SUPREME COURT OF QUEENSLAND

CITATION:	*Cox v Strategic Property Group Pty Ltd & Anor* [2011] QSC 111
PARTIES:	**PETER JAMES COX** (applicant) **v** **STRATEGIC PROPERTY GROUP PTY LTD** (ACN 116885691) (first respondent) and **LABOUR SOLUTIONS AUSTRALIA PTY LTD** (ACN 008137782) (second respondent)
FILE NO/S:	1561/11
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	16 May 2011
DELIVERED AT:	Brisbane
HEARING DATE:	6 May 2011
JUDGE:	Dalton J
ORDER:	**Application dismissed**
CATCHWORDS:	Limitation of Actions; material fact of a decisive character; specialist's report; knowledge of applicant; connection between injury and ongoing symptoms. *Limitation of Actions Act* 1974 (Qld) s 31, s 31(2)(a), s 31(2)(b) *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234, 249-250, 246, 245, 254 *Dick v University of Queensland* [2000] 2 Qd R 476, 483 *Healy v Femdale Pty Ltd* [1993] QCA 210 *Platen v WWP Pty Ltd* [2004] QSC 258 *Russell v State of Qld* [2004] QCA 370 [28] *Switzer v Qantas Airways Limited* [2011] QDC 52 *Van der Merwe v Arnott's Biscuits Limited* [2010] QSC 145 *Watson v Poynter* [2003] QCA 224
COUNSEL:	AJ Williams for the applicant AC Harding for the first respondent JS Miles for the second respondent

SOLICITORS: Slater and Gordon for the applicant
HBM Lawyers for the first respondent
HopgoodGanim Lawyers for the second respondent

[1] **DALTON J**: This is an application pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld) (the Act) for the period of limitation in relation to a personal injuries action to be extended. The application is opposed. Neither respondent alleged that they are prejudiced by the delay in the matter. Neither respondent denies that there is evidence to establish a right of action in the plaintiff, apart from a defence founded on the expiration of the limitation period – see s 31(2)(b) of the Act. The respondents say that there is no material fact of a decisive character relating to the applicant's right of action which was not within his knowledge, or means of knowledge, in time for him to have brought an action within the limitation period – s 31(2)(a) of the Act.

History of Injury and Response to it

[2] On 13 June 2007 the applicant was 19 years old. During the course of his work he was lifting a heavy beam with other men. The beam fell and the applicant hurt his back. He received medical certificates to justify his taking time off work until July 2007. At this point he returned to work having been told by his general practitioner that the injury would gradually stabilise and he would recover. On 7 January 2008 he sought help from a chiropractor. The chiropractor gave a report dated 5 March 2008. The report says that the applicant ascribed his persistent lower back pain to an incident six to seven months previously when his lower back was strained while assisting with carrying a steel beam at work. The chiropractor says there was no history given of any lower back pain prior to that episode. The chiropractor's report goes on to say that the applicant told him he had only been able to undertake light duties at work since the accident due to persistent pain in his lower back whenever he attempted heavier duties. The chiropractor gave an opinion that x-rays showed damage at L5/S1. The chiropractor reported that conservative chiropractic care had been started with, "positive results to date."

[3] The applicant says he approached WorkCover to reopen his claim in July 2008. As part of this process, on 6 August 2008 the applicant attended for an x-ray on referral from his general practitioner. The x-ray report noted, "mild central L5/S1 disc protrusion". On 8 August 2008 WorkCover refused to reopen the applicant's claim. The applicant swears that his request for a reopening was denied, "based on the advice of Dr Crichton." Dr Crichton was apparently a doctor employed by WorkCover to advise on the reopening. The applicant does not swear what he was told by WorkCover or by Dr Crichton. It is not clear whether WorkCover ever mentioned Dr Crichton to him, his affidavit, extracted above, may just be a historical recounting of the fact.

[4] The applicant applied to Q-Comp to review the decision to refuse to reopen his claim. From the applicant's statement of facts accompanying his application to Q-Comp, it is clear that he believed his ongoing symptoms to be referable to his injury at work. He says the initial injury had never settled:

> "…
> Since the accident in May 2007 I have persistently suffered pain in my back.

> This has stopped me from holding onto a job for very long.
> …
> In January of this year I decided to see a chiropractor to see if treatment would relieve my ongoing pain.
> I was sent for x-rays which revealed a compressed disc …
> Treatment began and appeared to relieve the pain, but only temporarily.
> …
> My doctor sent me for a scan which also revealed the same disc compression.
> …
> I just want my back to get better so that I can work free of back pain.
> …"

[5] On 6 November 2008 that review was dismissed. An eight page decision was issued by Q-Comp which included these paragraphs:

> "…
> Dr Crichton, external medical officer, examined your file and in his medical opinion there is no evidence to suggest your injury failed to settle. He further stated that 12 months is considered more than adequate for a minor injury such as a lumbar back strain to have settled and he does not consider your current symptoms to be related to this event.
> Based on the above reasons, I have decided not to reopen your claim for compensation based on the Workers' Compensation and Rehabilitation Act 2003, section 32.
> …
> I consider there is insufficient medical information to support a causal link between the applicant's current injury and the incident at work on 13 June 2007. As such I have been unable to determine that the applicant has an ongoing entitlement to weekly compensation or medical treatment in relation to the injury he sustained on 13 June 2007.
> …"

[6] The applicant does not swear that he received or read this eight page decision, nor does he exhibit the decision. He swears that the Q-Comp decision was, "that I had no ongoing incapacity arising from the work related injury of 13 June 2007." He does not swear that he changed his view that his ongoing symptoms were a result of the injury at work because of the Q-Comp decision, or its reference to Dr Crichton's views. He does not say it even caused him to doubt his earlier views.

[7] The applicant swears that he did not know he had rights to pursue common law damages and that he thought his right to have his WorkCover claim reopened was the "only avenue to which I am entitled to any kind of compensation." The applicant says that he continued to experience pain but took no further action until he saw his present lawyers shortly outside the limitation period. He swears he was originally referred to a firm other than the lawyers who now act for him and does not give the date of that referral.

[8] On 6 October 2010 Dr John Pentis examined the applicant at the behest of his solicitors. His report is dated 13 October 2010. The history given to Dr Pentis was

of the accident involving the beam and then continued problems with his back, "it has niggled on." There is no history of any other back symptoms except those which followed the accident at work. There is no history of any other relevant accident or injury to the back. Dr Pentis noted that the applicant returned to work on light duties, "but hasn't been able to hold down a job". The report stated, "long term it is probably best that he doesn't return to any heavy manual work, any work where repetitive bending and lifting is required as it will cause further problems with the spine."

[9] The respondents relied upon notes from the applicant's GP surgery. On 28 July 2008 the GP's notes read, "low back pain since accident last year … review with x-rays and will refer … says hurts all time since accident a year ago." On 6 August 2008 the notes state, "has reopened lumbar back pain claim with WorkCover. Further lower back pain. Can't manage any light duties. Sweeping alone causes back pain. Has been having chiropractic treatment for six months with no help … will probably need rehab to different occupation than labourer." On 14 August 2008 the GP notes state, "CT scan shows definite L5/S1 protrusion with spinal canal pressure. WorkCover won't reopen claim. Needs to find different occupation." The general practitioner who saw the applicant on the last two of these consultations says that he suggested to the applicant that he find a different occupation than his current occupation as a labourer. He says that he is quite blunt when he gives patients such advice.

Material Fact of a Decisive Character

[10] The applicant contends that his receipt of Dr Pentis' report was a material fact of a decisive factor because he learnt for the first time that his ongoing back condition was related to the accident which occurred on 13 June 2007. No doubt that would be a new material fact of a decisive character, within the meaning of the Act, had the applicant learnt it from Dr Pentis' report. It was submitted on behalf of the applicant that prior to receiving Dr Pentis' report he was in receipt of advice from WorkCover that Dr Crichton had advised that his back problems were not related to the accident of 13 June 2007 and that had been reinforced with the advice from Q-Comp of 8 August 2008. It was also said on behalf of the applicant that it was not until he received the report of Dr Pentis that he was diagnosed with a permanent impairment to his back as a result of the accident which occurred on 13 June 2007. Again, there is no doubt the permanent or long-term nature of the injury is capable of amounting to a new material fact of a decisive character, if the applicant learnt of it from Dr Pentis' report. It is submitted that the applicant was only 19 at the time of the accident and that although he completed senior, he had not obtained an OP score and that, in the circumstances, it was quite reasonable for him to not consult either doctors or lawyers until he did.

[11] I reject these contentions on behalf of the applicant. To begin with, he does not swear that his knowledge or beliefs were changed or influenced in any way by Dr Pentis' report. It is perfectly plain from the material that the applicant has always regarded the ongoing back problems he has experienced as having their origin in the accident of 13 June 2007. He does not swear to the contrary. He does not swear that he ever changed or modified his view based upon what he was told by WorkCover. In fact, as noted above, he does not actually swear that he was told by WorkCover that Dr Crichton did not believe his ongoing symptoms were related to the accident of 13 June 2007. Whatever advice he received when WorkCover

refused to reopen his claim, he did not accept it: his appeal to Q-Comp was based on his belief that his ongoing symptoms were related to the accident of 13 June 2007. He does not swear that he changed this belief after Q-Comp rejected his appeal. All he says is that he was unaware of any other avenue through which he was entitled to any kind of compensation. After the Q-Comp review he swears that he continued to experience pain but kept working as best he could. The applicant has never suggested any cause for his back pain other than the accident of 13 June 2007. I reject the notion that it was not until he received Dr Pentis' report that he understood the accident was responsible for his ongoing back pain.

[12] I further reject the suggestion that it was not until he received Dr Pentis' report that the applicant understood he had a serious, long-term impairment of his back. By August 2008 he knew that his back symptoms were not temporary. He knew that they were significantly interfering with his ability to work – he said he could not even sweep without considerable pain. His general practitioner gave him advice in August 2008 that he needed to find an occupation other than labouring on account of the back problems he was experiencing. There can be no suggestion that it was not until he received the report of Dr Pentis that the applicant understood that he had a significant, long-term injury to his back which was affecting, and was going to continue to affect, his ability to earn an income.

[13] Counsel for the applicant urged that this case was factually similar to the cases of *Van der Merwe v Arnott's Biscuits Limited*[1] and *Switzer v Qantas Airways Limited* [2] because in both of those cases the plaintiffs had received medical opinion that the injuries the subject of their claims were not related to the accidents alleged to have caused them. In fact, this case contrasts to both those cases. The applicant here does not swear that he was told anything of Dr Crichton's view before he lodged his Q-Comp review. Certainly up to the time he lodged his Q-Comp review he was firmly of the belief that his back symptoms had been caused by the accident at work. He does not swear that the Q-Comp rejection changed that view, or even led to him questioning it. In this regard both the evidentiary and persuasive onus were on the applicant.[3]

[14] The applicant is not like the plaintiff in *Healy v Femdale Pty Ltd* [4] who got on with her life, returned to her employment and did not experience significant pain or disability, so that it was not unreasonable of her not to take appropriate advice. The applicant says that from the time of his injury he experienced significant ongoing pain which prevented him working at his usual occupation much of the time. By August 2008 he had been told by his treating GP that he needed to look for a different occupation. He knew by that stage that the effects of his injury were long-term and that they were impacting, and would continue to impact, on his ability to earn income.

[15] While the applicant swears that he did not realise he had a right to pursue a common law claim for damages, as well as pursue statutory remedies against WorkCover,

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1 [2010] QSC 145.
2 [2011] QDC 52.
3 *Russell v State of Qld* [2004] QCA 370 [28].
4 [1993] QCA 210.

that ignorance is not something which justifies an extension.[5] The applicant has failed to demonstrate that he was unaware of any material fact of a decisive character after August 2008. His application pursuant to s 31(2) of the Act must therefore fail. I dismiss the application. I hear will the parties as to costs.

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[5] *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234, 249-250, 246, 245, 254; *Dick v University of Queensland* [2000] 2 Qd R 476, 483; *Watson v Poynter* [2003] QCA 224; *Platen v WWP Pty Ltd* [2004] QSC 258.