SUPREME COURT OF QUEENSLAND

CITATION:	*Mason v Toowoomba CC* [2005] QCA 46
PARTIES:	**COLIN ROSS MASON** (applicant/respondent) v **TOOWOOMBA CITY COUNCIL** (respondent/applicant/appellant)
FILE NO/S:	Appeal No 9249 of 2004 DC No 3377 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 March 2005
DELIVERED AT:	Brisbane
HEARING DATE:	24 February 2005
JUDGES:	Jerrard and Keane JJA and White J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal granted** **2. Appeal dismissed** **3. The applicant before this Court to pay the costs of the application for leave to appeal and of the appeal in this Court to be assessed**
CATCHWORDS:	LIMITATION OF ACTIONS – CONTRACTS, TORTS AND PERSONAL ACTIONS – PERSONAL INJURY CASES – respondent granted leave to commence action pursuant to s 31(2) *Limitation of Actions Act* 1974 (Qld) – respondent originally thought that he had injured his back as a result of a discrete incident – later received medical opinion that injury was a result of work activities performed for the applicant over a period of time – whether the receipt of this knowledge was a material fact of a decisive character to justify the granting of leave under s 31(2) – whether the respondent had conceded in evidence that he was aware prior to the medical opinion being given of his injury and the fact that it occurred over a period of time WORKERS' COMPENSATION – ENTITLEMENT TO AND LIABILITY FOR COMPENSATION – PERSONS ENTITLED TO COMPENSATION – OTHER CASES – applicant argues that respondent seeks to sue on injury that is

different from that claimed in notice of claim for compensation – respondent has not been given damages certificate under *WorkCover Queensland Act* 1996 (Qld) – whether respondent is a 'claimant' within the meaning of the term used in s 305 of the Act – whether the discretion created by s 305 of the Act may be exercised in the respondent's favour

District Court of Queensland Act 1967 (Qld), s 118
Limitation of Actions Act 1974 (Qld), s 30, s 31(2)
WorkCover Queensland Act 1996 (Qld), s 250, s 253, s 261, s 264, s 265, s 280, s 302, s 305

Tanks v WorkCover Queensland [2001] QCA 103; Appeal No 9435 of 2000, 20 March 2001, cited

COUNSEL: M Grant-Taylor SC, with G W Diehm, for the applicant/appellant
G R Mullins for the respondent

SOLICITORS: Hede Byrne & Hall (Toowoomba) for the applicant/appellant
Grevells Solicitors for the respondent

[1] **JERRARD JA:** In this appeal I have read and respectfully agree with the reasons for judgment and orders proposed by Keane JA. I add the following comments.

[2] The respondent Mr Mason had applied by an application dated 3 May 2001 for compensation (not damages) pursuant to the provisions of the *WorkCover Queensland Act* 1996. His application described the injury for which he sought that compensation as “lower back sprain”, described as occurring on 30 April 2001. That application was dealt with pursuant to the provisions of Chapter 3 of that Act. Mr Mason’s solicitors requested WorkCover by letter dated 13 January 2003 to have Mr Mason’s injury "permanently assessed", presumably meaning that WorkCover were being asked pursuant to s 197 in Chapter 3 Part 9 Division 2 to have Mr Mason’s injury assessed to decide if it had resulted in a degree of permanent impairment.

[3] By notice dated 14 March 2003 WorkCover advised Mr Mason that in his claim numbered S000701960 he was assessed as having a five per cent degree of permanent impairment attributable to the injury. The injury was described as "Moderate to severe aggravation or acceleration of pre-existing disease in the lumbar sacral spine". The date of the injury was 30 April 2001. On 23 April 2004 WorkCover received a Notice of Claim for Damages from Mr Mason, provided by him to WorkCover pursuant to s 280 of the Act, notifying WorkCover of an intent to claim damages for an injury to the lumbar sacral spine, being an "Aggravation of pre-existing degeneration" resulting in a five per cent degree of impairment; the event resulting in the injury was described as happening on 30 April 2001. Mr Mason gave notice by that document of an intent to claim $183,762.00 in damages. WorkCover responded to that s 280 Notice by letter dated 29 April 2004, advising that WorkCover waived compliance in respect of any and all areas of non-compliance. The outline of argument from the applicant Toowoomba City Council accepts that by reason of s 308(1)(a)(ii) of the Act, because Mr Mason was to be taken as having given a complying Notice of Claim before the end of the period of

limitation, he was entitled to bring a proceeding for damages after the end of that period of limitation, which proceeding had to be brought within 60 days after a compulsory conference in respect of that claim was held.

[4] The problem Mr Mason's legal representatives were concerned he might face, and the problem the Toowoomba City Council asserted he did face, was its contention that the proceedings Mr Mason wanted to bring, for an injury described as an aggravation of degenerative changes to the lumbar spine and discal derangement of the lumbar spine caused between the period 15 February 1999 to 29 April 2001, were arguably a claim in respect of a different injury from that for which he had received the Notice of Assessment, and for which he had given the Notice of Claim for Damages. Toowoomba City Council submitted on the appeal that these were two distinct injuries, not one.

[5] Section 253 of the Act is relevant because of that argument by the City Council. The section provides:

> **"General limitation on persons entitled to seek damages**
> **253.(1)** The following are the only persons entitled to seek damages for an injury sustained by a worker –
> (a) the worker, if the worker has received a notice of assessment from WorkCover stating that—
> (i) the worker has sustained a certificate injury; or
> (ii) the worker has sustained a non-certificate injury; or
> (b) the worker, if the worker's application for compensation was allowed and the injury sustained by the worker has not been assessed for permanent impairment; or
> (c) the worker, if the worker has not lodged an application for compensation for the injury; or
> (d) a dependant of the deceased worker, if the injury sustained by the worker results in the worker's death.
> **(2)** The entitlement of a worker, or a dependant of a deceased worker, to seek damages is subject to the provisions of this chapter.
> **(3)** To remove any doubt, it is declared that subsection (1) abolishes any entitlement of a person not mentioned in the subsection to seek damages for an injury sustained by a worker."

[6] Mr Mason had received a notice of assessment as described, which stated that he had sustained a non-certificate injury. The latter conclusion follows from the assessment being for a five per cent permanent impairment. If he had but the one injury, namely a degeneration of his spine however caused, then he satisfied s 253(1)(a). If, on the other hand, the reality was that he sustained two different injuries, then in respect of the one for which the extension of the limitation period was ordered, he had not lodged an application for compensation and so satisfied the description in s 253(1)(c). Either way he fell within one or other of categories of persons who were entitled to seek damages for an injury sustained by a worker. Section 250 defines a "claimant" as a "person entitled to seek damages"; and I respectfully agree with Keane JA that Mr Mason satisfied that description and so

was a "claimant" as that term was used in Chapter 5 of the Act, and in particular in s 305.

[7] Finally, the applicant relied, as Keane JA describes, on the use of the word "claimant" in s 255 and s 258, [referring to persons mentioned in s 253(1)(a)(i) and (ii)] and the use of the word "person" in s 264 and s 268, [referring to persons mentioned in s 253(1)(c) and (d)], to argue that the references distinguished between those whom the applicant agreed were "persons entitled to seek damages" within its definition (workers whose injuries had been assessed by WorkCover) and those who were not, namely workers whose injuries were yet to be assessed. The most obvious flaw in that reasoning was that "claimant" is also used in s 261, referring to persons mentioned in s 253(1)(b); and therefore to a worker whose injury has not been assessed.

[8] **KEANE JA:** On 27 September 2004 the learned primary judge made orders granting leave to Mr Mason, the respondent in the proceedings in this Court, pursuant to s 31(2) of the *Limitation of Actions Act* 1974 ("the Limitations Act") to file and serve a claim and statement of claim in relation to an injury described as an aggravation of degenerative changes to the lumbar spine and discal derangement of the lumbar spine caused between the period 15 February 1999 to 29 April 2001. His Honour also made consequential orders. The Toowoomba City Council, the applicant in the proceedings in this Court, now seeks leave to appeal, pursuant to s 118 of the *District Court of Queensland Act* 1967 ("the District Court Act"), against those orders.

[9] On the hearing of the application for leave to appeal, this Court reserved its decision on the grant of leave; and heard full argument as to the merits of the proposed appeal.

[10] It should be noted that, at first instance, the respondent also sought leave, under s 305 of the *WorkCover Queensland Act* 1996 ("the WCQA"), to commence a proceeding notwithstanding his failure to comply with the requirements of s 280 of the WCQA. Although the order made by the learned primary judge does not expressly recite that the leave to file and serve a claim and statement of claim against the applicant was given pursuant to s 305 of the WCQA, the applicant acknowledged in the course of argument that the learned primary judge did, indeed, purport to exercise the discretion vested in him by s 305 of the WCQA. This concession was properly made, as the terms of the application before the learned primary judge made clear.

[11] The applicant seeks to challenge the decision of the learned primary judge on two broad grounds. First, in relation to the order extending the period of limitation pursuant to s 31(2) of the Limitations Act, it is contended that the learned primary judge erred in concluding that a material fact of a decisive character relating to the respondent's right of action against the applicant was not within his means of knowledge until a date after the commencement of the year last preceding the expiration of the period of limitation for the action.[1] I shall refer to this contention as "the limitation point".

[12] The second point which the applicant seeks to agitate in this Court is that, because the respondent is not a "claimant" within the meaning of that term as it is used in

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1 See s 31(2)(a) and s 30(1).

s 305 of the WCQA, the respondent was not a person in whose favour the discretion created by s 305 might be exercised. The basis for this contention is that the injury in respect of which the respondent seeks to sue the applicant is a different injury from that which was the subject of the respondent's claim for compensation. The respondent has not been given a damages certificate under s 265 of the WCQA in relation to the injury the subject of the action, and, accordingly, is not a person "entitled to seek damages". He is, therefore, not a "claimant" as defined for the purposes of s 305 of the WCQA by s 250 thereof. The applicant also makes the associated point that, if it is correct to say that the respondent does not qualify for the exercise of the discretion created by s 305 of the WCQA, then the applicant is not a person in favour of whom an extension of the limitation period may be granted under the Limitations Act because he cannot satisfy the requirement of s 31(2)(b) of that Act, viz, that there be "evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation".

[13] I shall deal with the applicant's points in turn, but before I do so, I should refer briefly to the facts so that the applicant's arguments may be more fully understood.

Factual background

[14] The respondent, who is now 51 years of age, commenced employment with the applicant in early 1998. He was originally employed laying sewerage pipes and benching manholes, but on 26 May 2000 he started work on the Council's "sand truck". In a notice of claim for damages under s 280 of the WCQA, signed on 21 April 2004, the applicant asserted that on 30 April 2001 he had suffered an injury to his lumbar-sacral spine in the course of his employment with the applicant.

[15] Earlier, on 26 September 2003, the respondent had attended upon, and been examined by, Dr Greg Gillett, an orthopaedic surgeon. Dr Gillett, on that date, expressed the opinion that the respondent's back injury had been sustained, not as a result of a discrete incident occurring on 30 April 2001, but rather as a result of the effects of the work activities in which the respondent had been engaged with the applicant over a period of time leading up to 30 April 2001.

[16] In support of the respondent's application for an extension of time, the respondent deposed that, until he read the report of Dr Gillett of 26 September 2003 he had not been advised by any medical practitioner that he had been injuring his spine or had injured his spine as a result of working for the applicant prior to commencing work on the sand truck. Before being advised by Dr Gillett, the respondent believed that he had injured himself on 30 April 2001.

[17] On the basis of this evidence, it was contended on behalf of the respondent that the material fact of a decisive character of which the respondent did not know or have the means of knowledge, was that he had suffered an injury to his back gradually over a period of time prior to 30 April 2001. The learned primary judge clearly accepted this evidence.

[18] His Honour went on to record that on 8 March 2004, Mr Mason was certified medically unfit for work.

[19] The learned primary judge noted the discrepancy between Dr Gillett's advice and the terms of the notice of claim of 21 April 2004 which was, as has been said, referrable to a particular incident on 30 April 2001. His Honour concluded in this regard that it was not "justifiable to embarrass Mr Mason in the ultimate by

distinctions depending on whether his injury can be fixed as occurring on 30 April 2001 or as a result of repeated insults in the months before". He also held, relevantly to the exercise of each of the discretions conferred by s 31(2) of the Limitations Act and s 305 of the WCQA, that there was no suggestion of prejudice to the applicant or to WorkCover Queensland in the circumstances of the case.

The limitation point

[20] In relation to the limitation point, the applicant's attack has two prongs. The first is that the learned primary judge's reference to the circumstance that the respondent was certified medically unfit to work as of 8 March 2004, and his Honour's discussion of the possibility of "the material fact of a decisive character coming to an applicant's knowledge may be that his working career is over", suggest that his Honour found the certification of 8 March 2004 was the material fact of a decisive character, when this had not been argued by the respondent, and could not be so regarded in any event. In this regard, the applicant goes so far as to contend that his Honour granted an extension based on the conclusions reached in March 2004 as to the significance of the respondent's condition for his ability to work in the future, a matter which arose subsequent to Dr Gillett's report. The applicant contends that the certification of unfitness to work was not identified by the respondent as being either material or decisive.

[21] The second prong of the applicant's attack in relation to the limitation point, is that his Honour erred in fact in failing to appreciate that the respondent had conceded that he was aware of his injury, and that it had occurred over time prior to 30 April 2001, prior to Dr Gillett's advice on 26 September 2003.

[22] Section 30 of the Limitations Act provides relevantly as follows:

> "**(1)** For the purposes of this section and sections 31, 32, 33 and 34—
>
> (a) the material facts relating to a right of action include the following—
>
> (i) the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;
>
> …
>
> (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."

[23] As has been mentioned, his Honour accepted the respondent's evidence that until Dr Gillett's opinion of 26 September 2003, the respondent did not appreciate that the personal injury in respect of which he wished to sue the applicant was caused by work activities prior to 30 April 2001. If one accepts, as his Honour clearly did, Dr Gillett's evidence as to that fact, that evidence being uncontradicted, then it appears that a material fact relating to the right of action was not known to the respondent until 26 September 2003. In this regard, there is no reason to conclude that the respondent had done other than taken all reasonable steps available to him to find out that fact before it was explained to him by Dr Gillett. Accordingly, it was not within his means of knowledge.

[24] Next, it seems to me that the facts relating to the occurrence of the actual injury the subject of the claim are of a decisive character: they are essential to the existence of a reasonable prospect of success in the action and the quantum of damages recoverable in an action relating to those injuries. In my view, the flaw in the applicant's attack on the learned primary judge's conclusion in this regard is that it fixes upon the question whether the right of action would result in an award of damages sufficient to justify the bringing of an action without recognizing the necessity to establish reasonable prospects of success in establishing negligence on the part of the defendant and then focusses on the March 2004 certification of unfitness to work as if that were the **only** material fact of a decisive character which the respondent needed to know in order to appreciate that an action would have reasonable prospects of success. In this regard, the accurate identification of the activities which actually caused the injury, is also a fact of a decisive character. If one does not identify the activities which caused the injury, how can one say whether or not they involved negligence on the part of the defendant? It is readily apparent from the terms of s 30(1)(b) that there may be more than one material fact of a decisive character. Section 31(2) only requires that one such fact not be within the means of knowledge of the applicant until the material time.

[25] The second aspect of the applicant's attack on the learned primary judge's reasons in relation to the extension of the limitation period involves the contention that the respondent had conceded that he was well aware, before the time that he saw Dr Gillett in September 2003, that it was the heavy work that he had done on the sand truck in the many months leading up to April 2001 which had caused him his back pain.

[26] In my view, this aspect of the applicant's attack on the decision below should be rejected. In cross-examination, the respondent said:

> "Well you did not think that you had injured yourself on the 30th of April 2001, did you? -- I'd injured - I knew I'd injured myself but I didn't know that I'd done any damage to my spine ---
> You knew ---- ? -- ---- because I could not carry on after the 30th of April.
> You knew, Mr Mason, that you had injured your back prior to the 30th of April 2001, didn't you? -- No. I had pain in my back. I did not injure it before then.
> You had had pain in your back constantly for several months prior to the 30th of April 2001? -- On the sand - yeah, on the sand truck before the 30th of April, before it went, my back went.
> Yes, you had pain in your back for months, for several months before the 30th of April? -- While I was on that sand truck, yes.
> Yes. Well it was pain that was present all the time, wasn't it? -- Yeah, it got worse.
> Yes. It got progressively worse over that time and it got to its worst by the 30th of April 2001, didn't it? -- Yep.
> You accept, do you not, that you had an injury to your back before the 30th of April 2001? -- Well not - sort of I had that pain sort of leading up to it but not the injury, no, I didn't, not until the 30th till it - that I could not work anymore.
> Did you think that you had back pain without having had an injury to your back? -- I had back pain leading up to it, to the injury, yes.
> Yes. But you knew that that was because you had an injury to your back, didn't you? -- I didn't know I had an injury to my back until it went that day."

[27] It is, in my respectful opinion, quite apparent from this passage that the respondent was endeavouring to make a distinction between the experience of symptoms of back pain and an appreciation that their source was in an actual injury of a structural kind to the spine as distinct from the aches and pains which attended heavy physical work.

[28] The applicant contends that the distinction between, on the one hand, the back pain to which the respondent admitted and, on the other, that pain sourced upon "injury", is specious. I reject this contention. This distinction between aches and pains and the existence of a structural reason for their occurrence is real, and indeed, commonplace.

Was the respondent a claimant?

[29] I turn to the second of the applicant's challenges to the learned primary judge's decision. In my opinion, the short answer to this point is that it fails to appreciate that a person may be a person "entitled to seek damages" so as to satisfy the definition of "claimant" for the purposes of s 305 of the Act, while nevertheless being subject to the further restrictions upon the exercise of that entitlement imposed by the provisions of Chapter 5.

[30] It is accepted, and indeed urged, by the applicant that the respondent was, by virtue of s 253(1)(c) of the WCQA, a person "entitled to seek damages for an injury". But then it was said that, because s 253(2) of the WCQA provided that "The entitlement

of a worker … to seek damages is subject to the provisions of this chapter", a failure to comply with other provisions of Chapter 5 meant that a person otherwise described in s 253 could not be a "person entitled to seek damages" so as to fall within the definition of "claimant" in s 250 of the WCQA.

[31] It is to be emphasized that the question here is not whether there was a statutory impediment to a person seeking damages, but whether s 305 was available to the respondent to obviate the problem which arose from his failure to comply with s 280 of the WCQA. The answer to this question depends on whether the respondent was a "claimant" within the meaning of s 250 of the WCQA. By virtue of s 250, the respondent was a "claimant" if he was "a person entitled to seek damages".

[32] It may be noted also that s 250 of the WCQA also defined the term "damages certificate" to mean "a certificate under section 262, 265 or 270 given to a claimant by WorkCover that entitles the claimant to seek damages". This definition of "damages certificate" is itself a strong indicator that a person may be a "claimant" before receiving a damages certificate under s 265, even though the possession of the damages certificate may be necessary to enforce or otherwise pursue that entitlement.

[33] The applicant drew attention to the circumstance that s 264 of the WCQA provided that s 265 applied to "a person mentioned in section 253(1)(c)"; and that s 265(1) provided: "The person may seek damages for the injury only if WorkCover gives the person a damages certificate under this section". The applicant contrasts these sections, and their references to "a person", to provisions such as s 261 and s 262 which referred to "a claimant". For my part, I find it difficult to regard this difference in language as an indication of a legislative intention that a person who is "entitled to seek damages" because he or she is a person mentioned in s 253(1)(c), and therefore a "claimant" by virtue of s 250 ceases to answer those descriptions because he or she has yet to obtain a damages certificate. As I have said, s 250 expressly contemplated that a person might be a claimant without having obtained a damages certificate under s 265.

[34] This view is consistent with an understanding of the scheme of the WCQA in which the provisions of Chapter 5 of the WCQA in Part 2, Division 1 establish by s 253, the categories of persons who are entitled to seek damages for an injury sustained by a worker. These are the categories of "claimants" for the purposes of Chapter 5 of the WCQA. Subsequent provisions of Chapter 5, such as s 265(1) impose conditions upon the exercise of that entitlement to recover damages. Thus s 301 of the WCQA, which appears in Part 7 of Chapter 5 (the same Division in which s 305 appears), provides:

> "This division states the conditions that must be satisfied before a claimant can start a court proceeding".

Section 302, which imposes conditions on the commencement of proceedings for damages, expressly assumes that the person to whom its provisions apply is a "claimant".

[35] Another example of a restriction on the exercise of the entitlement conferred by s 253(1) can be found in s 280 of the WCQA which provided relevantly that "Before starting a proceeding in a court for damages, a claimant must give notice under this section within the period of limitation for bringing a proceeding for the

damages under the *Limitation of Actions Act 1974*". A person who has not complied with s 280 may thus be a person who is not entitled to start a proceeding in a court for damages. Nevertheless, as the text of s 280 itself makes clear, such a person may be "a claimant".

[36] This understanding of the scheme of Chapter 5 of the WCQA is not affected by the circumstance that s 252(2) of the WCQA provided: "All the provisions of this chapter are provisions of substantive law". The restrictions imposed on a person entitled to seek damages may be substantive, but they do not displace the fundamental entitlement conferred by s 253, nor do they deny the application of the description "claimant" to such a person.

[37] Because I have concluded that the respondent belonged to a category of persons who were entitled to seek damages, even on the basis of the applicant's submission that s 253(1)(c) was applicable to him, it is unnecessary for me to resolve the question whether the injury referred to in the respondent's claim for compensation, and the injury referred to in the respondent's notice of claim under s 280 is the same injury. For the same reason, it is not necessary for me to address the respondent's submission that, because the injury was the same in each case, s 253(1)(a)(ii) applied to him, and his notice of claim conformed to s 280. Of course, if that submission were accepted, it would follow that the exercise of the court's discretion under s 305 was not necessary to enable the proceedings for damages to be commenced.

[38] Further, I do not consider it necessary to the determination of the present case to express a view as to the proper resolution of the difference of approach to Chapter 5 of the WCQA taken by Davies JA and Williams JA in *Tanks v WorkCover Queensland*.[2] That is because, in the present case, no question arises as to the inter-relationship between the provisions of the WCQA and other legislation. It is sufficient for present purposes to say that the respondent was a person entitled to seek damages for the purposes of the definition of "claimant" because of the operation of s 253(1)(c); and that the application of this description was not displaced because the lawful exercise of that entitlement was subject to other conditions imposed by Chapter 5. Accordingly, it was open to the learned primary judge to exercise the discretion conferred by s 305 of the WCQA in favour of the respondent.

[39] Once it is accepted that this discretion was available to the learned primary judge, it must also be accepted that there is no basis for suggesting that his Honour's exercise of discretion miscarried.

Conclusion

[40] For the foregoing reasons, I consider that the applicant's challenges to the decision of the learned primary judge should fail.

[41] Because the arguments advanced on behalf of the applicant were significant and substantial, and because, if accepted, they would have led to the dismissal of the respondent's proceedings, and hence a termination of the action in favour of the applicant, I would grant leave to appeal. I would, nevertheless, dismiss the appeal for the reasons which I have given.

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[2] [2001] QCA 103, cf [16], [22], [26] per Davies JA and [32] - [33], [43], [50] and [54] per Williams JA.

[42] The orders I would make are as follows:

(a) that the application for leave to appeal be granted;

(b) that the appeal be dismissed;

(c) that the applicant before this Court pay the costs of the application for leave to appeal and of the appeal in this Court to be assessed.

[43] **WHITE J:** I have read the reasons for judgment of Keane JA and those of Jerrard JA and agree with their Honours that although leave to appeal should be granted the appeal should be dismissed.

[44] I agree with the orders proposed by Keane JA.