SUPREME COURT OF QUEENSLAND

CITATION:	*Weis Restaurant Toowoomba v Gillogly* [2013] QCA 21
PARTIES:	**WEIS RESTAURANT TOOWOOMBA** (applicant) **v** **ALLAN EDWARD GILLOGLY** (respondent)
FILE NO/S:	Appeal No 6461 of 2012 DC No 3 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Toowoomba
DELIVERED ON:	15 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	31 October 2012
JUDGES:	Margaret McMurdo P and Fraser JA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. That the Appellant have leave to appeal.** **2. That the appeal be allowed.** **3. That the order made in the District Court on 22 June 2012 be set aside, and that in lieu thereof it be ordered that the originating application filed 13 January 2012 be dismissed with costs.** **4. That the Respondent pay the Appellant's costs of the appeal.**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER – WHAT ARE MATERIAL FACTS – where the respondent suffered personal injury at Weis Restaurant after his chair collapsed under him, thus leading him to fall to the floor – where limitation period for personal injuries action extended pursuant to order under s 31 *Limitation of Actions Act* 1974 (Qld) – where the respondent had resolved to pursue his claim against Weis Restaurant for personal injuries – where appellant contended that identity of defendant was not material fact of decisive character – where

the proceeding the respondent had decided to pursue could have simply been instituted against the 'Weis Restaurant' business name, regardless of whether it was a registered business or unregistered business name – whether primary judge erred in finding that identity of the true legal entity was a material fact of decisive character – whether primary judge erred in making the order for an extension of time

Limitation of Actions Act 1974 (Qld)

NF v State of Queensland [2005] QCA 110, considered
Randel v Brisbane City Council [1984] 2 Qd R 276, considered
Wood v Glaxo Australia Pty Ltd [1994] 2 Qd R 431; [1993] QCA 114, considered

COUNSEL: M S Trim for the applicant
D Rangiah SC, with S Cleary, for the respondent

SOLICITORS: Sparke Helmore for the applicant
Shine Lawyers for the respondent

[1] **MARGARET McMURDO P:** I agree with Daubney J's reasons and orders.

[2] **FRASER JA:** I agree with the reasons for judgment of Daubney J and the orders proposed by his Honour.

[3] **DAUBNEY J:** This is an appeal against an order made pursuant to s 31 of the *Limitation of Actions Act* 1974 ("*LAA*") by which the limitation period for a personal injuries action by the Respondent against the Appellant was extended.

Background

[4] The incident in which the Respondent claims to have been injured occurred in Weis Restaurant, Toowoomba, on 14 January 2009. In his affidavit in support of the application, the respondent described the incident as follows:

> "3. I state that on the evening of 14th January 2009, I was having dinner with a business associate by the name of Mr Peter Hedley and my wife Coralee Gillogly at the Weis Restaurant located in Margaret Street, Toowoomba.
>
> 4. I recall that at some point during the meal without warning my chair that I was sitting on collapsed underneath and I fell heavily onto the floor striking my right knee.
>
> 5. Upon closer inspection, it was apparent that one of the legs on the chair had came off completely and that it appeared that the chair had previously been broken and had been attempted to be fixed with a 'glue' substance. I recall that I was assisted up from the floor and a new chair given to me. Although quite shaken and embarrassed, I did not want to leave the restaurant and cause a scene although I was in a bit of pain at the time as I was with a business associate and my wife at the time of the incident.

> 6. I recall that the incident was reported to a member of staff at the restaurant; I believe that young lady's name was also 'Coralee' (the same as my wife's first name or something similar) and although I can't recall if an incident report was completed what had occurred was witnessed by quite a few people and some of the staff at the restaurant. I also believe the restaurant may have given us a discount off our meal by way of an apology. I recall that when we left the restaurant I said something to Peter along the lines of 'God, my knee hurts and my arse is sore', or words to that effect."

[5] The Respondent, who was 60 years old at the time, was a farmer at Moree, New South Wales. After returning to his property, he consulted initially with his general practitioner for the swelling and pain he was suffering in his knee. After some months, he was referred to an orthopaedic surgeon. An MRI was undertaken, as well as investigation by arthroscopy. On 21 October 2009, the orthopaedic surgeon reported to the Respondent's general practitioner in relation to the arthroscopy as follows:

> "Under a general anaesthetic the arthroscope was initially introduced into the knee. There was severe patello-femoral osteoarthritis Grade 4, with an extensively torn degenerate medial meniscus. This was associated with Grade 2-3 changes in the medial compartment. The medial meniscus was resected back to a stable rim. There was a loose fragment identified in the superolateral pouch along with extensive synovitis. The loose fragment was removed. At the conclusion of the procedure the wound was infiltrated with local anaesthetic. A Celestone injection was given intra-articularly due to the extent of the synovitis."

[6] The Respondent subsequently attended on the orthopaedic surgeon and his general practitioner for further treatment.

[7] On 21 July 2009, the Respondent consulted his New South Wales solicitor, Mr Russell Booby, with respect to this incident and the injury he had suffered. Mr Booby was, at that time, acting for the Respondent in another piece of commercial litigation. Mr Booby's file in respect of the current matter was in evidence before the learned primary judge on this application. In an affidavit filed below, Mr Booby confirmed, inter alia, that he "sent or received, as appropriate, each letter, facsimile and email" on the file and that each file note was an accurate record of the contents of his discussions with the Respondent on the occasions noted. Mr Booby was not required for cross-examination before the learned primary judge.

[8] Mr Booby's file note of his conference with the respondent on 21 July 2009 sets out details of the date and location of the incident, and then records:

> "→ discussion re time limits for claim – 3 yrs – QLD may be different - <u>check</u>
> → asked AG to write out a statement setting out the details
> → we will send Costs Agreement ASAP – ok to write to insurer but nothing more until CA."

[9] On 22 July 2009, Mr Booby wrote to "Weis Restaurant" at its Margaret Street, Toowoomba address, advising that he acted for the Respondent, giving brief details of the relevant incident, and asking that they advise of the name of their insurer.

[10] On 31 July 2009, a liability claims officer with the Appellant's insurer responded with a letter relevantly captioned "Our Insured : Weis Restaurant Toowoomba" and which said:

> "We acknowledge receipt of your letter dated 22 July 2009. We confirm that we are the liability insurer for Weis Restaurant Toowoomba.
>
> We are currently investigating this incident; once our investigations are complete we will contact you."

[11] On 16 October 2009, Mr Booby wrote to the insurer asking for an update. The insurer responded on 20 October 2009, advising that investigations were ongoing and asking that Mr Booby, in the interim, provide details of the Respondent's claim.

[12] On 17 November 2009, Mr Booby wrote the following letter to the Respondent:

> "I refer to the above matter and note that I have recently received a letter from WFI, the insurers for Weis Restaurant in Toowoomba and that they have asked for details of your claim.
>
> I would now like to employ the services of Barrister, Ms Helen Wall, who specialises in Personal Injury matters. In order to determine what you money you may be entitled to.
>
> I have enclosed for your kind attention a costs agreement. For us to continue with this matter we would ask that you kindly sign and return the agreement at your earliest convenience at which point we will write to Ms Wall to seek her opinion regarding this claim."

[13] A standard form costs agreement was enclosed with that letter.

[14] The Respondent next consulted with Mr Booby in relation to this matter on 2 February 2010. Mr Booby's file note of that conference relevantly records:

> "→ advise AG that I cannot act unless I have a signed cost agreement
> → discussed outstanding fees in the Hart matter & that I need to ensure fees are paid <u>before</u> I will take on this matter
> → he said he will <u>get it done</u>
>
> <u>ACTIONS</u>
> 1. NIL until the CA is signed."

[15] On 13 April 2010, the insurer wrote to Mr Booby advising that its investigations were complete and noting the details of the Respondent's claim had not been provided. On 5 May 2010, Mr Booby then wrote to the Respondent in the following terms:

> "I note that the Insurer has completed their investigation into the incident.
>
> In order for them to proceed with the matter they need to be provided with your account of the incident.

> If you would please provide this to us at your earliest convenience, we will forward your response to the insurer for assessment."

[16] Mr Booby's next file note is of an attendance on the Respondent on 9 September 2010. The note records that Mr Booby spoke with the respondent about the fact that Mr Booby had not received the costs agreement for this matter and that Mr Booby was not acting without the signed costs agreement due to payment issues in the other litigation. The note records that the Respondent advised that he would see a solicitor in Queensland, to which Mr Booby responded that that was a good idea, but that the Respondent "must be clear that without the [signed costs agreement Mr Booby is] not acting".

[17] The next file note related to an attendance by Mr Booby on the Respondent on 28 June 2011. The note contains numerous references to the other litigation. In respect of this matter, the note records Mr Booby raising the fact that the respondent had not responded to Mr Booby's letters of 17 November 2009 and 5 May 2010. The note records:

> "... - advised him that I must have signed costs agreement and his statement of the facts of the event before I can pursue the matter – he said that he might have lost the other one – I gave him a photocopy of the original CA ... I suggested that he should perhaps think about instructing another solicitor – he says that he has talked to 'someone in Mooree' – I told him that the 3 years runs out on 14 January next year and that whoever he was going to use would need to be given instructions asap – he said 'I will go home and think about it and will look at it when I have a chance' – I said 'We talked about this back in feb 2010 and u said u would get it done if u wanted me to act'."

[18] On 29 June 2011 the Respondent sent Mr Booby a fax comprising a brief handwritten statement of the incident and the injury suffered.

[19] On 1 July 2011 Mr Booby wrote the following letter to the Respondent:

> "I confirm our recent discussions (28/6/11) and I acknowledge your fax of 29/6/11 to my request (of 5 May 2010) for particulars.
>
> I note that despite my request you did not return the signed cost agreement which I originally sent to you in November 2009 and which I reminded you about a few days ago.
>
> As I discussed with you I am not able to act in this matter unless I have a signed cost agreement.
>
> I reiterate my verbal advice of 28/6/11 that your claim will run out at a date being 3 years from that date of the incident."

[20] On 21 December 2011, Mr Booby sent a fax to the Respondent attaching the following letter:

> "I note that I wrote to you on 17/11/2009 and included in my letter to you a cost agreement for this matter which I asked that you sign and return.
>
> In the same letter I indicated that I could not progress this matter unless the cost agreement was provided by you.

> To date I have not received that cost agreement.
>
> I advise that this claim has a 3 year statute of limitations which expires on 14 January 2012 after which time the claim cannot be made.
>
> I am unaware whether you have instructed another solicitor in the matter and if so I would ask that you advise them without delay that the above limitation applies.
>
> If you wish to proceed with the claim you should instruct a solicitor in Queensland prior to the 14 January 2012."

[21] In his affidavit, the Respondent said that he was "deeply shocked and angry" when he received that fax of 21 December 2011. He attempted to contact Mr Booby, but was unable to reach him due to the Christmas/New Year break. The Respondent said that he then tried to contact several law firms in Queensland, but most were closed down for Christmas. He was not able to contact Mr Booby until 9 January 2012. The Respondent said that Mr Booby told him that if the Respondent could not find anyone in Queensland to act for him then he would have a barrister lodge the claim in Court but that he [i.e. Mr Booby] would not be doing it. The Respondent said:

> "I was shocked and stunned as I had been in his office for almost three years off and on for various legal matters and not once had he said anything to me about a time limit, nor that he hadn't gotten me to sign a client agreement."

[22] On 9 January 2012, Mr Booby sent a further fax to the Respondent which referred to discussions they had had that day about "no win – no fee" lawyers in Queensland. Mr Booby gave the Respondent the names of three such firms and continued:

> "I confirm my previous advice that the claim must be made before 14 January 2012.
>
> I have spoken with a 'pay for service' barrister in Qld and I confirm that the fee to file the statement of claim would be $4000 payable in advance."

[23] On 11 January 2012, the Respondent engaged his current Queensland solicitors. On 13 January 2012, an originating application was filed on behalf of the Respondent seeking, relevantly, the following orders:

> "1. The period of limitation for the Applicant's claim against the Respondent for damages for personal injuries sustained by the Applicant on 14 January 2009 be extended pursuant to Section 31 of the *Limitation of Actions Act* 1974 (Qld).
>
> 2. The Applicant be granted leave to start a proceeding in the court for damages based on a liability for personal injury against the Respondent pursuant to Section 43 of the *Personal Injuries Proceedings Act* 2002 ('the Act');
>
> 3. The proceeding be stayed pending compliance with Part 1 of Chapter 2 of the Act or the proceeding is discontinued or otherwise ends."

[24] After several directions hearings, the application was heard on 23 May 2012.

[25] The Respondent was the only witness who gave oral evidence – he was required for cross-examination. In his affidavit, the Respondent made no reference to having received a number of Mr Booby's letters, nor did he refer to having received advice from Mr Booby with respect to the limitation period. Under cross-examination, the Respondent asserted that Mr Booby had not advised him about the limitation period in the meeting on 21 July 2009, that the question of Mr Booby not acting unless he received a signed costs agreement was not discussed on 2 February 2010, that he did not receive Mr Booby's letter of 5 May 2010, that Mr Booby did not tell him in the meeting on 9 September 2010 that he could not act without the signed costs agreement because of payment issues in the other matter, and that he did not receive Mr Booby's letter of 1 July 2011.

[26] The learned primary judge, who had the advantage of seeing and hearing the Respondent, said that the Respondent impressed him as an honest witness, but went on to say:

> "Whilst I do not doubt the [Respondent's] honesty, I am concerned about the reliability of his memory – at least so far as matters which, I think it fair to say, he would have regarded as being of relatively small moment at the time they are said to have occurred."

[27] Importantly for present purposes, however, the Respondent expressly agreed in evidence that by the middle of 2009, when he first consulted with Mr Booby, the Respondent "had decided to pursue a claim against Weis's Restaurant" for his injury.[1] He again confirmed this later in his cross-examination. It was then suggested to him that learning about the fact that Weis Restaurant Toowoomba Pty Ltd ran Weis Restaurant was not important to him, to which the Respondent that he had only ever known it as "Weis Restaurant" and not as "proprietary limited", and then again agreed with the proposition that in 2009 he was determined to pursue the claim against Weis Restaurant.

The decision below

[28] After setting out the factual background and relevant provisions of the *LAA*, the learned primary judge commenced his consideration of the case as follows:

> "39. To succeed in this application the applicant must first show, on the balance of probabilities, that:
>
> a. a material fact relating to his right of action
> b. was not within his means of knowledge.
> c. until a date after the commencement of the year last preceding the expiration of the period of limitation.
>
> 40. The only fact relied upon as being a 'material fact relating to [the applicant's] right of action' is the true identity of the proposed defendant, *viz*. Weis Restaurant Toowoomba Pty Ltd."

[29] His Honour then found (at para 46) that he was satisfied on the material before him that the Respondent did not know "that the company Weis Restaurant Toowoomba Pty Ltd was the legal identity which it would be necessary to name as a defendant if he were to bring an action until 5th April 2012".

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1 AR 14.

[30] The learned primary judge further found, for the purposes of the application, that the Respondent and Mr Booby "at least in the initial stages had a solicitor and client relationship, and that the [Respondent] reasonably believed that Mr. Booby was acting for him in respect of his claim against the restaurant". His Honour continued:

> "In so finding I am mindful that the correspondence in Mr. Booby's file demonstrates that there were numerous assertions by Mr. Booby that he would not act until a costs agreement was signed. But in fact Mr. Booby did act on the applicant's behalf by engaging in correspondence with the restaurant proprietors initially, and then with the insurers. At no relevant time – so far as I am aware – did he say to the insurers that the applicant was no longer his client."

[31] Importantly for the purposes of this appeal, the learned primary judge held:

> "54. In my view the actual identity of the company operating the restaurant was, within the meaning of the section, a material fact of a decisive character. It was critically important to know against whom an action might succeed."

[32] His Honour then turned to consider the question whether this material fact was not within the Respondent's means of knowledge prior to 14 January 2011. After referring to the judgment of Keane JA in *NF v State of Queensland*,[2] the learned primary judge said:

> "59. Accepting, as I do, that the applicant had retained Mr Booby to act for him in his personal injuries claim from about mid-July, 2009 – and that that circumstance prevailed until at least mid-2010 it seems to me that it is clear that the applicant had indeed taken all reasonable steps to find out the relevant fact. He would have known, one might suppose, that his solicitor had written to 'the restaurant' – and that the insurer of 'the restaurant' had been corresponding with his solicitor. I cannot conceive how it might be thought that he should have done something further to ascertain the legal identity of the operator of 'the restaurant'."

[33] The learned primary judge then turned to the question as to whether the Respondent had established that there was evidence to establish the Respondent's right of action. His Honour referred to the circumstances of the collapsing chair, the observation of "apparently shoddy earlier repairs" to the chair, and the suffering of significant injury. He thought it "not unreasonable" to suppose that some employees of the restaurant would have been aware of the nature of the repairs to the chair and should have been aware that there was a risk of the chair not standing up to repeated use. He concluded:

> "65. If in fact the employers were not aware of the nature of the repair then that to me would suggest that those responsible for running the restaurant did not have a proper system for inspecting such critically important items as the chairs.
>
> 66. In my view there is ample evidence to satisfy the requirement of the *Act*, whether the cause of action be thought to be delictual or contractual."

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[2] [2005] QCA 110.

[34] The learned primary judge also rejected an argument advanced on behalf of the Appellant. He accepted that former employees of the Appellant may have moved on, but said that this did not mean that they would be impossible to locate. His Honour found that nothing had been advanced on behalf of the Appellant to demonstrate that the Appellant would suffer such prejudice in the conduct of its defence as to require that the application be denied.

Arguments on appeal

[35] It was contended by the Appellant before this Court that the learned primary judge had erred in four respects:

(a) The Respondent did not establish that he had a right of action – there was no evidence which justified the finding that the Respondent had a claim to pursue, nor the finding that "Weis Restaurant Toowoomba Pty Ltd" was the "company operating a restaurant" and the proper defendant to any action;

(b) The Respondent did not take reasonable steps to discover the identity of the operator of the restaurant – he could have discovered that fact, but took no real steps to advance his claim from mid-2009 to early 2012;

(c) The identity of Weis Restaurant Toowoomba Pty Ltd was not a material fact of a decisive character. Learning the identity of the company would not lead a reasonable person to pursue the claim and the Respondent admitted that he intended to pursue the claim from July 2009 onwards, when it became apparent he had a serious knee injury;

(d) The evidence suggested that the Appellant would be prejudiced by extending the period because a witness is no longer in the Appellant's employ.

Material fact of a decisive character

[36] It is convenient to deal first with the question whether the learned primary judge erred in holding, in effect, that knowledge by the Respondent that "Weis Restaurant Toowoomba Pty Ltd" was the legal entity which operated the restaurant was a material fact of a decisive character, in the circumstances of this case.

[37] Section 31(2) of the *LAA* confers on the Court a discretion to extend the limitation period for a personal injuries action when, relevantly, it appears to the Court, *inter alia*, "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 the date specified in s 31(2)(a).

[38] By subsection 30(1)(a)(ii), the "material facts relating to a right of action" include the identity of the person against whom the right of action lies.

[39] Subsections 30(1)(b) and (c) provide:

> "(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 mans 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."

[40] In *Randel v Brisbane City Council*,[3] McPherson J (as he then was) explained:[4]

> "In determining whether time should under s. 31(2) be extended there are three matters to be considered under subsecs. (a), (b) and (d) of s. 30. Essentially these are: (a) whether the unknown fact relating to the right of action is a 'material' fact within the meaning of that subsection; (b) whether the material facts relating to a right of action are 'of a decisive character'' and (d) whether the fact in question was not within the means of knowledge of the plaintiff. Of these, the standard to be applied in determining the second of these matters, involving as it does the behaviour of a reasonable man, is not related to the mentality, personal idiosyncracies, or behaviour of the particular plaintiff in question. The assessment required by this provision is entirely objective. On the other hand, the background and situation of the plaintiff are relevant to the determination whether he has under s. 30(d)(ii) taken 'all reasonable steps' to ascertain a fact: see *Castlemaine Perkins Limited v. McPhee* [1979] Qd.R. 469, 473. The questions to be asked and answered under each of subsections (b) and (d) are however quite distinct and independent. With great respect to what was said to by Wanstall C.J. in *Re Sihvola* [1979] Qd.R. 458, 466E, it is not legitimate to import into the inquiry under s. 30(d) the reference to be found in s. 30(b) to the phrase 'the reasonable man'."

[41] It is clear enough that the discretion under s 31(2) only arises if an applicant satisfies the Court that a "material fact of a decisive character" was not within his or means of knowledge. It is also clear enough that not every material fact is one "of a decisive character". An applicant may be ignorant of a material fact (as, for example in this case, the precise legal identity of the person against whom a right of action lies) but "it will not be a material fact of a decisive character if the reasonable man, having taken appropriate advice on the facts of which the [applicant] did have knowledge, would regard those facts as showing that an action would have a reasonable prospect of success and ought to be taken".[5]

[42] As I have already noted, the only fact in this case which the Respondent sought to characterise as being of the necessarily decisive character was the legal identity of the owner of the restaurant. In my view, however, the central finding below that the actual identity of the company operating the restaurant was a material fact of

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3 [1984] 2 Qd R 276.

4 At 277-278.

5 *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234, per Wilson J at 248; see also Deane J at 251.

a decisive character because it was "critically important to know against whom an action might succeed" cannot be sustained. On his own evidence, the Respondent had, by mid-2009, resolved to pursue his claim against Weis Restaurant for the personal injuries he had suffered as a consequence of the incident on 14 January 2009. By subsection 30(1)(b)(i), a material fact relating to a right of action is of a decisive character only if, relevantly, a reasonable person who knew that fact and had taken appropriate advice on that fact would regard that fact as showing that an action on the right of action would have a reasonable prospect of success and result in an award of damages sufficient to justify the bringing of the action. On the facts of this case, there was simply nothing about the precise legal entity which owned this restaurant which went to that necessary question. It is clear that the Respondent not only knew of all of the facts which showed (from his perspective) that he had an action with reasonable prospects of success, he had in fact decided to pursue that action. It was not necessary for him to know the precise legal identity of the owner of the restaurant in order to pursue the action. On his own evidence, he knew its business name, i.e. "Weis Restaurant". The proceeding he had decided to pursue could have simply been instituted against that business name, regardless of whether it was a registered or unregistered business name.[6]

[43] Accordingly, I consider that, on the facts of this case, the identity of "Weis Restaurant Toowoomba Pty Ltd" as the actual identity of the company operating the restaurant was not a material fact of a decisive character for the purposes of s 31(2) of the *LAA*. That being the only such fact sought to be relied on by the Respondent as justifying an exercise of the discretion to extend time in his favour, it follows that I find both that the learned primary judge erred in making the order for an extension of time and that this is not a case in which, on the evidence, the discretion to extend the limitation period is enlivened. On that basis, the appeal should be allowed.

[44] The remaining matters argued on appeal can be dealt with in relatively short compass.

Evidence to establish the right of action

[45] The Appellant argued that the evidence below was insufficient for the Court to be satisfied, for the purposes of s 31(2)(b) of the *LAA*, that there was evidence to establish the right of action apart from the defence founded on the expiration of the period of limitation.

[46] The relevant findings by the learned primary judge were as follows:

> "60. The last of the statutory hurdles for the applicant to overcome is that he must demonstrate that 'there is evidence to establish the right of action ...'
>
> 61. Again much has been written on the proper approach to this issue, and again I do not intend to spend time reviewing them. They demonstrate, in my view, that the applicant does not have to prove his case twice – once on the application to extend time and then at trial. It seems to me that the applicant must be able to point to some 'evidence' which if accepted by a trial judge will establish the right of action.

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6 *Uniform Civil Procedure Rules*, rr 89 and 90.

> 62. For me this is perhaps the easiest part of my determination. There is evidence of the applicant's being at the restaurant; of his chair collapsing from under him; of his thus falling to the floor; of his observation of apparently shoddy earlier repairs to the chair; and of his suffering significant injury.
>
> 63. It is important to bear in mind that we are here dealing with a restaurant. It will be receiving patrons of all shapes and sizes who will spend most of their time whilst patronising the establishment sitting on the chairs provided. I think it fair to say that one's ordinary experience of life would suggest that in such circumstance to repair a broken chair merely by glueing would be to court disaster.
>
> 64. In my view it is not unreasonable to suppose that some employees of the restaurant would have been aware of the nature of the repairs to the chair – and hence, as it seems to me, should have been aware that there was a risk of the chairs not standing up to repeated use.
>
> 65. If in fact the employers were not aware of the nature of the repair then that to me would suggest that those responsible for running the restaurant did not have a proper system for inspecting such critically important items as the chairs.
>
> 66. In my view there is ample evidence to satisfy the requirement of the *Act*, whether the cause of action be thought to be delictual or contractual."

[47] To satisfy the requirement under s 31(2)(b) that there is evidence to establish the right of action, the respondent needed only point to the existence of evidence which it could reasonably be expected would be available at the trial and which would, if unopposed by other evidence, be sufficient to prove his case.[7] In the present case, it was probably unnecessary for the learned primary judge to embark on the suppositions expressed in paragraphs 64 and 65 of his reasons. In paragraph 62, his Honour identified evidence which, on its face, could be regarded as sufficient to establish the cause of action. Having regard to that evidence, I do not consider that the learned primary judge erred in finding that the requirement of s 31(2)(b) had been satisfied.

Taking reasonable steps to discover the identity of the operator of the restaurant

[48] Given my view that the fact of the precise legal identity of the owner of the restaurant was not a material fact of a decisive character, it is not necessary to pursue the question whether that fact was not within the means of the Respondent's knowledge. Given the arguments advanced on appeal, however, I should make the following brief observations.

[49] The question whether this particular fact was not within the Respondent's means of knowledge directs attention to s 30(1)(c) of the *LAA*. I have set out above in paragraph [30] the learned trial judge's reasons for finding that this particular fact was not within the Respondent's means of knowledge. Central to the learned

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7 *Wood v Glaxo Australia Pty Ltd* [1994] 2 Qd R 431, per Macrossan CJ at 434-435.

primary judge's reasoning was the notion that the Respondent had retained Mr Booby to act generally in the personal injuries claim from about mid-July 2009, and that this sufficed for the purpose of the Applicant having taken all reasonable steps to find out the relevant fact.

[50] The difficulty with the approach adopted below, however, was that the evidence simply did not support the learned primary judge approaching the matter on the basis that Mr Booby had a general retainer to act in the Respondent's personal injuries claim from mid-2009. The evidence was clear that Mr Booby's retainer was limited to conducting initial correspondence with the restaurant's insurer. The fact of that limited retainer also needs to be viewed in the context of the Respondent's evidence that by the time the Respondent first consulted with Mr Booby, the Respondent had determined that he was going to pursue a claim against the restaurant in respect of the personal injuries he had suffered. A reasonable person in that position, as at mid-2009, would have given his solicitors appropriate general instructions to pursue the personal injuries claim. A solicitor, so instructed, would then easily have been able to ascertain the legal identity of the owner of the restaurant by the simple expedient of a business name search and/or by pursuing the notice of claim procedures prescribed under the *Personal Injuries Proceedings Act* 2002 – the giving of a notice of claim under s 9 would have necessitated responses either under s 10 or s 12 in which the actual legal identity of the owner would have been disclosed.

[51] Accordingly, I consider that the learned primary judge's finding that, in effect, the Respondent had taken all reasonable steps to find out this fact was not available on the evidence.

Prejudice

[52] As to the contention that the learned primary judge erred by failing to accede to the Appellant's submission that the application should be refused because of prejudice, the only matter to which the learned primary judge was directed was the fact that a former employee, who would be a necessary witness for the defendant's case, was no longer employed by the Appellant. The learned primary judge was not persuaded that this fact of itself amounted to sufficient prejudice to refuse the application. His Honour said it was hardly surprising that a former employee had "moved on", and that the mere fact that the employee had moved on did "not mean that it will now prove impossible" to locate the employee.

[53] In fact, the only evidence before the learned primary judge concerning this former employee was in an affidavit of the restaurant's manager, Mr Pohlman, who referred to the incident on 14 January 2009 and said:

> "Following the incident, I recall that an incident report form about the incident was completed by one of the Respondent's former employees, Coralee Smith and given to me; however, I am unable to locate a copy of that document."

[54] There was no evidence put before the learned primary judge with respect to any attempts which had been made to locate Ms Smith, let alone any evidence which suggested that she was not able to be located.

[55] In my opinion, no error has been demonstrated in respect of the learned primary judge's approach on this point.

Conclusion

[56] In the circumstances outlined above, it is clearly appropriate for the Appellant to have leave to appeal under s 118 of the *District Court of Queensland Act* 1967.

[57] For the reasons set out above, I would order as follows:

1. That the appellant have leave to appeal.
2. That the appeal be allowed.
3. That the order made in the District Court on 22 June 2012 be set aside, and that in lieu thereof it be ordered that the originating application filed 13 January 2012 be dismissed with costs.
4. That the Respondent pay the Appellant's costs of the appeal.