SUPREME COURT OF QUEENSLAND

CITATION:	*Limpus v State of Qld & Ors* [2003] QCA 563
PARTIES:	**COLIN LIMPUS** (applicant/first respondent) **v** **STATE OF QUEENSLAND** (first respondent/second respondent) **GRANT DENNIS HOWARD and CHERYL JOY HOWARD** (second respondent) **WHITSUNDAY SHIRE COUNCIL** (third respondent/appellant)
FILE NO/S:	Appeal No 3906 of 2003 SC No 1761 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Appeal from interlocutory decision
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	11 September 2003
JUDGES:	Jerrard JA and Dutney and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**1. Appeal dismissed** **2. Appellant pay the first respondent's costs of the appeal**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULE OF COURT – JOINING PARTIES TO PROCEEDINGS – where respondent granted leave pursuant to r 69 *Uniform Civil Procedure Rules* 1999 (Qld) to add the second defendant to a proceeding against the first defendant – where apparent degree of uncertainty exists as to who is the responsible party – whether decision of learned judge to join the party was unreasonable and unjust LIMITATION OF ACTIONS – CONTRACTS, TORTS AND PERSONAL ACTIONS – PERSONAL INJURY CASES – where respondent injured in single vehicle accident on a state controlled road – where limitation period expired over a year before the second defendant was joined to the proceeding – where learned judge held that appellant did not

show any specific prejudice in addition to the ordinary disadvantages caused by delay – whether learned judge acted on wrong principle

Limitation of Actions Act 1974 (Qld), s 31(2)
Uniform Civil Procedure Rules 1999 (Qld), r 69

Bates v Queensland Newspapers [2001] QSC 83; SC No 1324 of 1993, 27 March 2001, discussed
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, considered
Cacchia v Rungert & Ors [2002] QCA 207; Appeal No 1153 or 2001, 21 June 2002, distinguished

COUNSEL: R J Douglas SC, with D Scheidewin, for the appellant
D A Reid, with D J Murphy, for the first respondent
S J Hamlyn-Harris for the second respondent

SOLICITORS: Barry & Nilsson for the appellant
Murphy Schmidt for the first respondent
Crown Solicitor, C W Lohe, for the second respondent

[1] **JERRARD JA:** This matter is an appeal against an order made in this court on 9 April 2003, granting the respondent/plaintiff Colin Limpus leave pursuant to r 69 of the *Uniform Civil Procedure Rules* 1999 (Qld) (*UCPR*) to add Whitsunday Shire Council as a second defendant to a proceeding commenced on 22 February 2002 against the State of Queensland. The relevant limitation period expired on 24 February 2002, and the appellant Council was thus added as a defendant a little more than 13 months later. It contends that the learned judge acted on a wrong principle in granting leave, and that in any event the order was plainly wrong.

Background matters and chronology

[2] Mr Limpus complains in the proceeding that he was riding a motorcycle along Shute Harbour Road from Airlie Beach to Proserpine at about 8.30 p.m. on 24 February 1999 when he lost control of it, on a curve in the road at its intersection with Rifle Range Road. His pleadings describe his suffering significant injuries as a result of falling from the motorcycle to the roadway in that single vehicle accident, which his pleadings allege was caused by his motorcycle wheels coming into contact with gravel on the road surface, causing a sideways slide of the motorcycle. The plaintiff's affidavit states that after the accident he noticed gravel lying on the road, which he assumed had been discharged onto the road from a nearby bus stop, but which the plaintiff was unable to inspect more closely then because of his injuries.

[3] On some unidentified date the plaintiff engaged solicitors to act for him in respect of those injuries, and on 11 April 2001 instructed his present solicitors. On 22 April 2001 they received some photographs of the scene from his previous solicitors. The evidence does not disclose when those were taken. The judgment under appeal describes those as not showing the road surface at or about the time of the accident, but notes that they do show dirt and gravel on the road in the vicinity of the accident scene.

[4] On an unidentified date the plaintiff's new solicitors requested a police report of the accident, which was received on 20 June 2001. Next, those solicitors prepared, on 10 July 2001, a Freedom of Information (FOI) application in respect of Shute Harbour Road which was directed to the Department of Main Roads, but the solicitors were unable to submit it around that date, because the plaintiff had left his address known to those solicitors, without providing any forwarding one. He in fact moved twice before those solicitors were able to obtain his signature to that request and forward it in mid October 2001 to the Department of Main Roads.

[5] On 14 December 2001 the solicitors learnt from the Department that there were a significant number of documents regarding Shute Harbour Road available for inspection, and that inspection occurred on 3 January 2002. It did not reveal any reports on any problems occurring at the intersection.

[6] On 4 January 2002 the plaintiff's solicitors told him they considered it necessary to obtain an engineer's report on the intersection and accident, and on 7 February 2002 the plaintiff gave instructions to his solicitors to obtain one. On 22 February 2002 the plaintiff's claim and statement of claim against the State of Queensland was filed, before the receipt of the engineer's report. The engineer's inspection occurred on 11 March 2002 and the engineer took photographs of the scene which the solicitors received on 20 March 2002. Those photographs showed gravel in the relevant area, in greater volume than the earlier photographs, and the learned trial judge concluded that it was certainly possible that there was gravel there, as the plaintiff claimed, at the time of the accident. The judgment under appeal records that the engineer rang the solicitors in a timely fashion to inform them that the engineer considered rain was likely to cause deposits of gravel on the road surface from a driveway of a house at the apex of the corner, and that in the engineer's opinion a spoon drain had been needed to take gravel away from the road surface.

[7] This information was of course received after the limitation period had expired. On 21 June 2002 the plaintiff learnt in a telephone conversation with his solicitors that they understood gravel on the road surface at the time of his accident may have come from a private driveway, crossing over property controlled by the Council (the footpath), and that the solicitors considered the Council should be joined as a defendant. No steps were taken to apply for the joinder and in January 2003 the engineer's report was finally received, dated 15 January 2003. Its contents include the observation that after the accident the plaintiff had knowledge of people who had seen the Council sweeping the area. The plaintiff's affidavit read before the learned judge confirms "that the factual matters in that report are true and correct".

[8] On 3 March 2003 the plaintiff filed an application to join as second defendants the owners of the land from which the plaintiff's engineer opined the gravel possibly may have come, and to join the Council as third defendant. The learned judge dismissed the application to join the land owners but gave leave to add the Council as second defendant.

The judgment under appeal

[9] The plaintiff's affidavit described his own personal unwillingness to inspect the scene of the accident on those occasions when he travelled past it (he having moved from Proserpine to Sarina in September 1999) when attending his doctor; the judgment under appeal notes that even so, the plaintiff did not do anything to have

the scene inspected on his behalf in the period after the accident to establish its possible causes. The judgment further describes the plaintiff's own material as unsatisfactory in other respects, including that at the stage when information was being gathered by his new solicitor, he lost touch with that solicitor, causing vital time to be lost. That observation no doubt referred to the period in the third and fourth quarters of 2001 when he was being sought by his solicitors to sign the FOI application.

[10] The judgment further noted that when the expiration of the limitation period was fast approaching the plaintiff had not contacted his solicitor for one month about the proposal to obtain an engineer's opinion, and that on the assumption that he knew that the Whitsunday Shire Council had swept the area after the accident, he did not tell his solicitor about that in any timely way. The judgment notes that some other unexplained delays, such as why no steps were taken to seek the joinder of the proposed second and third defendants when their potential liability was identified as early as June 2002, and why the engineer's report was not received for so long, could not be attributed to the plaintiff personally.

[11] The learned judge held that the clear conclusion to be drawn from what had happened was that there was a failure to appreciate the possibility that the local authority might have had a role in maintaining the intersection in a safe condition. The plaintiff's available information, giving him reason to believe that the Council had swept the road on occasions after the accident, might have prompted his solicitors to investigate that local authority's possible liability, particularly because of the interaction of s 901 of the *Local Government Act* 1993 (Qld) with s 43 of the *Transport Infrastructure Act* 1994 (Qld). Whatever investigation has been done, the plaintiff's pleadings continue to assert Shute Harbour Road is a gazetted road which the State of Queensland owned, occupied and/or was responsible for maintaining pursuant to the provisions of the latter Act, but now also plead that the Council owned, occupied and/or managed the footpath over which it was reasonably foreseeable gravel might be transported (from the driveway of that house) and deposited onto the intersection.

[12] The learned trial judge referred to the decisions in this Court at first instance of *Jerome v Hill* [2001] 1 Qd R 496, *Bates v Queensland Newspapers Pty Ltd* [2001] QSC 83, and the decision of this Court of Appeal in *Cacchia v Rungert & Ors* [2002] QCA 207. The judge remarked that the latter decision indicates that a weighing exercise is involved on a case by case basis, and that the decision also confirms that the discretion given by r 69 of the *UCPR* is a broad one, not dependant on an applicant demonstrating special or peculiar circumstances. The learned judge then accepted that joining the Council would involve exposing it to an action some (12) months after the limitation period expired (in fact 13), and to a liability to which it would not otherwise be exposed, but that no specific prejudice in addition to the ordinary disadvantages caused by delay had been alleged by the Council. The learned judge then held that, taking into account the factors referred to in the course of the reasons for judgment, it was just to include the Council as a party after the end of that limitation period. Those factors referred to included of course the delays for which the respondent/plaintiff was responsible and those for which he was not. Presumably they also included his injuries, the fact that he did consult solicitors within time, did give instructions for both a FOI search and for an engineer's report, and that he gave those within the limitation period.

The appellant's submissions

[13] The matter upon which the appellant particularly focused on in argument on the appeal was what it submitted was the learned judge's error in the observation that no specific prejudice was alleged by the Council, which statement, in the appellant's submission, demonstrated that the learned judge had incorrectly placed an onus upon the Council to demonstrate prejudice, rather than upon the plaintiff to demonstrate its absence. The appellant also submitted that the judge erred in distinguishing *Cacchia v Rungert & Ors* on the basis that it was necessary in that case for the plaintiff to succeed against an existing defendant (the local authority for the area), to establish the pleaded derivative liability of the defendant sought to be added (the State of Queensland). The appellant also complains that the learned judge effectively found for it and against the plaintiff on the issues of no sufficient or satisfactory explanation of the failure to join the appellant prior to the limitation period, the limited extent of the investigation carried out by the respondent or instructed by him on his behalf prior to such expiry, and the lapse of time between the respondent becoming aware of the need to join the appellant and his bringing the application to do so. Despite this and despite a finding of the ordinary disadvantages caused by delay, the learned judge ordered the joinder, which order in the appellant's submission was plainly unjust.

Relevant principles

[14] *UCPR* 69(1)(b) allows a court at any stage of a proceeding to order the inclusion as a party of:

> "…
> (i) a person whose presence before the court is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in the proceeding;
> (ii) a person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and completely on all matters in dispute connected with the proceeding.
> …"

It appears undisputed that this would authorise an order adding the Council; however r 69(2) limits that power granted by r 69(1)[1] by its provision that the court must not include or substitute a party after the end of a limitation period unless one of a series of specified circumstances applies. The last of these (r 69(2)(g)) is that:

> "for another reason the court considers it just to include or substitute the party after the end of the limitation period."

[15] In *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 the High Court heard an appeal from a decision of this Court allowing an order under s 31(2) of the *Limitation of Actions Act* (1974) (Qld), extending a limitation date from mid 1982 to early 1995, in respect of an assertedly unnecessary and inappropriate medical procedure allegedly undertaken without adequate explanation of available options. The High Court by majority reversed this Court's decision and in so doing made observations and rulings on the exercise of the s 31(2) discretion relevant to the exercise of the discretion granted by *UCPR* 69(2).

---

[1] See the remarks of Fryberg J in *Greig v Stramit Corporation Pty Ltd* [2003] QCA 298 at [158].

[16] Dawson J,[2] in a short judgment agreeing with McHugh J, described s 31 of the *Limitation of Actions Act* as conferring a discretion upon a court to extend time which should only be exercised in favour of an applicant where in all the circumstances justice was best served by so doing. The onus of satisfying the court that the discretion should be exercised lay on the applicant, which required establishing that the commencement of an action beyond the limitation period would not result in significant prejudice to the prospective defendant. His Honour expressed the view, described by him as in agreement with McHugh J, that to allow the commencement of an action outside a limitation period selected by the legislature was prima facie prejudicial to a defendant who would otherwise have the benefit of that limitation.

[17] Toohey and Gummow JJ wrote a joint judgment likewise placing the onus on an applicant to satisfy the court that grounds exist for the exercise of the discretion in that applicant's favour, but placing an evidentiary onus on the prospective defendant to raise any considerations telling against the exercise of the discretion.[3] Where that prejudice was alleged by reason of the effluxion of time, it was for the defendant to place in evidence sufficient facts to lead the court to the view that prejudice would be occasioned and for the applicant to show that those facts did not amount to material prejudice; the ultimate onus remaining on the applicant.[4] Their Honours went on to hold that the most important consideration in many cases for a court asked to exercise the s 31(2) discretion was whether, by reason of the time that had elapsed, a fair trial was possible;[5] a weighing process was not called for, the real question being whether the delay had made the chances of a fair trial unlikely.[6] Their Honours observed that in all the circumstances of that particular case it could hardly be gainsaid that there would be some prejudice to the Brisbane South Regional Health Authority by reason of the delay (17 years by the date of judgment) that had ensued, and they quoted from the finding by the trial judge that the Health Authority was placed in a position of serious prejudice from the lapse of time.

[18] McHugh J likewise held an applicant bore the onus of showing that the justice of the case required the exercise of the discretion in the applicant's favour, and made a number of oft-quoted and relevant observations about limitation periods. Those observations include that the enactment of time limitations has been driven by the general perception that where there is delay the whole quality of justice deteriorates[7], sometimes palpably, and sometimes in a way not recognisable even by the parties; and that the discretion to extend should therefore be seen as requiring an applicant to show that his or her case is a justifiable exception to the rule that the welfare of the State is best served by the limitation period in question.[8]

[19] His Honour held that accordingly an applicant has the positive burden of demonstrating that the justice of the case requires that extension,[9] and that once the

---

2 At 186 CLR 544.
3 At 186 CLR 547.
4 At 186 CLR 547, citing from Gowans J in *Cowie v State Electricity Commission* (Vic) [1964] VR 788 at 793 in a passage endorsed by Gibbs J in *Campbell v United Pacific Transport Pty Ltd* [1966] Qd R 465 at 474.
5 At 186 CLR 548.
6 At 186 CLR 550.
7 At 186 CLR 551.
8 At 186 CLR 554.
9 Ibid.

potential liability of a defendant has ended, its capacity to obtain a fair trial if an extension of time were granted is relevant and important.[10] He wrote (at CLR 555):

> "Legislatures enact limitation periods because they make a judgment, inter alia, that the chance of an unfair trial occurring after the limitation period has expired is sufficiently great to require the termination of the plaintiff's right of action at the end of that period. When a defendant is able to prove that he or she will not now be able to fairly defend him or herself or that there is a significant chance that this is so, the case is no longer one of presumptive prejudice. The defendant has then proved what the legislature merely presumed would be the case. Even on the hypothesis of presumptive prejudice, the legislature perceives that society is best served by barring the plaintiff's action. When actual prejudice of a significant kind is shown, it is hard to conclude that the legislature intended that the extension provision should trump the limitation period. The general rule that actions must be commenced within the limitation period should therefore prevail once the defendant has proved the fact or the real possibility of significant prejudice."

McHugh J went on to note that the learned trial judge in that case had made a finding of actual prejudice, making the trial judge's decision to dismiss the application for an extension inevitable.

[20] I respectfully observe that those judgments, which place an onus on an applicant to show that the justice of a particular case requires an extension of a limitation period, which onus is unlikely if not unable to be satisfied where the passage of time beyond a limitation period has resulted in a prospective defendant no longer being able fairly to defend the proceedings, do place an evidential onus on a potential defendant to identify the prejudice to it of which the defendant is aware and which makes a fair trial no longer possible or creates a significant chance of that result.

[21] Those judgments, in their reference to the justice of the case, are expressed in terms similar to those of *UCPR* 69(2)(g),[11] and express principles which it is appropriate to apply when exercising that discretion. The rule has already received judicial interpretation consistent with those principles. In *Bates v Queensland Newspapers* Chesterman J wrote, at para [20], in a passage quoted with apparent approval in the judgment of this court in *Cacchia v Rungert* at [16]:

> "The rule confers a wider general discretion on the court but it can only be exercised where the reason, which makes the destruction of the defence just, can be clearly identified and is seen to be sufficient. An explanation for the failure to join the party within time will always be relevant though lack of such an explanation is not a precondition to the power."

[22] The reference to the destruction of the defence is to the otherwise good defence of the expiration of a limitation period, and his Honour had earlier described r 69(2)(g) as imposing an onus on an applicant to bring forward the reason from which it might be seen that it would not be unfair for a defendant to be exposed to a stale

---

10 At 186 CLR 555.

11 The *UCPR* are made pursuant to the rule making power given in s 118 of the *Supreme Court of Queensland Act* 1991 (Qld), which section forms part of an amended Part 9 enacted by the *Civil Justice Reform Act* 1998 (Qld) (Act No 20 of 1998).

claim.[12] In so holding Chesterman J was describing the discretion granted by *UCPR* 69 in terms echoing the judgments in *Brisbane South Regional Health Authority v Taylor*.

Can the Council fairly defend?

[23] The most striking aspect of the appellant's material is the absence of any claim in the only affidavit filed on its behalf that it faced any difficulty in defending the proceedings by reason of the four years which had elapsed since the incident. The appellant's CEO deposed to having been served with the application on 13 March 2003 and that until then the Council knew nothing of the potential claim against it by the plaintiff. He also deposed that had the plaintiff requested permission to inspect documents the Council held in relation to that road at any time prior to 13 March 2003, those documents would have been made available for inspection. The CEO[13] did not declare that that Council had no knowledge of the road conditions before or at the time of the accident, nor that the Council had not known of the incident itself. The CEO did not describe any lack of opportunity to conduct inspections of the road surface at the relevant time, or to make any other relevant investigation, or that there had not been relevant inspections or investigations; or of any problem caused by staff changes over the period since the incident.

[24] Likewise the written submissions made on the Council's behalf to the learned trial judge complained of tardiness by the plaintiff and his solicitor, and submitted that ordinarily a plaintiff in his position would plead a claim against a local council as a matter of course. This is because of uncertainty as to the entity responsible for control, repair, and signage of the road and uncertainty as to whom any complaints about the road had been made. The submission did not refer to any relevant lack of opportunity by the Council to conduct its own investigation, or to the absence of any relevant investigation or information about the accident. That is, the appellant did not depose to any disadvantage, or argue in its written submission[14] to the learned trial judge that it was disadvantaged at all, in defending the proceedings because of the plaintiff's tardiness.

[25] In contrast, the affidavit filed by the land owners' solicitor opposing their joinder did plead prejudice in defending any claim to which they were added by reason of their not having undertaken any forensic inquiry (obviously at the relevant time)[15] and the written submissions made on behalf[16] of those potential respondents did argue that the passage of time ensured that any specialist engineering report they then obtained would not avail them "of any evidential defence," and that they were significantly prejudiced thereby.

[26] I respectfully consider that the observation by the learned trial judge that the appellant had not alleged any specific prejudice in addition to the ordinary disadvantages caused by delay contained no misdescription of either the evidence before the learned judge, or of any relevant onus of proof. The learned judge was there applying the decision in *Brisbane South Regional Health Authority v Taylor* both as to an evidential onus and as to presumptive prejudice. The learned judge

---

12 In [19] of the reasons in *Bates v Queensland Newspapers.*

13 His very short affidavit is AR 44.

14 The submission appears at AR 97-103.

15 At AR 45-46.

16 These are at 93-96.

correctly observed that no specific matters were raised by the Council. That was a significant matter for the learned judge to take into account when determining whether the plaintiff's delay had made the chances of a fair trial unlikely.

[27] The learned judge was not given evidence or written submissions allowing the judge to conclude that the Council could not adequately and fairly defend the plaintiff's claim against it. As a fair trial was possible the issue became whether the applicant had identified facts making the joinder just, where the plaintiff's own conduct had caused some delay before the expiration of the critical three year period, and other unexplained delays largely attributable to others had occurred after the limitation expired. The absence of matters prejudicing a fair trial for the Council is still only the absence of a very material adverse factor; a good or satisfactory explanation for the lapse of time which allowed the limitation period to pass, where there is an absence of prejudice, could be a sufficient positive factor making an order adding the Council just; where there is no specific prejudice demonstrated from delay but no satisfactory explanation for it, ordinarily an applicant would need to point to some other factor providing a clear reason for justifying an order.[17]

[28] The learned judge effectively held that the plaintiff had satisfied the onus placed upon him, referring as described to factors the judge did not specifically identify, but which I have attempted to in these reasons. That the plaintiff gave the relevant instructions within the limitation period, and that it may have been possible after getting those instructions to conduct the critical inspections and obtain at least an oral report sufficient to justify proceedings within time, tells in the plaintiff's favour where a fair trial can be held. The learned judge exercised the discretion without any relevant misdirection in law, and I do not accept the submission that the outcome is so unreasonable as to be wrong or that the learned judge was not entitled to conclude that it was just to add the Council. The judge quite clearly took into account all the arguments against the plaintiff, and I consider that a decision in his favour was open to the judge.

[29] I add that I consider the grounds upon which the learned judge distinguished the actual outcome in *Cacchia v Rungert* were accurate and that, unlike the position in that case, in this one there is apparently a degree of uncertainty as to who is the responsible party. Distinguishing the decision in *Cacchia v Rungert* was not particularly germane to the judgment of the learned judge, nor in this appeal.

[30] I would order that the appeal be dismissed and that the appellant pay the first respondent's costs of the appeal.

[31] **DUTNEY J:** I agree that for the reasons given by Jerrard JA the appellant has failed to show that the discretion exercised by the learned primary judge under r 69 of the *UCPR* has miscarried and I would also dismiss the appeal. I would order the appellant to pay the first respondent's costs of the appeal.

[32] **PHILIPPIDES J:** I agree with the reasons of Jerrard JA and with the orders proposed.

---

[17] In *Brisbane South Regional Health Authority v Taylor*, Toohey and Gummow JJ considered (at CLR 550) that where delay had not made a fair trial unlikely, there was no reason for not exercising the discretion to extend time. That judgment was written in the context of s 31(2), where the applicant contended material facts had only recently come to her knowledge.