SUPREME COURT OF QUEENSLAND

CITATION:	*Charlton v WorkCover Qld & Ors* [2006] QCA 498
PARTIES:	**5834/06** **GARY WALTER CHARLTON** (applicant/appellant) **v** **PROMINORA PTY LTD (IN LIQUIDATION)** **ACN 050 398 653** (first respondent) **WORKCOVER QUEENSLAND** (second respondent) **5835/06** **GARY WALTER CHARLTON** (applicant/appellant) **v** **S EMPLOYMENT SERVICES PTY LTD (IN LIQUIDATION)** **ACN 093 332 186** (first respondent) **WORKCOVER QUEENSLAND** (second respondent)
FILE NO/S:	Appeal No 5834 of 2006 Appeal No 5835 of 2006 SC No 308 of 2005 SC No 51 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	1 December 2006
DELIVERED AT:	Brisbane
HEARING DATE:	10 October 2006
JUDGES:	McMurdo P, Williams and Holmes JJA Separate reasons for judgment of each member of the Court, McMurdo P and Holmes JA concurring as to the orders made, Williams JA dissenting in part
ORDER:	**1. In 5834/06** **Appeal dismissed, no order as to costs** **2. In 5835/06** **i. Appeal allowed, no order as to costs**

ii. Order of 20 June 2006 set aside
iii. Order that the limitation period relating to the appellant's claim be extended until 15 July 2005
iv. Order that the respondents pay the appellant's costs of and incidental to the application for an extension of time to be assessed

CATCHWORDS: WORKERS' COMPENSATION – ENTITLEMENT TO COMPENSATION – INJURY DISEASE OR DISABILITY – AGGRAVATION OF INJURY – where the appellant either developed or aggravated a hernia during his employment with each of the first respondents – this injury required surgical intervention and the appellant's capacity to work was significantly affected as a result – whether the appellant sustained an 'injury' within the meaning of s 34 *WorkCover Queensland Act 1996* (Qld) – whether the appellant should have been granted an extension of time in which to bring an action against the first respondents – whether the appellant is now entitled to commence proceedings claiming damages for personal injury

Corporations Act 2001 (Cth), s 471B
Limitation of Actions Act 1974 (Qld), s 11, s 30, s 31, s 31(2)(a)
Personal Injuries Proceedings Act 2002 (Qld), s 43
Uniform Civil Procedure Rules 1999 (Qld), r 69
WorkCover Queensland Act 1996 (Qld), s 34, s 158, s 158(1), s 159, s 161, s 203, s 253(1), s 265, s 266, s 267, s 280, s 305, s 306, s 308, s 488, s 491, s 497, s 499, s 506(2)

Bonser v Melnacis [2000] QCA 13; [2002] 1 Qd R 1, applied
Bridge Shipping Pty Limited v Grand Shipping SA & Anor (1991) 173 CLR 231, cited
Davison & Ors v Queensland [2006] HCA 21; (2006) 80 ALJR 946, considered
Queensland v Stephenson (2006) 226 CLR 197, considered
Reat v University of Queensland [2000] QSC 35; SC No 839 of 2000, 2 March 2000, distinguished
SG v State of Queensland (No 2) [2004] QCA 461; Appeal Nos 6045, 6046, 6047, 6049, 6050 and 6051 of 2004, 3 December 2004, considered

COUNSEL: R J Douglas SC, with A J Moon, for the appellant
S C Williams QC, with A S Mellick, for each first respondent in appeals 5834/06 & 5835/06
S C Williams QC, with A S Mellick, for the second respondent

SOLICITORS: Connolly Suthers for the appellant
Sterling, Boulton Cleary & Kern for the first and second respondents

[1] **McMURDO P:** The facts and issues are set out by Williams JA in his reasons. I need not repeat the appellant Mr Charlton's Tolkienesque travails through the provisions of the *WorkCover Queensland Act* 1996 (Qld) ("the Act") in his attempt

to merely commence an action for damages against his employers for injuries he claims to have suffered in his workplace.

[2] I agree with Williams JA that the Industrial Magistrate's decision, which for the first time enabled the appellant under s 253(1) of the Act to seek damages for injuries he sustained in his workplace, was a material fact of a decisive character relating to his right of action and was not within his means of knowledge under s 31(2)(a) *Limitation of Actions Act* 1974 (Qld).

[3] I also agree with Williams JA that the reference in s 308(1)(a) of the Act to "the period of limitation" includes any extension of the limitation period granted under s 31(2) *Limitation of Actions Act*.

[4] Prominora Pty Ltd ("Prominora"), the respondent in CA No 5834 of 2006 and Mr Charlton's employer from 19 July 1999 until 30 June 2000, was not a party to Mr Charlton's application filed on 11 May 2005 nor to the primary judge's resulting order made by consent on 27 May 2005. The only respondents to that application and order were S Employment Services Pty Ltd ("S"), the respondent in CA No 5835 of 2006 and Mr Charlton's employer from 1 July to 14 August 2000, and WorkCover Queensland, the insurers under the Act of both Prominora and S. That order, which was not the subject of any appeal, included a grant of leave to Mr Charlton under s 305 of the Act to bring proceedings against S, despite Mr Charlton's non-compliance with Ch 5 of the Act. Both Prominora and S apparently employed Mr Charlton serially at the same place and in the same position during the time when he alleges he was injured at work; each was insured by WorkCover Queensland under the Act; and each is now a respondent, together with WorkCover Queensland, in these related appeals. Because of those factors, the practical result of the orders suggested by Williams JA in respect of Prominora in Appeal No 5834 of 2006 is attractive. Prominora and S remain, however, separate legal entities. For that reason I cannot agree with his Honour that the consent order of 27 May 2005, made only in respect of S and WorkCover Queensland and not in respect of Prominora, is sufficient to now permit Mr Charlton to commence proceedings (if the other conditions of that order were also met) against Prominora.

[5] Unfortunately this means that Mr Charlton's preliminary quest, to commence an action against those whom he claims were his employers when he was injured in the workplace, is not yet over. I note however that, on the material and submissions before this Court, Mr Charlton appears to have excellent prospects of success in an application under r 69 *Uniform Civil Procedure Rules* 1999 (Qld) to include, despite the end of the limitation period, Prominora as a party to any proceedings he commences against S: cf *Howard v WorkCover Queensland*.[1]

[6] In Appeal No 5835 of 2006 I would make the orders (i) to (iv) proposed by Williams JA. In Appeal No 5834 of 2006 I would dismiss the appeal. I agree with Holmes JA that in those circumstances there should be no order as to costs in either appeal.

[7] **WILLIAMS JA:** This appeal essentially concerns the question whether or not the appellant is now entitled to commence proceedings claiming damages for personal injury sustained while he was employed during the period 19 July 1999 to 14 August 2000. It can be assumed for present purposes, given the decision of the

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1 [2001] 1 Qd R 388.

Industrial Magistrate of 15 July 2004, that during that period of employment the appellant either developed, or aggravated, a hernia or hernias which necessitated surgical intervention. It can also be assumed for present purposes that the appellant's capacity to work has been significantly affected as "a direct result or consequence of the attempts to repair his right hernia".

[8] In the circumstances which have arisen, in order to be able to pursue such a claim for damages it was necessary for the appellant to obtain an extension of the limitation period with respect to his claim pursuant to the provisions of s 30 and s 31 of the *Limitation of Actions Act 1974* (Qld). That application was dismissed on 20 June 2006, and it is from that decision that this appeal is brought.

[9] The background to the decision of 20 June 2006 is, unfortunately, rather complex and it is necessary to set out the relevant history in some detail in order to appreciate what is involved in the present appeal.

[10] Between 19 July 1999 and 14 August 2000 the appellant believed on reasonable grounds that he was employed by "Steamit" as a labourer, primarily employed to pump out the contents of industrial tanks at the Yabulu nickel plant. His Group Certificate for income tax purposes showed his employer to 30 June 2000 as "Steamit Nth Qld Division", and for the period from 1 July 2000 to 14 August 2000 as "Steamit Employment Services Pty Ltd (Nth Qld)". However, evidence which emerged after the appellant made a claim for statutory compensation establishes, and it can be assumed for present purposes to be correct, that his employer from 19 July 1999 to 30 June 2000 was Prominora Pty Ltd, now in liquidation ("Prominora"), and from 1 July 2000 to 14 August 2000, by S Employment Services Pty Ltd ("S Employment"), a company only incorporated on 15 June 2000 and now in liquidation. Given the information on the Group Certificates, and the fact that the appellant deposed to the fact that he was not aware of any change in the identity of his employer as at 1 July 2000, his belief that at all material times, he was employed by "Steamit" is understandable.

[11] Having been advised by medical practitioners (see for example reports from Dr Hack of 24 May 2002 and 21 June 2002) that his employability was significantly affected by his medical condition, he lodged a claim for statutory compensation with WorkCover on 19 July 2002 (s 158 and s 159 of the *WorkCover Queensland Act 1996* (Qld) ("the Act")). In that he alleged that the first symptoms with respect to his hernia were experienced on 19 October 1999 and that his employer at that time was "Steamit Group". In a statement in support of that application dated 2 August 2002 he again referred to his employer as "Steamit Group". That application for statutory compensation was rejected by WorkCover and that decision was communicated in a notice to the appellant dated 23 October 2002 (s 161 of the Act). WorkCover determined that the appellant "did not sustain an 'injury' within the meaning of section 34 of the *WorkCover Queensland Act 1996*". WorkCover also concluded that the application was "lodged outside the 6 month limit in which a valid application is to be lodged as per section 158(1) of the Act".

[12] As was his right (s 488 and s 491 of the Act), the appellant then applied for a review of that decision. In accordance with the provisions of the then applicable legislation QCorp reviewed the decision of WorkCover, but upheld it. The decision, communicated by letter dated 14 February 2003, was that the appellant had not discharged the onus of establishing the facts entitling him to statutory

compensation. QCorp determined that the appellant had not lodged a valid application under s 158 of the Act and that there was no need to proceed further and consider s 34 of the Act.

[13] In my opinion it is necessary to pause at that stage in the chronology and consider the position of the appellant so far as any possible claim for damages was concerned.

[14] Section 253 of the Act then provided as follows:

> "(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."

[15] There are numerous decisions of this Court, suffice it to name only *Bonser v Melnacis* [2002] 1 Qd R 1, *Tanks v WorkCover Qld* [2001] QCA 103, *Hawthorne v Thiess Contractors Pty Ltd* [2002] 2 Qd R 157 and *Watkin v GRM International Pty Ltd* [2007] 1 Qd.R. 389, to the effect that unless a worker comes within one of the four categories defined in s 253 there is no enforceable cause of action for damages against the employer. That position was accepted by both parties to this appeal.

[16] As at February 2003 when the decision of QCorp was communicated to the appellant he was clearly not within the category of a worker defined by paragraphs (a), (b), (c) or (d) of s 253(1). WorkCover had already rejected the application for statutory compensation on the basis that the appellant had not sustained an injury as

defined, and QCorp had not found it necessary to review that. In those circumstances he could not obtain a notice of assessment under s 203 as he was not entitled to statutory compensation. Thus he did not qualify under (1)(a). For similar reasons he could not qualify under (1)(b). Prima facie he did not come within (1)(c) because he had applied for compensation.

[17] But it was contended both at first instance and on the hearing of the appeal by WorkCover that the appellant had an entitlement under s 253(1)(c) as he had not lodged a valid application for compensation because it was out of time. That of course was then very much in dispute by the appellant and ultimately the appellant's contention was found to be correct. But further, pursuant to s 265 the appellant's right to proceed with a claim for damages was conditioned on his obtaining a certificate "only for the purpose of seeking damages": s 265(2). But that certificate could only be issued if an application for compensation had not been lodged and WorkCover concluded that the appellant had "sustained an injury": s 265(3)(b). As WorkCover had already determined that the appellant had not sustained an injury it is difficult to see how such a certificate could have been issued.

[18] But despite that, there was evidence that WorkCover would have issued such a certificate. Many objective observers might well conclude that that displayed cynicism in circumstances such as this. Assuming such a certificate would have been issued, it would have been subject to the other provisions of s 265, s 266 and s 267. Further, it would have necessitated the appellant effectively abandoning his valuable right to statutory compensation because the procedure followed was predicated on there being no application for compensation. The entitlement to compensation was not dependant on proof of negligence. Also such a certificate would, at least, have been of doubtful validity once it was established that in law a timely application for compensation had been lodged. (cf *Reat v University of Queensland* [2000] QSC 35).

[19] Looked at objectively, no reasonable person in the position of the appellant would have concluded that he ought to attempt in 2003 to enforce an entitlement to damages by seeking entry through the gate defined by s 253(1)(c) of the Act. In the circumstances the appellant took what could be regarded as the only reasonable course open to him. He appealed the decision of QCorp to an Industrial Magistrate; s 497 and s 499.

[20] By the decision handed down on 15 July 2004 that court held that the appellant had sustained an injury for purposes of s 34 of the Act, and that the application for statutory compensation had been made within time. By operation of s 506(2) that decision becomes the decision of WorkCover. The effect then of that decision was that the gateway to a claim for damages provided by s 253(1)(b) was opened to the appellant. Prior to that decision, as is previously noted, no gateway was reasonably available to the appellant.

[21] But by the time of that decision more than three years had elapsed since the appellant had ceased employment with "Steamit" on 14 August 2000. In consequence any proceeding claiming damages was statute barred unless the appellant obtained an extension of the three year limitation period by relying on the provisions of s 30 and s 31 of the *Limitation of Actions Act 1974* (Qld).

[22] Before considering the decision at first instance on the application for an extension of the limitation period it is necessary to record some further steps taken by the appellant. By 2005 S Employment was in liquidation. Also by that time it was not possible for the appellant to comply with s 280 of the Act which required that a worker, before starting proceedings in a court for damages, had to give a notice to WorkCover specifying the matters stated in that section. That notice had also to be given within the "period of limitation for bringing a proceeding for damages under the *Limitation of Actions Act 1974*".

[23] Against that background it is necessary to refer to some further sections of the Act. Section 305 relevantly provided:

> "(1) Subject to section 303, the claimant may start the proceeding if the court, on application by the claimant, gives leave to bring the proceeding despite noncompliance with the requirements of section 280.
>
> (2) The order giving leave to bring the proceeding may be made on conditions the court considers necessary or appropriate to minimise prejudice to WorkCover from the claimant's failure to comply with the requirements of section 280."

[24] That then engages s 308 which provides:

> "(1) A claimant may bring a proceeding for damages for personal injury after the end of the period of limitation allowed for bringing a proceeding for damages for personal injury under the *Limitation of Actions Act 1974* only if –
>
> (a) before the end of the period of limitation—
>
> (i) the claimant gives a notice of claim that is a complying notice of claim; or
>
> (ii) the claimant gives a notice of claim for which WorkCover waives compliance with the requirements of section 280; or
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> (iii) a court makes a declaration under section 304; or
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> (iv) a court gives leave under section 305; and
>
> (b) the claimant complies with section 302.
>
> (2) However, the proceeding must be brought within 60 days after a compulsory conference for the claim is held."

[25] Given those provisions the appellant filed an application on 11 May 2005 naming S Employment and WorkCover as respondents seeking the following relief; leave to bring an action against S Employment pursuant to s 471B of the *Corporations Act 2001* (Cth), an extension of time to commence proceedings pursuant to s 31 of the *Limitation of Actions Act 1974*, leave pursuant to s 305 of the Act to bring proceedings despite non-compliance with the provisions of Chapter 5 of the Act, an order that proceedings be stayed pending compliance by the appellant with the

provisions of Chapter 5, and an order that the appellant lodge a s 280 notice of claim for damages within 60 days of an order extending the limitation period.

[26] A consent order was made on that application on 27 May 2005 granting leave pursuant to s 471B of the *Corporations Act* to bring an action against S Employment, granting leave pursuant to s 305 of the Act to bring proceedings despite non-compliance with Chapter 5, ordering that the proceedings be stayed pending compliance with Chapter 5, adjourning the application for extension of time pursuant to s 31 of the *Limitation of Actions Act 1974*, and ordering that the applicant lodge a s 280 notice of claim within 60 days of any order to extend the limitation period.

[27] The application for an extension of the limitation period was then heard on 6 June 2006. By then the appellant had filed a further application on 6 February 2006, naming Prominora and WorkCover as respondents, seeking an order pursuant to s 471B of the *Corporations Act 2001* that leave be granted to commence proceedings against Prominora, and an order pursuant to s 31 of the *Limitation of Actions Act 1974* granting an extension of time to bring proceedings against Prominora. That application was also heard on 6 June.

[28] The learned judge at first instance refused to extend time pursuant to s 31 of the *Limitation of Actions Act 1974*. However he expressed the view that the requirements of s 31(2)(b) of that Act were satisfied.

[29] It will have been observed that in the later application the appellant did not seek an order pursuant to s 305 of the Act with respect to proceedings against Prominora. Counsel for the appellant contended that the consent order of 27 May 2005 permitted the institution of proceedings not only against S Employment but also against Prominora. In that regard the learned judge at first instance said:

> "In my view there is no basis for giving the section the construction contended for. The order under s 305 was made for the Applicant's benefit in the proceedings against the Respondent S Employment Services Pty Ltd and WorkCover. I was not referred to any authority and I am not aware of any principle which would permit the benefit of the order to be invoked against the Respondent Prominora Pty Ltd. It was accepted that, if this could not be done, the application against that Respondent must fail."

[30] The learned judge at first instance then referred to the history of the appellant's application for statutory compensation resulting in the order of the Industrial Magistrate of 15 July 2004.

[31] At first instance it was then noted, referring to *Hamling v Australia Meat Holdings Pty Ltd* [2006] 2 Qd.R. 235, that an order under s 305 could only be made within the limitation period. There was no issue in *Hamling* as to an extension of the limitation period and that decision does not answer the question in issue here. The judge indicated he was prepared to accept the appellant's submission that the limitation period so referred to was the limitation period extended by order pursuant to s 31 if such order was subsequently made.

[32] The learned judge then dealt with the submission that until the order of the Industrial Magistrate the appellant did not fall within any of the categories referred

to in s 253 of the Act and in consequence was not in a position to commence proceedings.

[33] After a review of the relevant authorities he came to the conclusion that "all matters of fact relevant to the Applicant's cause of action were known to the Applicant well prior to the determination by the industrial magistrate. … In my view the determination of the industrial magistrate on 15th July 2004 cannot satisfy the test of a material fact of a decisive nature for the purposes of ss 30 and 31 of the *Limitation of Actions Act*. What it did was to remove an obstacle to the enforcement of the cause of action." Because of that each application for an extension of the limitation period was dismissed.

[34] The first question to be addressed is whether the omission of Prominora from the s 305 consent order prevents the subsequent institution of proceedings against it if the applicant is otherwise successful in obtaining an extension of the limitation period.

[35] On its proper construction an order under s 305 enables a claimant to make an application under s 308 for an extension of the limitation period. Until a proceeding claiming damages is actually commenced (s 306) a claimant seeking to comply with the requirements of Chapter 5 of the Act is dealing with WorkCover. As s 305(2) makes clear the concern of a court on an application under that provision must be to ensure that "prejudice to WorkCover" is minimised. Because of that WorkCover must clearly be a respondent to such an application and usually would be the only respondent. It is only when a claimant has safely negotiated all barriers imposed by Chapter 5 entitling him to start proceedings in accordance with Part 7 Division 2 of Chapter 5 that it becomes necessary to name the employer as a party to the proceedings claiming damages.

[36] But in this case the appellant made S Employment a party to the s 305 application and the consent order was in terms that "the applicant be granted leave to bring the proceedings" despite non-compliance with s 280. The earlier part of the order granted leave to commence proceedings against S Employment notwithstanding it was in liquidation and that order went on to define those proceedings as "action against [S Employment] for damages for personal injury arising from the negligence and/or breach of contract and/or breach of duty of [S Employment] in and about the employment" of the appellant. To comply with s 471B of the *Corporations Act* the proceedings had to be defined. The question then arises whether "the proceedings" referred to in the later paragraphs of the order dealing with the aspect of the application brought under the Act should be read as limited to the proceedings earlier defined.

[37] If WorkCover is the only necessary respondent to an application under s 305 it is difficult to see why the effect of an order under that provision should be different because in the application orders were additionally sought under the *Corporations Act* against one employer against whom it was sought to commence proceedings. If an order made on such an application naming only WorkCover as respondent entitles the commencement of proceedings against whoever was the employer or employers, then why should the position be different because the other application was made at the same time?

[38] In my view the order made by consent on 27 May 2005 permitted the appellant to commence proceedings (if the other conditions were met) against whoever was his employer at the relevant time.

[39] But even if that be wrong there are still ways Prominora could be made a party to the proceeding claiming damages. There is no doubt such proceedings could be commenced against S Employment. Pursuant to rule 69 of the UCPR a party may be included as a party to the proceeding after the expiration of the limitation period in prescribed circumstances. Where, as here, there has been confusion as to the identity of the employer and a trading name has been used to hide the true identity of the employer, the court would almost certainly accede to a request that Prominora be included. (cf *Bridge Shipping Pty Limited v Grand Shipping SA & Anor* (1991) 173 CLR 231 and *Howard v WorkCover Queensland* [2001] 1 Qd R 388). The fact that WorkCover dealt with the application for compensation naming "Steamit Group" as employer demonstrates it was not misled and would not be prejudiced by Prominora being made a party to proceedings claiming damages.

[40] Finally on this point s 306(2)(b) of the Act should be noted. Both companies have apparently now been wound up and in consequence WorkCover could be named as the only defendant to the proceeding. Even where the employer is the defendant WorkCover has the conduct of the proceeding: s 306(5). Given all that, the omission of Prominora from the s 305 application would seem to be irrelevant.

[41] Here it was necessary for the appellant to rely on s 308 and seek an order extending the applicable limitation period. Both S Employment and Prominora were parties to the hearing seeking an extension of the limitation period, albeit as respondents to separate applications. WorkCover was also a party. In consequence no-one was prejudiced at that stage.

[42] The next question is whether or not, when it is said that applications under s 305 must be brought within the limitation period and when s 308(1)(a) refers to "before the end of the period of limitation", the reference is to the ordinary limitation period or to an extended period of limitation consequent upon an order made pursuant to s 30 and s 31 of the *Limitation of Actions Act*. The role played by s 305 is broadly similar to that played by s 43 of the *Personal Injuries Proceedings Act 2002* (Qld); that provision empowers the court to give leave to a claimant to start proceedings despite non-compliance with the requirements of the Act, if the court is satisfied there is an urgent need to start the proceedings. A question arose as to whether an application pursuant to that provision had to be brought during the currency of the applicable limitation period (either the ordinary period or an extended period). In some cases it was suggested that on its proper construction s 43 could only operate where the original or extended limitation period had not expired (see, for example, *SG v State of Queensland* [2004] QCA 215). But that view was rejected by all members of the Court in *SG v State of Queensland (No 2)* [2004] QCA 461. That latter decision went on appeal to the High Court, and the decision of the High Court is consistent only with the view that an order pursuant to s 43 can be made prior to the determination of the question whether the limitation period should be extended: *Davison & Ors v Queensland* (2006) 226 CLR 234. It is also only consistent with the proposition that when provisions such as s 308 and s 43 refer to a limitation period the reference is to an extended period, whether the order extending the period is made before or after the application under the section in question.

[43] The reasoning in *SG v State of Queensland (No 2)* and *Davison* must in my view equally apply when one is considering s 305 and s 308 of the Act. Here the learned judge at first instance made an assumption that the limitation period referred to included a limitation period extended by order pursuant to s 31 of the *Limitation of Actions Act* though made subsequently. In the light of the authorities I have referred to that assumption was clearly correct.

[44] That then leads to the critical question in the present appeal, namely whether the appellant established a case for extending the limitation period as he submitted. As already noted the appellant failed at first instance because the judge concluded that all relevant matters of fact were known to the appellant well prior to the Magistrate's decision of 15 July 2004. But that does not necessarily mean that the test cannot be satisfied. As Gummow, Hayne and Crennan JJ said in *Queensland v Stephenson* (2006) 226 CLR 197 at 208:

> "Whether the decisive character is achieved by the applicant becoming aware of some new material fact, or whether the circumstances develop such that facts already known acquire a decisive character, is immaterial. It is true to say, as the plaintiffs submit in their written submissions, that in a sense none of the material facts relating to the applicant's right of action is of a decisive character until a reasonable person 'knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing' the features described in *sub-paragraph* (i) and (ii) of s 30(1)(b). Whether that test has been satisfied *at a particular point in time* is a question for the court."

[45] Sections 30 and 31 of the *Limitation of Actions Act* were not drafted with the intricacies of the Act (particularly s 253) in mind. There were not in 1974 many, if any, statutory provisions such as s 253 of the Act. In my view when one considers the provisions of s 253 in the context of s 30 and s 31 of the *Limitation of Actions Act* it must be a decisive consideration that for the first time a person has become entitled to seek damages for an injury sustained in the course of employment. As already noted, until the decision of the Industrial Magistrate the appellant had no entitlement to commence proceedings seeking damages for an injury allegedly sustained in the course of his employment. The decision of the Industrial Magistrate had the effect of clothing facts already known with a decisive character, namely the consequence that a reasonable person taking appropriate advice on those facts would conclude that it was only then appropriate to commence proceedings.

[46] It follows in my view that the learned judge at first instance erred in refusing to make an order extending the limitation period so that it expired 12 months after the date of the decision of the Industrial Magistrate, namely 15 July 2005.

[47] The order pursuant to s 305 was made on 27 May 2005, and therefore within the extended limitation period. Further, the appellant would have 60 days from the date of the order extending the limitation period to 15 July 2005 in which to lodge a notice complying with s 280 of the Act.

[48] At the outset of the hearing in this Court counsel for the appellant sought to read and rely on an affidavit of S L Turner. That affidavit exhibited the reasons of the Industrial Magistrate for his decision of 15 July 2004, and also set out details of the statutory compensation paid by WorkCover to the appellant. Objection was taken

to the use of that affidavit, and the Court reserved its decision on that question. I have not found it necessary to rely on the material contained in that affidavit and in those circumstances the better course is to say that the Court rejects the reception of the affidavit as evidence. However, I would note that the reasons of the Industrial Magistrate could be referred to by this Court without their being made an exhibit to an affidavit.

[49] Because there were two applications before the learned judge at first instance with respect to the extension of the limitation period two separate appeals have been lodged. The orders should be the same in each appeal and should be as follows:

(i) appeal allowed;

(ii) order of 20 June 2006 set aside;

(iii) order that the limitation period relating to the appellant's claim be extended until 15 July 2005;

(iv) order that the respondents pay the appellant's costs of and incidental to the application for an extension of time to be assessed;

(v) order that the respondents pay the appellant's costs of and incidental to the appeal to be assessed.

[50] **HOLMES JA:** I have had the advantage of reading the reasons for judgment of Williams JA. I agree with his Honour's observations as to the effect of the Industrial Magistrate's decision in opening a statutory gateway to the appellant in his claim for damages. Unfortunately, the decision of the High Court in *Queensland v Stephenson*[2] does not appear to have been cited to the learned judge at first instance. That decision makes it clear that later events may confer a decisive character on material facts already known, for the purposes of s 31 of the *Limitation of Actions Act* 1974 (Qld). This seems to have been just such a case.

[51] I agree also that s 308 of the *WorkCover Queensland Act* 1996 when it refers to "the end of the period of limitation" ought to be taken to mean the limitation period for personal injuries actions as prescribed by s 11 of the *Limitation of Actions Act* and extended by s 31. One could not feasibly read "the period of limitation" in s 308 as confined to the primary three year period under s 11. A literal reading to that effect would preclude the bringing of proceedings after three years had passed, whatever the merits of an extension of time, except in the unlikely case where an applicant unaware of a material fact of a decisive character was nonetheless sufficiently well-informed to give notice of claim or seek leave or a declaration within the three years.

[52] If it is accepted that the section is referring to the end of the limitation period as it may be extended, the latter date serves simply as a cut-off point in the calendar by which one of the events prescribed in s 308(1)(a) - the giving of the notice, or obtaining of the declaration or leave - must have occurred. There is nothing in the terms of the section which would require that that cut-off point be set before, rather than after, the prescribed event, and there is no obvious imperative to read it in such

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[2] (2006) 226 CLR 197.

a way. It follows that I agree that the order granting leave under s 305 was made within jurisdiction.

[53] However, I am, with regret, unable to agree with his Honour that the leave obtained by the appellant under s 305 extended to proceedings against Prominora. The appellant had, at least on the face of things, an action against each of S Employment and Prominora. He made his application, under s 305 and under s 471B of the *Corporations Act* 2001 (Cth), against S Employment and WorkCover. For the purposes of the s 471B application, "the proceedings" was defined as

> "an action against the first respondent [S Employment] for damages for personal injury arising from the negligence and/or breach of contract and/or breach of duty of the first respondent in and about the employment of the applicant".

But that expression, "the proceedings", was also used, without any distinction, in that part of the application which sought the s 305 order. The consent order was made in terms of the application. Even if the parties bound by it were not limited to the respondents, it can still only be read, in my view, as granting leave to bring proceedings in respect of the negligence or breaches of S Employment, not wrongs by any other former employer, and more particularly, not Prominora. On my view, then, the appellant will have to seek other orders under the *Uniform Civil Procedure Rules* 1999 in order to join Prominora as a defendant.

[54] For those reasons I would make the orders proposed by Williams JA only in Appeal Number 5835 of 2006, and would dismiss Appeal Number 5834 of 2006. Given, on that outcome, the mixed success of the parties, I would make no order as to costs.