SUPREME COURT OF QUEENSLAND

CITATION:	*Brew v Followmont Transport Pty Ltd* [2004] QSC 421
PARTIES:	**BENJAMIN ANDREW BREW** (Plaintiff) v **FOLLOWMONT TRANSPORT PTY LTD** **(ACN 010 518 279)** (Defendant)
FILE NO/S:	459 of 2003
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court in Cairns
DELIVERED ON:	26 November 2004
DELIVERED AT:	Cairns
HEARING DATE:	26 October 2004
JUDGE:	Jones J
ORDER:	**1. The plaintiff's application filed on 11 December 2003 is dismissed.** **2. Judgment for the defendant in the action.** **3. The plaintiff pay the defendant's costs of and incidental to the action to be assessed on a standard basis.**
CATCHWORDS:	WORKERS' COMPENSATION – EVIDENCE AND ONUS OF PROOF – ESTOPPEL – ESTOPPEL BY CONDUCT – Whether the defendant adopted an erroneous assumption of the plaintiff's which caused the plaintiff detriment by failing to respond as required by s 285 *WorkCover Act* 1996 – where action or conduct on behalf of the defendant could not have caused the plaintiff to maintain an erroneous assumption – where plaintiff's inaction caused detriment PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – judgment under r 293 *Uniform Civil Procedure Rules* – where 'no real prospect of success' *Uniform Civil Procedure Rules* 1999 (Qld), r293 *Motor Accident Insurance Act* 1994 (Qld) *WorkCover Act* 1996 (Qld), s280, s282, s285 *Brew v WorkCover* (2004) 1 QdR 621, cited

The Commonwealth v Verwayen (1990)170 CLR 394, applied

COUNSEL: Mr A J Moon for the applicant
Mr R Douglas SC with Mr K Holyoak for the respondent

SOLICITORS: Connolly Suthers for the applicant
Blake Dawson Waldron for the respondent

[1] Before me are two applications, the determination of which will effectively dispose of the question whether the plaintiff is entitled to pursue his claim against the defendant. Initially, some issue was taken about the framing of the plaintiff's application and the fact that it seeks a declaration in terms which would be inappropriate to make. However, the parties have agreed that I should proceed with the application on the basis that it seeks the determination of an issue pursuant to Part 5 of Chapter 13 of the *Uniform Civil Procedure Rules* (UCPR). Though the rules have not been strictly complied with, the issue is sufficiently identified on the pleadings and correspondence to allow it to be considered and determined. The parties are in agreement as to the nature of the declaration which is now sought by the plaintiff.[1]

Background facts

[2] The plaintiff was injured on 18 November 1999 whilst driving a truck in the course of his employment with the defendant. He consulted his present solicitors within a few months of the accident. He received statutory workers' compensation payments in respect of the injuries but he also instructed his solicitors to pursue a claim for damages.

[3] His solicitors formed the view that the damages claim was subject to the operation of the *WorkCover Act* 1996 ("the Act"). A Notice of Claim pursuant to s 280 of the Act and dated 5 April 2002 was received WorkCover on 15 April 2002. By virtue of s 282, WorkCover was required to respond to the Notice of Claim by –

(a) stating its satisfaction that the Notice complied with s 280;

(b) if not satisfied, identifying the non-compliance; or

(c) if not waiving non-compliance, allowing the plaintiff a reasonable time to remedy that non-compliance.

[4] On 15 May 2002 WorkCover, through its solicitors, responded to the Notice by saying it required further details. On 16 May 2002 the plaintiff's solicitors challenged whether those details were required by the terms of s 280 and the associated regulations. On 28 July 2002 WorkCover confirmed that the s 280 Notice was deemed by them to be complying.

[5] The next step in the statutory procedural regime is dictated by s 285 of the Act. This section requires WorkCover, within six months of receiving a complying notice, to give written notice stating its position as to liability and indicate whether it accepts any offer made by the claimant and if not, put forward its own offer to the claimant. WorkCover's response pursuant to this section was dated 26 November 2002 and was to the effect that WorkCover was not liable because the claim was properly characterised as arising under *Motor Accident Insurance Act* ("MAIA") and consequently the *WorkCover Act* had no application. WorkCover had earlier raise this point with the plaintiff's solicitors in a letter dated 12 November 2004.[2] By this date the limitation period in which the plaintiff could commence his action had not expired. The plaintiff did not take any action as a consequence, and even when he received the s 285 response continued to assert that his choice of the statutory scheme was correct.[3]

[6] The plaintiff in fact commits this action on 18 June 2003. The defendant, by its defence, raised the issues that the plaintiff had failed to give notice to the licensed insurer pursuant to s 37 of the MAIA and further that the action was now statute barred.

[7] By this application the plaintiff seeks a declaration that the defendant is estopped by its conduct from pursuing these defences and to have struck out the relevant passages in the defence. By its application the defendant seeks summary judgment on the defence on the basis that the plaintiff has no reasonable prospects of success. (See r 293 of UCPR). If the plaintiff fails in his application the defences raised

---

1 Affidavit of Julie McStay filed 26 October 2004; letters dated 29 January 2004 and 30 January 2004; see also transcript pp 17-18

2 Ex "E" to affidavit of Allan Spargo sworn 30 January 2004

3 Ibid Ex "F"

against him appear to be insurmountable and the defendant would be entitled to the relief which it seeks.

Conduct relied upon to found estoppel

[8] The plaintiff contends that WorkCover by its failure to make its response as required by s 285 maintained an assumption that his solicitors had erroneously formed viz that his claim was properly made under the Act. That conduct is constituted by WorkCover, having received the Notice of Claim on 15 April 2002, seeking further information as to its s 282 response, by its entering into further correspondence concerning medical examinations and in its failure to make a s 285 response prior to the expiration of the limitation period on 18 November 2002.

[9] The s 282 response by WorkCover was by facsimile letter dated 15 May 2002 and containing the following relevant terms:-

> "Pursuant to s 282, in the event that you client holds these documents in his possession and has failed to annex them, then WorkCover Queensland considers your client's notice of claim for damages to non-compliant and requires your client to provide copies of those documents. However, should an undertaking be given to provide the above documents within a reasonable period of time, WorkCover Queensland will be prepared to deem your client's notice of claim for damages to be compliant."[4]

[10] The plaintiff's solicitors replied advising that the sought after documents were not available to which WorkCover's solicitors responded on 28 May 2002 in the following terms:-

> "We refer to your facsimile of 23 May 2002 and advise that pursuant to section 282, our client is satisfied that your client's notice of claim for damages complied with section 280 of the *WorkCover Queensland Act*.
>
> Accordingly, our client's section 285 response is due within six months of today's date.
>
> Kindly advise whether your client is arranging any further medical assessments. In the event that your client will be arranging further medical assessments, we anticipate obtaining our client's instructions to do the same. Alternatively, should you client not be obtaining any

[4] Ex "G" to affidavit of Andrew Douglas sworn 10 December 2003

> further medical assessments, we may be in a position to provide our client's section 285 response earlier than required under the Act."[5]

The plaintiff's response on 4 June 2002 made no comment about the timing of the s 285 response.

[11] These terms clearly set out WorkCover's position as the timing of its obligations pursuant to s 285. Before me the plaintiff asserted that WorkCover was wrong in its approach and that it ought to have treated the Notice of Claim as complying and therefore to have responded pursuant to s 285 on or before 15 October 2002. The question of whether a Notice of Claim complies with the requirements of s 280 of the Act and the associated regulations is a question of fact and it is not determined by the opinion held by the officers of WorkCover.[6] But for the purpose of determining the conduct relevant to estoppel the determination whether this Notice was a complying one and whether therefore WorkCover met the statutory timing obligations, are moot points.

Estoppel

[12] The essence of the doctrine of estoppel is the prevention of a person suffering a detriment by reason of the opposite party's unconscionable conduct. In his detailed characterisation of the doctrine Deane J in *The Commonwealth v Verwayen*[7] enumerated a number of concepts. The plaintiff refers me particularly to the second of these which reads:-

> "2. The central principle of the doctrine is that the law will not permit an unconscionable – or, more accurately, unconscientious – departure by one party from the subject matter of an assumption which has been adopted by the other party as the basis of some relationship, course of conduct, act or omission which would operate to that other party's detriment if the assumption be not adhered to for the purposes of the litigation."[8]

[13] Mr Moon of counsel for the plaintiff acknowledges that the plaintiff's assumption that the *WorkCover Act* applied was erroneous. He argues that by its "conduct" WorkCover has adopted the erroneous assumption as the basis for which the future conduct of the pre-trial proceedings would be conducted, and that by not indicating

---

5 Ex "J" to affidavit of Andrew Douglas sworn 10 December 2003
6 *Lau v WorkCover Queensland* (2002) QCA 2.4
7 (1990) 170 CLR 394
8 Ibid at p 444

to the contrary before the period of limitations has expired has caused detriment. That submission of course depends on the plaintiff establishing that the erroneous assumption was in fact adopted by WorkCover and that there was actual conduct which operated on the plaintiff maintaining the erroneous assumption.

Resolution of the issues

[14] The solicitors to WorkCover in its letter of 28 May 2002 made clear its opinion as to the timeline for the fulfilment of its obligation under the Act. If the plaintiff thought this opinion was erroneous he had the opportunity to say so but he could not possibly have been misled that WorkCover claimed the right to respond at anytime in that six months period, part of which was beyond the expiration of the limitation period for the commencement of the action. From the terms of that letter the plaintiff had no basis for assuming that he would have a response prior to the expiration of the limitation period. Moreover WorkCover, without obligation to do so, did in fact question the plaintiff's choice of his course of action.

[15] No other conduct is identified in the evidence or relied upon in the pleadings to justify the plaintiff's inaction in seeking leave to commence his action before it became statute barred. I accept that as a matter of probability, if leave had been sought, it would have been granted.

[16] Mr Douglas, solicitor acting on behalf of the plaintiff, gave evidence that he directed his mind to the question of which statutory insurer would be obliged to indemnify the defendant. He consulted with his colleagues on the issue and he obtained details of the licensed insurer under MAIA. Quite simply, he has made the wrong choice. He agreed in cross-examination that it would have been quite open to him to have given notice under each of the separate statutory schemes.[9] He agreed that in a sense he opted to give notice under the *WorkCover* legislation and waited to see whether a contrary view was expressed by WorkCover.

[17] There was no obligation on WorkCover to inform him of its view that he may have been proceeding under the wrong scheme. Its obligations were pursuant to the statute were fulfilled. However WorkCover did in fact raise its concern that the

---

9 Transcript 8/30

plaintiff's assumption was erroneous. By its solicitors letter dated 12 November 2002 it advised:-

> "We advise that our client's section 285 response will be forwarded to you in the next day or so. However, given certain time constraints, it was felt to be appropriate to put your client on notice that WorkCover believes that your client's claim properly falls within the provisions of the *Motor Accidents Insurance Act* 1994.
>
> Accordingly, if your client has not already done so, it would seem appropriate for you to deliver a section 37notice to the CTP insurer pursuant to section 39(5)(c) of the relevant Act.
>
> We note that there is an impending limitation period, and there is therefore a need, if you have not already done so, to make an application before the expiration of that limitation period."[10]

[18] There was no action or conduct on the part of WorkCover between its letter of 28 May 2002 and the expiration of the limitation period which could be said to have caused the plaintiff to maintain the erroneous assumption as to the applicable insurance scheme and thereby act to his detriment. His inaction after the issue was raised on the 11 November 2002 and his later insistence of the correctness of his choice precludes any finding of detriment.

[19] Accordingly, I can find no basis for the claim that the defendant is estopped from asserting that this action has not been properly instituted. It has been judicially determined that the claim was one to which the provisions of MAIA applied.[11] It is conceded the written notices have not been given to the licensed insurer and thus pursuant to s 37 of MAIA the action has not been properly commenced.

[20] The defendant is entitled to rely upon this defence and also the fact that the action is statute barred. I am satisfied that the plaintiff in these circumstances has no prospect of succeeding in his action and that the defendant is therefore entitled to judgment.

Orders

[21] I make the following orders:-

1. The plaintiff's application filed on 11 December 2003 is dismissed.

---

10 Ex "E" to affidavit of Allan Spargo sworn 30 January 2004

2. Judgment for the defendant in the action.

3. The plaintiff pay the defendant's costs of and incidental to the action to be assessed on a standard basis.

---

[11] *Brew v WorkCover Queensland* (2004) 1 QdR 621