SUPREME COURT OF QUEENSLAND

CITATION:	*Downing v Baird* [2018] QCA 347
PARTIES:	**ARTHUR CHARLES DOWNING** (applicant) **v** **DAVID BAIRD** (respondent)
FILE NO/S:	Appeal No 3755 of 2018 DC No 435 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – Unreported, 19 April 2016 (Rafter SC DCJ)
DELIVERED ON:	11 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2018
JUDGES:	Sofronoff P and Philippides and McMurdo JJA
ORDER:	**Application refused with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – where the respondent successfully sought summary judgment against the applicant for the performance of a deed at first instance – where the applicant lodged an application for an extension of time nearly two years after summary judgment was given in favour of the respondent – where the applicant seeks to rely on the triable issues that this Court held had been raised in almost identical circumstances in a separate appeal by the applicant against different respondents, arising out of the same factual circumstances – where the applicant also wishes to advance the case that the respondent colluded with another party, with whom the applicant dealt, in order to defeat the applicant's rights – whether the applicant has demonstrated exceptional circumstances to justify the delay of nearly two years *Beil v Mansell (No 1)* [2006] 2 Qd R 199; [2006] QCA 173, cited *Downing v MNSBJ Pty Ltd & Ors* [2018] QCA 223, discussed *O'Callaghan v Hall & Anor* [1993] QCA 297, cited *Spencer & Anor v Hutson & Ors* [2007] QCA 178, cited
COUNSEL:	The applicant appeared on his own behalf J C Faulkner for the respondent

SOLICITORS: The applicant appeared on his own behalf
Matthews Hunt Legal for the respondent

[1] **SOFRONOFF P:** This is an application to extend time in which to appeal an order made on 19 April 2016 by Rafter SC DCJ giving summary judgment to the respondent for the sum of $164,000. That sum, together with interest, was paid on about 12 May 2016.

[2] The facts giving rise to the proceeding, as drawn from the applicant's affidavit read before Rafter SC DCJ, and from other affidavits read on this application, were as follows.

[3] The applicant has been a developer of tourist attractions for many years. He was interested in developing a tourist attraction in the form of a water park on the Sunshine Coast. In February 2010 he found a suitable site on Steve Irwin Way at Glenview. The land was not for sale. However, the applicant expressed an interest in buying the land to the owner and the land was then put up for sale. The applicant negotiated for its purchase but no contract resulted. After some time, the owner's agent told the applicant that the owner was willing to grant him an option to purchase the land. The land consisted of two allotments, Lot 2 and Lot 22 on SP 221902. The agent told the applicant that it was important for the owner to retain a portion of the land and further negotiations would be required to ensure that a remnant would remain with him.

[4] The applicant incorporated a special purpose company, Australia Pacific Investment Pty Ltd ('API'). That company was a subsidiary of another company, Waterplay Pty Ltd, which was controlled by the applicant. On 7 May 2012 the owner of the land and API entered into a call option contract. Pursuant to that contract, the owner of the land granted API an option to purchase the land for an agreed purchase price and upon agreed terms. In addition, the owner consented to API's making of a Development Application that, if granted, would permit API to obtain a "Material Change of Use" consent to enable API to develop that land in the way it desired (clause 13). API was obliged to pay the owner a "Call Option Fee" of $1 on execution of the option contract (clause 11). API was obliged to pay the owner a further sum of $32,500 70 days after entry into the contract. This sum was only repayable in the event of default by the owner resulting in the termination of the contract. Otherwise, if the option were exercised it would constitute a part payment of the purchase price of the land and if the option was not exercised it was to be retained absolutely by the owner.

[5] The applicant lobbied the mayor and other councillors of the local authority to persuade them to look on his project favourably. He lobbied the relevant State Minister. He engaged architects, engineers and other consultants.

[6] The applicant received an email from the Council suggesting that it would be advantageous for him to meet the respondent, David Baird. They met on 8 January 2014. The respondent told him that he could fund the whole project. The applicant asked the respondent what he would want in return for funding the water park. The respondent said he wanted 50 per cent of the project, that is to say, a 50 per cent shareholding in the venture company. They agreed that the respondent would receive a 49 per cent holding in the venture company and 50 per cent of the profits. No written agreement was entered into to that effect.

[7] In mid-2014 the applicant became concerned that the respondent had been unable to provide any details about any proposed funding. The applicant managed to secure $240,000 to pay some of his consultants engaged on the obtaining of the development approval by selling shares in Sunshine Surf Park Pty Ltd, a company controlled by him, to interested investors who had been introduced to him by the respondent.

[8] By his solicitor, the respondent had demanded the transfer of 50 per cent of shares in Sunshine Surf Park to him. The applicant agreed to a transfer of shares to him over time as funding was provided. This did not happen.

[9] The consent to a Material Change of Use was approved in principle by the local authority on 27 January 2015.

[10] In February 2015 the respondent told the applicant that he had a friend who would buy the applicant out of the project for $2 million.

[11] The applicant considered that it was necessary to obtain more time before the option expired. By a deed executed on 30 April 2015 the time for performance of the obligations in the option contract was extended. Relevantly, the option exercise date was extended to 23 December 2015.

[12] In May 2015 the respondent introduced the applicant to his friend, Bradley Sutherland. Negotiations ensued between the applicant and Sutherland. There were also negotiations between Sutherland and the respondent.

[13] In due course, Sutherland's solicitors, Jones Day, prepared several agreements by which Sutherland, or a company controlled by him, would buy out the applicant, the respondent and the shareholders who had invested $240,000. First, there was a "Settlement Deed" between the applicant, the respondent and API. That deed recited that "the parties were pursuing the development and construction of a water park" on the land and that the respondent had provided consultancy services in connection with that project. The deed anticipated that Sutherland's company, Nurrowin Pty Ltd ('Nurrowin'), would acquire the land. The expression "Release Date" was defined to mean the date on which Nurrowin "acquires the Land" (clause 1.1). That date would trigger the applicant's obligation to pay the respondent $165,000 and, upon payment, each party released the other from all claims (clause 2).

[14] The second document was a "Share Sale and Purchase Deed" between the applicant and Mrs Downing on the one hand and the investors who had acquired shares in Sunshine Surf Park on the other hand. These investors agreed to sell their shares for a total sum of $264,000. The sale was to be settled on the "Completion Date" which was the date on which Nurrowin "acquires the Land".

[15] The third and final document was a "Deed of Nomination" between API and Nurrowin. Pursuant to that deed, API agreed to assign to Nurrowin its rights under the option contract with the owner of the land. That assignment would take place on the "Nomination Date" which was defined to mean 30 days from the date on which Nurrowin received FIRB approval to purchase the land and to develop it (clauses 1.1 and 2.1). This deed also reflected the existence of the "Settlement Deed" and the Share Sale and Purchase Deed. By clause 1.1 the deed defined "Settlement Agreement" to mean both the "Settlement Deed" and the "Share Sale and Purchase Deed". By clause 3.2 API directed Nurrowin to prepare each "Settlement

Agreement" and API agreed to pay the costs of such preparation. API agreed to procure the execution of the Settlement Agreements. API directed Nurrowin to pay the "Settlement Amounts" payable under those agreements to the "Investors", who were defined in clause 1.1 to mean the respondent and the shareholders.

[16] Clause 8 provided that the agreement would "terminate" upon the occurrence of, relevantly, "Completion not being reached by the Long Stop Date". The latter expression was defined to mean 23 December 2015. This was the date of expiry of the option.

[17] Evidently, the Settlement Deed and the Share Sale and Purchase Deed were each prepared to satisfy clause 3.2 of the Deed of Nomination. The Deed of Nomination is dated 21 September 2015. The other two agreements are dated "September 2015".

[18] On 30 October 2015 the Council approved the application for a development permit to reconfigure the lots.

[19] On 15 December 2015, Nurrowin's solicitor emailed the applicant's solicitor that he was "aiming to lodge titles on the 24th" and suggested that completion take place on the 23rd December. He went on that "Completion under the Deed of Nomination will occur after the land contract has been completed, and the land has been transferred to our client".

[20] On 22 December 2015, that solicitor emailed the applicant's solicitor again, enclosing settlement figures. He provided these "in anticipation of the completion of our client's contract with [the owner] tomorrow 23 December 2015 and the completion of the Deed of Nomination shortly thereafter (in accordance with the Deed of Nomination)".

[21] A dispute then arose between the applicant and Nurrowin concerning whether particular sums were to be deducted from the sum payable to the applicant. Early on the morning of 24 December 2015, the applicant's solicitor inquired of Nurrowin's solicitor whether settlement had been effected. Late that afternoon, the latter replied by email. He informed said that the seller had terminated the contract of sale. As result, he said, "Completion (as defined under the Deed) has not occurred by the Longstop Date, and in fact is unable to occur as the Contract has been terminated by the Seller. Accordingly, the Deed is automatically terminated, as of 12.01 am 24 December 2015."

[22] There was no explanation how the seller came to be in a position to terminate the contract lawfully.

[23] In fact, although Nurrowin's solicitor signed the transfer on 24 December 2015, the vendor's attorneys had performed the vendor's contractual obligation to sign the transfer on 23 December, before the expiry of the Longstop Date. There is thus a possible question whether or not it could rightly be claimed, as Nurrowin claimed, that the Nomination Deed had automatically terminated on the ground of the non-occurrence before midnight on 23 December of the "date on which the sale and purchase of the Land is completed and the land is transferred". There is also an extant question that could not be answered on a summary judgment application, namely how it came about that the seller was ever able to terminate the contract on 23 December only to sign a transfer on the same day.

[24] In any case, although Nurrowin contended that "Completion" as defined in the Nomination Deed had not taken place and never would, the respondent asserted to the applicant that the "Release Date" as defined in the Settlement Deed had passed because Nurrowin had actually acquired the land, as indeed it had. It will be recalled that the "Release Date" is defined in both the Settlement Deed and the Share Sale and Purchase Deed as "the date on which [Nurrowin] acquires the Land". The Nomination Deed defines the "Completion Date" differently as the "date on which the sale and purchase agreement between the Assignee and the Seller in respect of the sale and purchase of the Land is completed and the Land is transferred to the Assignee". The expression "the sale and purchase agreement" is undefined.

[25] Upon that assertion, the respondent brought a claim in the District Court to recover the sum of $165,000 payable to him by the applicant under the Settlement Deed. The respondent then sought summary judgment. The applicant was represented on the application. He put forward two arguments to resist summary judgment. The first was that the "land" that had been acquired by Nurrowin in order to trigger the occurrence of the "Release Date" was not the same as the "Land" the subject of the deed. The other submission was that it was possible that Nurrowin had actually paid the respondent $165,000 in discharge of the applicant's obligation. Both submissions were rejected and their rejection is not now challenged. On 19 April 2016 Rafter SC DCJ gave judgment for the respondent.

[26] Now, by an application for an extension of time within which to appeal that was filed almost two years after that judgment, the applicant seeks an opportunity to overturn the judgment.

[27] The case that the applicant now wishes to put forward to justify setting aside Rafter SC DCJ's order is twofold.

[28] First, he wishes to rely upon the triable issues that this Court held had been raised in almost identical circumstances in the applicant's appeal against the shareholders in *Downing v MNSBJ Pty Ltd & Ors*.[1]

[29] Second, he wishes to litigate the relationship between the respondent and Sutherland and submit that there is, or that there may be, an action based upon their collusion to defeat the applicant's rights.

[30] As I understand that argument, it is that, as the applicant is now aware, but as he did not know when summary judgment was sought, the respondent and Sutherland, and certain other persons, associated with one another with respect to a plan to obtain this project for themselves to the exclusion of the applicant. Together, they induced the applicant to enter into the agreements, drafted by Sutherland's solicitor, by representing to him that he would be paid in accordance with the Nomination Deed and that Nurrowin, pursuant to the Nomination Deed, would meet his obligations under those other instruments.

[31] As the applicant correctly submits, at least part of the case justifying the matter going to trial is identical to the matters that justified setting aside summary judgment in *Downing v MNSBJ Pty Ltd & Ors*.[2] However, unlike that appeal, in this case the applicant faces a hurdle that, in my opinion, is insuperable, namely the

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1 [2018] QCA 223.

2 *supra*.

delay of almost two years since judgment was entered and the judgment sum was paid. That delay has had the consequence that a consideration of the merits of the proposed appeal can be put to one side for the following six reasons.

[32] First, Mr Faulkner rightly submits that an extension of time of two years could only be warranted by exceptional circumstances.[3]

[33] Second, there is Mr Baird's evidence that he would be prejudiced financially if he became obliged to repay the judgment sum after the time that has passed since he received it. That evidence has not been challenged. It is inevitable that a person who has been paid a significant sum of money to satisfy a judgment will, over the course of two years, have altered his or her circumstances in reliance on that payment and in other ways. Whether there would be resulting financial pressure if the money had to be repaid is certainly relevant. But an unexpected new obligation to pay a substantial sum of money because of a successful, but delayed and unanticipated, appeal would itself constitute a prejudice that counts heavily against the grant of an extension of time.

[34] Third, it cannot be said that the points of contractual interpretation referred to in the Court's judgment in *Downing v MNSBJ Pty Ltd & Ors*[4] could not have been raised before Rafter SC DCJ. They are points that arise from a reading of the documents and not from some newly discovered facts.

[35] Fourth, the respondent's relationship with Sutherland and his desire to enter into a financial relationship with him in relation to the project was known to the applicant as early as mid-2015, as emails in evidence show, although it is true that some of the incidental detail, such as membership and control of certain corporations, was unknown. Indeed, it became the basis for the action against Sutherland and others that was initiated in the Supreme Court in the first half of 2016. Nor has this proposed case been articulated with any precision up to this point. It is therefore not possible to assess its merits.

[36] Fifth, in considering whether to grant an extension of time within which to appeal, it is relevant to consider the nature of any injustice that might be suffered by the applicant if an extension were to be refused. The onus is on the applicant to prove that he will suffer an injustice by a refusal of an extension. In this case, if the applicant is correct in his view that Sutherland, the respondent and others combined together to mislead him, thereby unlawfully depriving him of the option agreement or the benefit of the Nomination Deed, then it is not clear that any award of damages in his favour against Sutherland and the other defendants in the Supreme Court action would not include the amount for which he became liable to the respondent by their conduct. It is also not clear that any judgment would not include that sum if he succeeds upon the various interpretation arguments. I have put those propositions in the double negative because it is for the applicant for an extension of time to show that an injustice would result if an extension were not granted and that has not been demonstrated. The applicant is at liberty to formulate his claim against Sutherland to take into account these matters. Their ultimate fate is a matter for another court to decide in due course.

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3 see *Beil v Mansell (No 1)* [2006] 2 Qd R 199 at [38] per Muir J.

4 *supra*.

[37] Sixth, if that turns out not to be so, it does not follow that a judgment that has been regularly entered against a defendant, upon correct legal grounds as understood at the time judgment was entered, constitutes an injustice suffered by that defendant even if, two years later, the defendant discovers new arguments that might have avoided judgment.[5] It has been repeatedly said by this Court that the rules setting time limits should not be treated as of no importance. To do so would be destructive of the proper administration of justice.[6]

[38] For these reasons I would refuse the application with costs.

[39] **PHILIPPIDES JA:** I agree for the reasons state by Sofronoff P that the application should be refused with costs.

[40] **McMURDO JA:** I agree with Sofronoff P.

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5 *Biel, supra,* at [41] per Muir J.

6 see, eg, *O'Callaghan v Hall & Anor* [1993] QCA 297 cited in *Biel, supra,* at [38]; *Spencer & Anor v Hutson & Ors* [2007] QCA 178 at [28] per Keane JA.