SUPREME COURT OF QUEENSLAND

CITATION:	*Nooteboom v Ernest Henry Mining Pty Ltd* [2010] QSC 106
PARTIES:	**ALFONS IGOR NOOTEBOOM** (applicant) v **ERNEST HENRY MINING PTY LTD** **ACN 008 495 574** (respondent)
FILE NO/S:	BS 1910 of 2010
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	8 April 2010
DELIVERED AT:	Brisbane
HEARING DATE:	3 March 2010, written submissions 31 March 2010.
JUDGE:	A Lyons J
ORDER:	**The application is dismissed.**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER– EVIDENCE TO ESTABLISH RIGHT OF ACTION - where applicant suffered injuries in the course of his employment - where limitation period to bring action against employer has expired – where Industrial Magistrate subsequently made determination that the applicant's injury was not excluded by s 32(5) of the *Workers Compensation and Rehabilitation Act 2003* (Qld) – whether that determination amounts to a material fact of a decisive character under s 31 of the *Limitations of Actions Act 1974* (Qld) *Limitations of Actions Act 1974* (Qld) s 31. *WorkCover Queensland Act* 1996 (Qld) *Workers Compensation and Rehabilitation Act* 2003 (Qld) *Charlton v WorkCover Qld & Ors* [2006] QCA 498 *Grove v Bestobell Pty Ltd* (1980) Qd R 12 *Hintz v WorkCover Qld & Ors* [2007] QCA 72

Roberts v Australia and New Zealand Banking Group Limited. [2005] QCA 470
Hinz v Ergon Energy Corporation Limited[2009] QDC 60
Meacham v Brambles Security (unreported Williams J 7503/1996 15 December 1998.)
Birkett v James [1978] AC 297

COUNSEL: RAI Myers for the applicant
MT O'Sullivan for the respondent

SOLICITORS: Shine Lawyers for the applicant
Walsh Halligan Douglas for the respondent

A LYONS J:

[1] Alfons Nooteboom was employed as a mine technician at the Ernest Henry Mine (EHM) near Cloncurry for almost three years from February 2001 until 26 October 2003 when he suffered a breakdown and was admitted to hospital with panic attacks and anxiety. Mr Nooteboom claims that the injury arose in the course of his employment at the mine where he was subject to workplace bullying. He currently suffers from a major depressive disorder which requires ongoing psychiatric treatment.

[2] Mr Nooteboom commenced a claim for workers compensation on 27 October 2004. He did not however give a notice as required under s 280 (1) of the *WorkCover Queensland Act* 1996 (Qld) (WQA) or s 275 (1) of the subsequent Act the *Workers Compensation and Rehabilitation Act* 2003 (Qld) (WCRA), within the period of limitation required by the *Limitation of Actions Act* 1974 (Qld) for bringing proceedings for damages. It is now nine years since the applicant commenced his employment with the respondent and over six years since he ceased employment.

[3] By this application filed on 24 February 2010 the applicant seeks;

> (i) leave pursuant to s 305 of the WQA and s 298 of the WCRA to commence proceedings against the respondent in respect of injuries suffered by him during his employment in the period between February 2001 and October 2003.
>
> (ii) an order for an extension of the limitation period pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld).

[4] The relevant provisions of the *Limitations of Actions Act* therefore need to be considered. Section 31 sets out the circumstances in which the court may extend the limitation period as follows;

> **31 Ordinary actions**
> (1) This section applies to actions for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) where the damages claimed by the plaintiff for the negligence, trespass, nuisance or breach of duty consist of or include damages in respect of personal injury to any person or

damages in respect of injury resulting from the death of any person.

(2) Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court—

(a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and

(b) that there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation;

the court may order that the period of limitation for the action be extended so that it expires at the end of 1 year after that date and thereupon, for the purposes of the action brought by the applicant in that court, the period of limitation is extended

[5] Section 30 provides that for the purposes of s 31 material facts include the following;

30 Interpretation

(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;

(ii) the identity of the person against whom the right of action lies;

(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

[6] Accordingly pursuant to those provisions leave can be given if there is a material fact of a decisive character which was not within the means of knowledge of the person at the relevant time. The essence of the applicant's submission is that he should be given leave to commence proceedings and the limitation period should be extended because a material fact of a decisive character, for the purposes of s 31 did not occur until there was a decision of Industrial Magistrate Tonkin on 2 February 2009 in relation to his workers compensation claim. The applicant contends that it was not until this determination in 2009, that the injury occasioned to him was not excluded by s 32(5) of the WCRA, that he had a viable cause of action within the meaning of the legislation

Background

[7] The applicant claims he was subject to verbal abuse, threats of sexual harassment and victimisation during his employment. He states that on or about 26 October 2003 he suffered a breakdown and was suffering from severe psychiatric symptoms which included panic attacks and anxiety at the time of his resignation. He was advised he suffered a significant injury which required ongoing psychiatric treatment. He did not return to his employment after 26 October 2003. The records of the Medical Centre which Mr Nooteboom attended indicate that he had presented with symptoms of stress and anxiety on 20 June 2002 and 18 March 2003. There is also a record of attendance at the Cloncurry Hospital on 22 June 2002 for anxiety and stress.

[8] There was no indication however in 2002 or 2003 of a diagnosis of a major depressive disorder which is the psychiatric condition he now suffers from. Industrial Magistrate Tonkin in her reasons notes that both of the psychiatrists Dr Chalk and Dr Persley "had difficulty in pinpointing the date Mr Nooteboom developed the Major Depressive Illness (MDI)."[1] The reasons indicate that the evidence of the psychiatrist Dr Chalk was that the illness escalated in severity after he left work as Dr Chalk considered he was functioning well in May 2003. Dr Persley however considered that Mr Nooteboom had depression as a result of sustained stress and anxiety which evolved into more severe depression by the time he ceased employment. Industrial Magistrate Tonkin's findings were;

> "I am satisfied that it is more probable than not that Mr Nooteboom displayed features of a depressive illness during the year before he decompensated on 26 October 2003. The depressive illness was caused by sustained stress in the workplace commencing in February 2001. Given the absence of any psychiatric history prior to commencing work at EHM, and the absence of any stressors except workplace stressors which have been identified, this depressive illness, combined with his treatment at work on 26 October 2003, by Robert Whyte, led to the development of the Major depressive illness diagnosed as still present by Dr Chalk in March 2005 and Dr Persley in January 2007.

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[1] Exhibit 10 -Affidavit of RL Gordon sworn 24 February 2010.

> Whilst Mr Nooteboom was upset about his lack of success in his EOI for dozer training, his treatment at work by Robert Whyte on 26 October 2003 was not reasonable management action taken in a reasonable way and was a significant contributing factor to the development of the Major Depressive Disorder. I am not satisfied that the injury is excluded by s 32(5) of the Workers Compensation and Rehabilitation Act 2003".

[9] It is clear that the decision of the Industrial Magistrate was concerned with the applicant's claim for workers compensation and in particular the question as to whether or not the applicant's psychological injury was excluded by the provisions of s 32(5) of the WQA because his psychiatric disorder arose out of reasonable management action taken in a reasonable way by the employer in connection with the workers employment. The Magistrate concluded it was not excluded.

[10] The current application relates to an extension of the limitation period due to the applicant's failure to commence proceedings for damages within the limitation period of 3 years from the date of the injury.

[11] As with all applications which relate to the extension of a limitation period the relevant dates on which certain events occurred or dates upon which certain steps were taken are significant. Accordingly it is necessary to set out those dates in some detail in order to understand the issues which arise in this application.

[12] During the relevant period there were also a number of legislative changes. At the time the applicant commenced employment in February 2001 the WQA 1996 was in force and on 1 July 2001 some relevant amendments were made to s 253. In 2003 the WQA 1996 was replaced by the WCRA 2003 with the relevant sections commencing on 1 July 2003.

Chronology

[13] In October 2004 some twelve months after he was admitted to hospital the applicant consulted his solicitors.

[14] On 4 November 2004 the applicant lodged a Worker's Compensation claim dated 27 October 2004 with the respondent which indicated that he had sustained a psychiatric injury and that the injury happened over time namely "From October 2004 to 3/9/04"(sic). The claim form indicated that he had stopped work in October 2004. It is clear that there is a great deal of confusion on the claim forms in relation to dates. It would seem clear that the applicant ceased work on 26 October 2003 when he was admitted to hospital suffering a nervous breakdown and he did not work after that date.

[15] Despite lodging the Workers Compensation Claim in October 2004 no further information from the applicant was forthcoming. On 26 April 2005 the applicant's file was closed as he had failed to respond to requests for medical certificates. No further information was received from the applicant until 2 March 2006 when a statement by the applicant dated 18 January 2006 was provided to the respondent.

[16] On 25 August 2006 the solicitors for the applicant received a letter from the self insurer XtraCare advising that the claim for compensation was rejected on two grounds. The first was that the application for workers compensation was deemed to

have been made out of time as the applicant had attended the Cloncurry Hospital "on 22 June 2002 and was certified as having an 'Anxiety/stress syndrome'" but had not lodged an application for compensation until 27 October 2004. The Act required that a claim for a condition which arose out of employment had to be made within 6 months after the entitlement arose. Secondly the decision maker was not satisfied that the psychological injury had arisen out of or in the course of the applicant's employment. There being a question as to whether the psychiatric disorder in fact arose as a result of reasonable management action taken in a reasonable way by the employer which would preclude compensation given that the applicant's breakdown and admission to hospital occurred after he was advised he had not been promoted at work.

[17] On 15 September 2006 the applicant delivered a Notice of Claim for Damages pursuant to s 280A of the WQA 1996 for the period 1 July 2001 to 30 June 2003 and a Notice of Claim for Damages pursuant to s 276 of the WCRA 2003 for the period 1 July 2003 to 31 October 2004. The forms indicated that the injury occurred over a period of time and that the behaviour causing the injury commenced in March 2001 and ceased in October 2004. An Application for a Conditional Damages Certificate was also lodged which stated that the symptoms commenced in October 2002. The letter accompanying the notices stated that there was an urgent need to commence proceedings and requested that XtraCare wave compliance with s 280A of the WQA and s 276 of the WCRA in respect of the two claims which had been lodged.

[18] On 20 September 2006 the solicitors for the respondent in a letter to the solicitors for the applicant advised that any action for damages for personal injuries said to have occurred during the operation of the 1996 Act was statute barred and that there was no urgent need for the applicant to commence proceedings as it was not a situation of a rapidly approaching limitation period as that period had well and truly passed. The letter continued that it may be that there was an urgent need to bring an application to extend the limitation period. Until such an application was brought the respondent stated it did not waive any procedural requirements of the Act in respect of a statute barred claim. The application for a Conditional Damages Certificate was also rejected as damages certificates were only relevant to injuries sustained prior to 1 July 2001. The letter continued;

> "Your client's entitlement to seek damages under the 1996 Act (assuming he is granted an extension of the limitation period to do so) lies only under s 253(1) (d) of the Act, as he never lodged an application under that Act for compensation for an injury allegedly suffered within the period of operation of the Act. Any such entitlement then falls within the operation of division 6 of Chapter 5 of the act, but ss 262, 265 and 270 are not within that division."

[19] The solicitors for the respondent also advised that as the notice of claim under the WCRA 2003 for compensation was rejected they were not aware of the basis for the entitlement to seek damages for an injury suffered during the period of operation of that Act. The solicitors for the respondent also stated that they were not aware of any reason as to why there was an urgent need to commence proceedings in relation to the WCRA claim and sought an "immediate response as to the basis of any such entitlement".

[20] On 25 September 2006 the solicitors for the applicant withdrew the Notices of Claim for Damages on the basis that "At this stage our client has no positive evidence that his injuries give rise to an entitlement to damages and in the absence of such evidence, we have been instructed to withdraw his application for damages certificate, section 280A (pursuant to the *Workcover Queensland Act* 1996) Notice and section 276 (pursuant to the *Worker Compensation and Rehabilitation Act* 2003)." The letter from the solicitors for the applicant also put the solicitors for the respondent on notice that if evidence was received then the application would be re-lodged.

[21] On 23 November 2006 the applicant lodged an Application for Review with Q-Comp with respect to the decision to reject his claim for workers compensation by the self-insurer which was received on 12 December 2006.

[22] On 8 June 2007 the decision by the self-insurer to reject the claim was confirmed by Q-Comp. The applicant lodged a Notice of Appeal to the Industrial Magistrates Court.

[23] On 2 February 2009 Industrial Magistrate Tonkin handed down her judgment overturning the decision of Q-Comp and accepting the statutory claim.

[24] On 6 March 2009 further Notices of Claim for Damages and an Application for a Conditional Damages Certificate were delivered to the respondent. The applicant identified the decision of the Industrial Magistrate as being a material fact of a decisive character. The Notices drew attention to the fact that the *"material fact date will expire on 01.02.2010"*. The applicant alleged *"the claimant is now entitled to compensation based upon the decision of the Industrial Magistrate on 2nd February 2009"*.

[25] On 10 March 2009 the solicitors for the respondent advised that there was no urgent need to commence proceedings. They advised that both the Notices of Claim referred to *"over a period of time*" claims from February 2001 to October 2003 *"subject to any s 31 application under the Limitation of Actions Act, **the limitation period has already expired** – it is not about to 'shortly expire'. The only relevant time issue is then the bringing of a s 31 application within the next 11 months while both Notices confirm that the only reason they purport to be urgent is that 'material fact date will expire on 01.02.2010."* Accordingly, there was no urgency whatsoever in respect to the Notices. *"There is ample time to submit compliant Notices, without any urgency arising."* The applicant was advised that *"compliance must be dealt with in the usual course"*. A further Conditional Damages Certificate was provided.

The relevant legislation

[26] As I have already indicated the relevant legislation changed during the period of the applicant's employment. For any psychiatric injury which occurred from the applicant's commencement of employment on 22 February 2001 until 30 June 2001 the relevant provision was s 253 (1) of the WQA which was in the following terms:

> "253(1) The following are the only persons entitled to seek damages for an injury sustained by a worker-
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> (a) the worker, if the worker has received a notice of assessment from WorkCover stating that
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> (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

…"

[27] Accordingly for any psychiatric injury sustained by the applicant between 22 February 2001 and 30 June 2001 s 253(1) would have prevented him from commencing proceedings as he had not met the criteria outlined in that section. Until the decision of the Industrial Magistrate on 2 February 2009 the applicant could not have met the criteria identified in s 253 (1) as he was not a worker who had his application for compensation allowed. It is therefore arguable that for any injury sustained prior to 1 July 2001 the decision of the Industrial Magistrate was a material fact of a decisive character.

[28] The decision of *Charlton v WorkCover Qld & Ors*[2] discussed the 1996 Act before the 2001 amendments. In that decision, because the appellant had no entitlement to seek damages until the decision of the Industrial Magistrate, leave was given to commence proceedings as the decision of the magistrate was considered to be a decisive consideration. Williams JA stated;

> "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.
>
> 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." (my emphasis)

[29] Accordingly for any injury sustained in this period there is indeed an argument that there should be an extension of the limitation period given the fact that the magistrate's decision of 2 February 2009 was a material fact of a decisive character. However there is no evidence before me that the applicant in fact sustained an injury between 22 February 2001 and 30 June 2001. It is also clear that there was in fact no Notice of Claim for Damages lodged in respect of this period but rather the claims refer to periods from 1 July 2001 to 30 June 2003 and 1 July 2003 to 31 October 2004. The reasons of the Industrial Magistrate also indicate that the applicant first

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2 [2006] QCA 498 at [45] – [46]..

went to a medical centre about stress and anxiety on 20 June 2002. Furthermore the conclusions of the magistrate indicated that it is more probable than not that the applicant displayed features of a depressive illness during the year before he decompensated on 26 October 2003 and that this depressive illness, combined with his treatment at work on 26 October 2003, by Robert Whyte, led to the development of the major depressive illness which is the relevant psychiatric injury. I am not satisfied therefore that there was any relevant psychiatric injury in the period 22 February 2001 to 30 June 2001.

[30] Accordingly the relevant period is after 30 June 2001.

[31] From 1 July 2001 the 1996 Act was amended by the *WorkCover Queensland Amendment Act* 2001 (Qld). The relevant amendments are as follows;

> **Amendment of s 253 (General limitation on persons entitled to seek damages)**
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> **(4)** Section 253(1)(c)—
> *omit, insert—*
> '(c) the worker, if—
> (i) the worker has lodged an application, for compensation for the injury, that is or has been the subject of a review or appeal under chapter 9; and
> (ii) the application has not been decided in or following the review or appeal; or
> '(d) the worker, if the worker has not lodged an application for compensation for the injury; or'.

[32] Section 253 of the 1996 Act was therefore amended from 1 July 2001, to provide that if a worker had lodged an application for compensation for an injury, that had been the subject of a review or an appeal under chapter 9 and the application had not been decided in or following the review or appeal, the worker was entitled to seek damages for an injury sustained by the worker.

[33] Accordingly in relation to an injury sustained between 1 July 2001 and 30 June 2003 the applicant was entitled to seek damages once he met the criteria in s 235 (1) and then complied with the pre-litigation requirements of the WQA 1996.

[34] The 2001 amendments to s270 of the 1996 Act also provided that a worker could seek damages for their injury only after any review or appeal under chapter 9 ends and the application for compensation was decided and the self insurer gave the claimant a notice of assessment as follows;

> **270 Access to damages if application for compensation is subject to review or appeal**
> **(1)** The claimant may seek damages for the injury only after—
> (a) any review or appeal under chapter 9 ends; and
> (b) the application for compensation is decided; and
> (c) WorkCover gives the claimant a notice of assessment.

[35] If there was an urgent need to start a proceeding for damages, s 280A provided a way for a claimant to satisfy s 308(1)(a)(ii) and the claimant could, pursuant to s 305, seek

leave to start a proceeding for damages for an injury without complying with s 302 as follows;

> **271 Need for urgent proceedings**
> **(1)** This section applies in relation to an urgent need for the claimant to start a proceeding for damages.
> **(2)** Section 280A provides a way for the claimant to satisfy section 308(1)(a)(ii).
> **(3)** Also, the claimant may, under section 305, seek leave to start a proceeding for damages for an injury without complying with section 302.
>
> **Insertion of new s 280A**
> After section 280—
> *insert—*
> **'280A Noncompliance with s 280 and urgent proceedings**
> **(1)** The purpose of this section is to enable a claimant to avoid the need to bring an application under section 305.
> **(2)** Without limiting section 304 or 305,[48] if the claimant alleges an urgent need[49] to start a proceeding for damages despite non-compliance with section 280, the claimant must, in the claimant's notice of claim—
>
> (a) state the reasons for the urgency and the need to start the proceeding; and
> (b) ask WorkCover to waive compliance with the requirements of section 280.
>
> **(3)** The claimant's lawyer may sign the notice of claim on the claimant's behalf if it is not reasonably practicable for the claimant to do so.
> **(4)** The claimant's notice of claim may be given by fax in the way provided for under a regulation.
> **(5)** WorkCover must, before the end of 3 business days after receiving the notice of claim, advise the claimant that WorkCover agrees or does not agree that there is an urgent need to start a proceeding for damages.
> **(6)** If WorkCover agrees that there is an urgent need to start a proceeding for damages, WorkCover may, in the advice to the claimant under subsection (5), impose the conditions WorkCover considers necessary or appropriate to satisfy WorkCover to waive compliance under section 282(2)(b).
> **(7)** The claimant must comply with the conditions within a reasonable time that is agreed between WorkCover and the claimant.
> **(8)** The claimant's agreement to comply with the conditions is taken to satisfy section 308(1)(a)(ii).

[36] Accordingly for an application under s 280A, the claimant in the Notice of Claim was required to state the reasons for the urgency and the need to start proceedings as well as asking the self insurer to waive compliance with s 280. The self insurer could impose any conditions necessary and appropriate to satisfy itself with respect to the waiver of compliance and the claimant was required to comply with any conditions within a reasonable time, as agreed between the self insurer and the claimant.

[37] If leave was given pursuant to that section, then the proceedings started by leave were stayed until any review or appeal ended, the self insurer gave the claimant the notice of assessment, the claimant elected to seek damages for injury and complied with s 302.

[38] The purpose of s 280A was to enable a claimant to avoid the need to bring an application under s 305.

[39] The relevant sections of the WCRA commenced on 1 July 2003 and s 237(1) (c) has continued the scheme established by the 2001 amendments to s 253 whereby a worker with an application for compensation subject to review or appeal is entitled to seek damages. Chapter 15 enacts transitional provisions and section 603(1) and (2) provides that the former WQA as in force when the injury was sustained will continue to apply in relation to the relevant injury. Accordingly s 305 of the former WQA continues in force. To the extent that there was an injury between I July 2003 and 26 October 2003 the provisions of s 298 of the WCRA apply.

[40] The effect of those legislative changes in July 2001 was that those amendments allowed the present applicant the means by which he could pursue his claim through the pre-litigation procedures even before the decision of Industrial Magistrate Tonkin in February 2009.

The applicant's arguments

[41] Despite the 2001 amendments to the Act the applicant submits that a material fact of a decisive character was not within the means of knowledge of the applicant until February 2009 and accordingly the limitation period should be extended. The applicant argues that it was not until the decision of the Industrial Magistrate on 2 February 2009, when it was held that the injury to the applicant was not excluded by s 32(5) of the *Workers Compensation and Rehabilitation Act* 2003 (Qld), that the applicant had a viable cause of action for the first time.

[42] In relation to the issue of whether a material fact was within the means of knowledge of the applicant reliance is placed by the applicant on Dunn J's statements in the 1980 decision of *Grove v Bestobell Pty Ltd*[3] where his Honour considered that there can be many material facts of a decisive character. In that case involving a claim for negligence involving asbestosis his Honour stated[4]

> "Indeed there are some facts of a decisive character which are not yet within his means of knowledge. By that I mean that he does not know whether it was a failure by the second respondent to protect him from the effects of inhaling asbestos particles or a failure of the first respondent so to protect him that caused the whole of his injury. And he does not know whether his injury was caused partly by the fault of one employer and partly by the fault of the other.
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> ...
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> I accept that the test to be applied is an objective test to be applied to a person in the position of the applicant, with his background and understanding; I have applied that test in reaching the conclusion which I have stated."

[43] In the present case the chronology outlined above has set out the relevant steps taken by the applicant. It is clear that the applicant consulted solicitors within a year of ceasing work and an application for workers compensation was made shortly thereafter. This claim was rejected on 25 August 2006 and on 23 November 2006 the

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3 (1980) Qd R 12.

4 (1980) Qd R 12 at [19].

applicant lodged an Application for Review with Q Comp which was received on 12 December 2006. Because of the amendments to the Act, once that application for review was lodged the claimant fell within the criteria identified in s 253(1)(c) and was thus entitled to seek damages at that time. In the present case therefore the fact that the applicant had his initial application for worker's compensation rejected was not a bar to him proceeding with the claim for damages.

[44] Accordingly, the decision by the Industrial Magistrate on 2 February 2009 could not be a material fact of a decisive nature. In my view therefore the first time the current applicant was a person "entitled to seek damages for an injury sustained by a worker" in accordance with s 253 of the 1996 Act was not when the decision of the Industrial Magistrate was made in February 2009. The Industrial Magistrate's decision did not result in "opening a statutory gateway"[5] in relation to the applicant's claim for damages because that gateway had already been opened. As Williams JA stated in *Hintz v WorkCover Qld & Ors*[6]

> "The appellant had all the knowledge relating to his right of action at the time he commenced the District Court proceedings on 26 June 2003. The problem was that at that time he failed to take the necessary steps pursuant to the Act (which were then open to him) to give him the right to commence proceedings at that time."

[45] Keane JA discussed the issue in these terms[7];

> "In truth, once the Industrial Magistrate had decided on 18 September 2002, the appellant was in a position, according to the decision of this Court in *Charlton v WorkCover Qld & Ors*, to obtain any necessary extension of time on the basis that he was then aware of a material fact of a decisive character, namely that his injury was one for which damages might be sought by action notwithstanding the restrictions in s 253(1) of the Act.
>
> The appellant could have commenced proceedings earlier on the strength of a conditional damages certificate under s 262(3) of the Act for the damages recoverable for his lower back injury. So far as the appellant's psychological injury is concerned, as the learned primary judge observed, and it is not disputed, there was no impediment posed by the Act to the appellant's pursuit of a claim for damages for his "over time" psychological injury. As his Honour noted, this injury, and the damages recoverable in relation to it, overlapped with any psychological consequences of the incident of 31 March 1999. As the learned primary judge held, an action for the recovery of damages for the lower back injury and the "over time" psychological injury would have been worth bringing so far as the likely quantum of damages was concerned. The appellant did not suggest that there was any reason why it would not have been reasonable for him to bring an action after 18 September 2002. And, of course, there is his unexplained attempt to commence an action in June 2003.
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> So far as the psychological injury alleged to be consequent upon the incident of 31 March 1999 is concerned, as at 18 September 2002, the

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5 *Charlton v WorkCover Qld & Ors* [2006] QCA 498 Holmes JA at [50].
6 [2007] QCA 72 at [9].
7 [2007] QCA 72 at [29] – [32]..

> appellant could have passed through the gateway in s 253(1)(c) of the Act on the basis that the appellant had not, as at that date, lodged an application for compensation for that psychological injury. The appellant could have sought a conditional damages certificate under s 265(4) of the Act; and he could have sought damages for the psychological injury on the strength of that conditional certificate. When that certificate was made unconditional, the appellant would have been entitled to recover his full entitlement to damages in respect of that injury. One may assume that the certificate would have been made unconditional having regard to the actual issue of the certificate on 28 June 2005. One certainly cannot assume that the certificate would not have been made unconditional.
>
> The appellant did not take any of these steps which were available to him to pursue his right of action in respect of the accident of 31 March 1999. It may be that he has a remedy against those who were advising him in this regard. But that is an irrelevant speculation here. The point for present purposes is that the learned primary judge was clearly correct to hold that the time for bringing an application pursuant to s 31(2) of the *Limitation of Actions Act* had long expired on 1 June 2006."

[46] It would seem to me therefore that the applicant in fact had all the knowledge relating to his right of action in late 2006 but the problem was that at that time he failed to take the necessary steps pursuant to the Act (which were then open to him) to give him the right to commence proceedings at that time. The lodging of the application for review received on 12 December 2006 was a material fact of a decisive nature because it entitled the applicant to seek damages and the ability for him to proceed to a damages claim was not dependent on the decision by Industrial Magistrate Tonkin. In my view then, the material fact of a decisive nature expired on 12 December 2007.

[47] It is clear that in subsequent correspondence the legal representatives for the applicant and the respondent both agreed that the date of the decision by Industrial Magistrate Tonkin was a material fact of a decisive nature. However, in my view, this is incorrect and is a mistake of law. As Mackenzie J said in *Roberts v Australia and New Zealand Banking Group Limited.*[8]

> "That outcome may seem harsh and inconvenient in a case where the decisive difficulty stemmed from a misapprehension by the appellant about the proper procedure in force under a statutory scheme, compounded by the respondent's solicitors not detecting the problem in time. At best for the respondent, it may result in liability shifting. However that outcome is unavoidable for the reasons given."

[48] In the decision of the Chief Justice in *Roberts v Australia and New Zealand Banking Group Limited*[9] his Honour stated;

> "It is well established that notions of estoppel and waiver do not run against a statute: if an entitlement to sue depends on compliance with statutorily prescribed conditions, non-compliance will not be excused because of what may otherwise conventionally amount to waiver or estoppel. See *Day Ford Pty Ltd v Sciacca* [1990] 2 Qd R 209, 216-221; *Commonwealth v Hamilton*

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8 [2005] QCA 470 at [60].

9 [2005] QCA 470 at [20]- [21].

> [1992] 2 Qd R 257, 267-8; *Beckford Nominees Pty Ltd v Shell Co of Australia Ltd* (1987) 73 ALR 373, 379.
>
> I am not satisfied the need to comply with s 280, or securing a waiver under s 280A or a grant of leave under s 305, lack the public dimension premising the exclusion of concepts of estoppel and waiver (cf. *Commonwealth v Verwayen* (1990) 170 CLR 394, 486, 497). The objects of the legislation set out in Pt 2 of Ch 1 disclose both a public and a private dimension which cannot be disentangled as Mr Mullins, for the appellant, would submit. It cannot be concluded provisions like s 280, s 280A and s 305 have a significance confined to the claimant and the insurer: they form part of an elaborate scheme with a broad public orientation (cf. s 5), embracing its financial viability and flow-on features like CTP insurance premium levels. Tightly regulating the circumstances in which claims may be pursued in court cannot be characterized as of concern only, or even primarily, to the parties immediately affected."

[49] The mistake of the parties therefore does not affect the fact that the claim is statute barred and that the material fact of a decisive nature occurred on 12 December 2006. It was, therefore, a matter for the legal representatives to have protected the applicant's interests by making an application for urgent proceedings to the self insurer in accordance with s 280A which required the agreement of the self insurer. The applicant was always able to protect his position by an application pursuant to s 305, seeking leave to start proceedings without complying with s 302.

[50] I consider the applications should fail. Given the failure to protect the applicant's interests is in reality the failure of the solicitors the applicant may have an avenue open to him to take an action against his solicitors.[10] That factor however has not been a determining factor in the resolution of the applications before me.[11] The basis for the dismissal of the application is the same as in *Hinz v WorkCover* where the applicant in that case "did not take any of these steps that were available to him to pursue his right of action in respect of the accident of 31 March 1999. It may be that he has a remedy against those who were advising him in that regard. But that is an irrelevant speculation here."

[51] The applications should therefore be dismissed. I will hear from Counsel as to costs.

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[10] *Hinz v Ergon Energy Corporation Limited* [2009] QDC 60*; Meacham v Brambles Security* (unreported Williams J 7503/1996 15 December 1998.)

[11] *Birkett v James* [1978] AC 297