of 2014:**

1. **The order of the Registrar made pursuant to rule 24 of the UCPR to renew the claim for 12 months from 5 August 2016 be set aside.**
2. **Pursuant to rule 16(b) of the UCPR, it is declared that the claim has not been validly served on the defendants.**
3. **The claim be dismissed.**
4. **The plaintiff's application filed 2 July 2018 be dismissed.**
5. **The plaintiff pay the costs of the defendants of the applications.**
6. **The plaintiff pay the costs of the defendants of the proceeding.**

**In BS No 9206 of 2014:**

1. **The order of the Registrar made pursuant to rule 24 of the UCPR to renew the claim for 12 months from 30 September 2016 be set aside.**
2. **Pursuant to rule 16(b) of the UCPR, it is declared that the claim has not been validly served on the defendants.**
3. **The claim be dismissed.**
4. **The plaintiff's application filed 2 July 2018 be dismissed.**
5. **The plaintiff pay the costs of the defendants of the applications.**
6. **The plaintiff pay the costs of the defendants of the proceeding.**

**In BS No 11436 of 2014:**

1. **The order of the Registrar made pursuant to rule 24 of the UCPR to renew the claim for 12 months from**

**27 November 2016 be set aside.**

- 2. Pursuant to rule 16(b) of the UCPR, it is declared that the claim has not been validly served on the defendants.**
- 3. The claim be dismissed.**
- 4. The plaintiff's application filed 2 July 2018 be dismissed.**
- 5. The plaintiff pay the costs of the defendants of the applications.**
- 6. The plaintiff pay the costs of the defendants of the proceeding.**

**CATCHWORDS:** PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COMMENCING PROCEEDINGS – TIME FOR SERVICE OF ORIGINATING PROCESS AND RENEWAL – where the plaintiff companies were part of the Kleenmaid corporate group of which the defendants were the auditors – where the plaintiff companies went into liquidation in 2008 – where the plaintiff in each proceeding filed claims against the defendants in 2014, shortly before the expiry of the limitation period – where the defendants were not served with the claims and the claims were renewed twice – where the defendants apply for the most recent renewals of the claims to be set aside – whether the plaintiffs apply for an additional renewal of the claims – where service was not effected due to the difficulties faced by the plaintiff companies in obtaining appropriate litigation funding – whether the renewals should be set aside

*Uniform Civil Procedure Rules 1999 (Qld), r 16(b), r 24*

*Agricultural & Rural Finance Pty Ltd v Kirk* (2011) 82 ACSR 390; [2011] NSWCA 67, cited

*Arthur Andersen Corporate Finance Pty Ltd v Buzzle Operations Pty Ltd (in liq)* [2009] NSWCA 104, cited

*Hunter v Hanson* [2014] NSWCA 263, cited

*Muirhead v The Uniting Church in Australia Property Trust (Q)* [1999] QCA 513, cited

*The IMB Group Pty Ltd (in liq) v Australian Competition and Consumer Commission* [2007] 1 Qd R 148, cited

*Weston in Capacity as Special Purpose Liquidator of One.Tel Ltd (in liquidation) v Publishing and Broadcasting Ltd* [2012] NSWCA 79, cited

**COUNSEL:** C A Wilkins for the plaintiff in each proceeding  
L F Kelly QC with S R Eggins for the defendants in each proceeding

SOLICITORS: McCullough Robertson for the plaintiff in each proceeding  
Lander & Rogers for the defendants in each proceeding

- [1] The three plaintiff companies were part of the “Kleenmaid Group” which went into liquidation in May 2009. Each company commenced a separate proceeding against the defendants in 2014 in respect of audits performed by those parties in 2008.
- [2] The defendants in each proceeding are:
- (a) the first defendant: PKF East Coast Practice (a partnership) (“**PKF**”), the partnership which carried out the audits;
  - (b) the second defendant: Wayne Wessels, the audit partner who signed off on each of the relevant audits; and
  - (c) the third defendants: 73 individuals in their personal capacities, whom the plaintiffs allege were partners of PKF at the relevant time.
- [3] In each proceeding, the plaintiff company alleges that the audits were performed negligently and seeks damages for breach of contract, negligence, and misleading or deceptive conduct.
- [4] As mentioned earlier, each of the proceedings were filed in 2014:
- 1. proceeding 7214/14 (“**the EDIS proceeding**”) was commenced on 5 August 2014;
  - 2. proceeding 9206/14 (“**the Kleenmaid Customer Solutions proceeding**”) was commenced on 30 September 2014; and
  - 3. proceeding 11436/14 (“**the Kleenmaid Corporate proceeding**”) was commenced on 27 November 2014.
- [5] However, the plaintiffs made no attempt to serve the defendants until August 2017, a period approximately three years after the claims were filed and more than eight years after the events the subject of the claims.
- [6] To prevent the claims from expiring, the plaintiffs twice applied for – and were granted – renewals of the claims by a registrar.<sup>1</sup> On 2 July 2018, the plaintiffs applied to the Court for a further renewal of the claims. On 25 August 2017, the defendants applied for orders setting aside the most recent renewals of the claims and declarations that the claims have not been properly served.<sup>2</sup>
- [7] It appears the claims were filed, subject to any pleading that a defendant may wish to make about the expiry of the limitation period, not long prior to the expiration of the relevant limitation period of six years. The plaintiffs’ duty was to serve those claims

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<sup>1</sup> *Uniform Civil Procedure Rules 1999 (Qld)* r 24.

<sup>2</sup> Application filed 25 August 2017 (CFI #6 in each proceeding).

within a year unless extended for some good reason. Here, the claims have still not yet been served properly some four years after the claims were filed.

- [8] As Keane JA<sup>3</sup> held in *The IMB Group Pty Ltd (in liq) v Australian Competition and Consumer Commission*:<sup>4</sup>

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.

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.<sup>5</sup>

- [9] His Honour cited also the general principle in *Muirhead v The Uniting Church in Australia Property Trust (Q)*<sup>6</sup> where Williams J<sup>7</sup> noted that the general principle is that it is for the applicant for renewal of a claim to establish ‘some good reason why the case should be excepted from the general rule that the court will not exercise its jurisdiction in favour of renewal.’<sup>8</sup>

- [10] I was also taken by counsel for the plaintiffs to the cases of *Hunter v Hanson*,<sup>9</sup> *Agricultural & Rural Finance Pty Ltd v Kirk*<sup>10</sup> and *Weston in Capacity as Special Purpose Liquidator of One.Tel Ltd (in liquidation) v Publishing and Broadcasting Ltd*.<sup>11</sup> Each confirm the general position in cases such as these.

- [11] In this case, there is no doubt that, even if there were not specific prejudice caused by the fact that the defendants were not informed of these claims being filed, there would certainly be the usual prejudice that results from excessive delay. The defendants could have been informed at any time after the claims were filed that there were claims against them and the reasons why they were not being served. The defendants could have been served within the original 12 months, or within the second or third period of 12 months after the claims were renewed. None of this occurred.

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<sup>3</sup> As his Honour then was.

<sup>4</sup> [2007] 1 Qd R 148.

<sup>5</sup> [2007] 1 Qd R 148 [53]-[54] per Keane JA (McMurdo P and Cullinane J agreeing).

<sup>6</sup> [1999] QCA 513.

<sup>7</sup> As his Honour then was.

<sup>8</sup> [1999] QCA 513 [29] per Williams JA (Davies JA agreeing).

<sup>9</sup> [2014] NSWCA 263 [32] per McColl JA (Macfarlan and Emmett JJA agreeing).

<sup>10</sup> (2011) 82 ACSR 390; [2011] NSWCA 67 at 411-412 [104]-[105] per Tobias JA (Macfarlan JA and Sackville AJA agreeing).

<sup>11</sup> [2012] NSWCA 79 [20] per Sackville AJA (Campbell and Young JJA agreeing).

- [12] What was the cause of the delay? In this case, the cause of the delay was that the liquidators were awaiting a decision from a litigation funder which they regarded as providing sufficient funding. The Court of Appeal in New South Wales has held in *Arthur Andersen Corporate Finance Pty Ltd v Buzzle Operations Pty Ltd (in liq)*,<sup>12</sup> that does not constitute an adequate reason for not serving a claim that has been filed.
- [13] It was held in that case that:
- ... it would be inappropriate to allow an extension of time for the service of a writ or statement of claim where a significant cause of the delay has been the willingness of the plaintiff to do nothing about service while awaiting a decision from a litigation funder as to whether or not to provide the necessary funds. Were that to be regarded as a good reason to extend time, the court would be allowing plaintiffs to arrogate to non-parties the right to decide the period by which the time for service of a writ should be extended. That would be fundamentally in conflict with the court's duty to exercise, alone, the discretion conferred upon it.<sup>13</sup>
- [14] In this case, the plaintiffs are in an even worse position, because there were two occasions when the liquidators did have litigation funding, when, they could, at the very least, have informed the defendants of the claims.
- [15] Their reluctance to serve the claims might well have been understandable on economic grounds. The fact that the claims were not served does not mean that the liquidators or their lawyers have been negligent. Understandably, these plaintiffs wanted more certainty about being able to fund the litigation through to the end, to prosecute the claim.
- [16] But that is not the legal test, because the court must balance the public interest in litigation about matters of significance such as the alleged negligence of auditors, against the public interest in such litigation being conducted fairly and efficiently. Here, the delay has meant that the litigation cannot be conducted fairly and efficiently and without unfair prejudice to the defendants caused by the plaintiffs' delay. The plaintiffs have accordingly failed to show that there is good reason to warrant the renewal of their claims.
- [17] It follows that the renewal of the claims cannot be supported. Therefore, the plaintiffs' applications are dismissed. The defendants' applications are granted and I make the following orders in each proceeding:
1. The orders of the Registrar made pursuant to rule 24 of the UCPR to renew the claim for 12 months from 5 August 2016 for the EDIS proceeding, 30 September 2016 for the Kleenmaid Customer Solutions proceeding, and 27 November 2016 for the Kleenmaid Corporate proceeding be set aside.
  2. Pursuant to rule 16(b) of the UCPR, it is declared that the claim has not been validly served on the defendants.

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<sup>12</sup> [2009] NSWCA 104.

<sup>13</sup> [2009] NSWCA 104 [82] per Ipp JA (with whom Tobias and McColl JJA agreed).

3. The plaintiff's application filed 2 July 2018 be dismissed.
4. The claim be dismissed.
5. The plaintiff pay the costs of the defendants of the applications.
6. The plaintiff pay the costs of the defendants of the proceeding.