SUPREME COURT OF QUEENSLAND

CITATION:	*Anderson v Gofish Pty Ltd & Ors* [2017] QSC 30
PARTIES:	**NEVILLE SCOTT ANDERSEN** (plaintiff) **v** **GOFISH PTY LTD ACN 071 663 011** (first defendant) **CIVIL MINING AND CONSTRUCTION PTY LTD ACN 102 557 175** (second defendant) **DOWNER EDI WORKS PTY LTD ACN 008 709 608** (third defendant) **PROBUILD CIVIL PTY LTD ACN 010 870 587** (fourth defendant) **EMBERWELL PTY LTD ACN 010 448 530** (fifth defendant/third party) **VSL AUSTRALIA PTY LTD ACN 000 528 914** (sixth defendant/second third party) **DEPLIN PTY LTD ACN 010 392 908** (seventh defendant) **AAI LIMITED ACN 005 297 807** (eighth defendant) **TES QLD PTY LTD ACN 136 425 682** (third third party/respondent)
FILE NO/S:	No BS6128 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application for extension of time
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	23 February 2017
DELIVERED AT:	Brisbane
HEARING DATE:	2 February 2017
JUDGE:	Boddice J
ORDER:	**Orders as per draft, initialled by me and placed with the papers**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIOD – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER – GENERALLY – where the plaintiff suffered catastrophic injuries requiring limb

amputation when a concrete parapet fell on him at a worksite during it's unloading - where the plaintiff became aware of contractual obligations between relevant parties out of time – where the plaintiff applies to extend the limitation period - whether new information constitutes a material fact of a decisive character – whether extension of time should be granted

Limitation of Actions Act 1974 (Qld) s 31
Personal Injuries Proceedings Act 2002 (Qld)
Uniform Civil Procedure Rules 1999 (Qld)

Dick v University of Queensland (2000) 2 Qd R 476; [1999] QCA 474, applied
Honour v Faminco Mining Services Pty Ltd [2009] QCA 352, cited
NF v State of Queensland [2005] QCA 110, cited
Moriarty v Sunbeam Corporation Limited (1988) 2 Qd R 325; [1988] FC 024, cited

COUNSEL:	M K Conrick for the applicant M O'Sullivan for the respondent
SOLICITORS:	DM Wright and Associates for the applicant Lander and Rogers for the respondent

[1] On 21 June 2016, the plaintiff commenced this proceeding against the first to eighth defendants claiming damages for personal injuries sustained by him on 7 December 2011 when he was struck by a precast concrete bridge parapet weighing approximately 3.3 tons. The parapet had dislodged from a semitrailer during an unloading process involving a mobile crane at a construction site near Cooroy in the State of Queensland.

[2] Each defendant has filed Notices of Intention to Defend and Defences and Notices Claiming Contribution. The second, third and fourth defendants also issued a Third Party Notice against the fifth and sixth defendants and a further entity, Trades Employment Services Pty Ltd (TES) on 8 August 2016.

[3] By application, filed 23 December 2016, the plaintiff sought an order, pursuant to s 31 of the *Limitations of Actions Act* 1974 (Qld) ("the Act"), for the time to institute proceedings for damages for the personal injuries suffered by him on 7 December 2011 against TES to be extended to 26 February 2017. The application sought further ancillary relief under the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") and the

Personal Injuries Proceedings Act 2002 (Qld) ("PIPA"). TES opposes an extension of time.

Background

[4] The plaintiff is a single man born on 9 July 1960. His regular occupation is that of heavy transport driver. As a consequence of the incident, the plaintiff sustained an amputation of his right dominant arm above the elbow and of his right leg through the hip. The plaintiff alleges he has suffered significant loss, including a loss of his earning capacity in the future.

[5] The limitation period for the commencement of proceedings by the plaintiff in respect of the incident in which he suffered personal injuries expired on 7 December 2014.

[6] No proceedings were commenced prior to that date having regard to the legislative requirements for the undertaking of pre-proceeding procedures prior to the commencement of formal proceedings.

Parties

[7] At the time of the incident, the plaintiff was employed as a heavy transport driver by the first defendant. It operated as a labour hire company, hiring the plaintiff's services to the seventh defendant.

[8] The second, third and fourth defendants are members of a joint venture ("Synergy JV") carrying out contract work in relation to a realignment of a section of the Bruce Highway near Cooroy in the State of Queensland. The joint venture was in occupation of the construction site at which the plaintiff sustained his severe personal injuries on 7 December 2011.

[9] The fifth defendant was the operator of the mobile crane on the day in question. Synergy JV had contracted with the fifth defendant to provide mobile crane services to the site, including for the unloading of parapets from transport vehicles.

[10] The sixth defendant was contracted by Synergy JV to manufacture and deliver to the site the concrete bridge parapets. The sixth defendant engaged the seventh defendant to deliver the parapets to the site.

[11] The eighth defendant is the compulsory third party insurer of the mobile crane and of the prime mover and trailer involved in the incident when the parapet dislodged striking the plaintiff.

[12] TES was an entity engaged by Synergy JV to supply skilled labour to the construction site. That skilled labour included supervisors of the site, including supervision of the unloading of materials. At the time of the incident, a supervisor provided by TES, Paul Pulkkimen, was supervising the unloading of the parapets from the delivery vehicle.

Pre-proceeding

[13] Prior to the institution of this proceeding, numerous steps had been undertaken by the plaintiff, pursuant to the *Motor Accident Insurance Act*, the *Workers Compensation and Rehabilitation Act* and PIPA.

[14] The plaintiff served a notice of accident claim form on the eighth defendant on 6 June 2012. Orders were made preserving the plaintiff's right of action against that defendant on 28 November 2014.

[15] On 27 October 2014, the plaintiff served an urgent common law claim notice on WorkCover, the insurer for the plaintiff's employer, the first defendant.

[16] On 7 November 2014, the plaintiff served notices pursuant to PIPA on the second to seventh defendants. Those parties subsequently indicated they were proper respondents, that the PIPA notices were compliant and that the limitation period was extended.

[17] On 28 April 2015, WorkCover denied liability and asserted that the plaintiff's injuries were caused by the second to seventh defendants. WorkCover issued notices of contribution to those defendants. On 15 May 2015, orders were made preserving the plaintiff's right of action against those defendants.

[18] Pursuant to those pre-proceeding procedures, arrangements were made for compulsory conferences to be held with all defendants on 27 April 2016. On 26 February 2016, the plaintiff was advised by Synergy JV that they served a contribution notice on TES in September 2015. Synergy JV advised that as the contribution notice had been served outside the permitted time, the agreement of the parties was sought to TES being added to the plaintiff's claim and that if TES did not consent to be so added they had instructions to make application for TES to be added and attend the compulsory conference.

[19] The compulsory conferences were held on 27 April 2016. TES participated in those conferences. The claim was not resolved at those conferences. The proceeding was subsequently instituted by the plaintiff.

Proceeding

[20] The plaintiff alleges that Synergy JV gave him access to the site on the day in question and escorted him to the delivery point where he was directed by Synergy JV to park at a particular spot to enable the parapets to be unloaded by the mobile crane. The plaintiff further alleges that whilst he was attempting to stow away the chains used to secure the parapets, the mobile crane crew commenced to unload the right hand rear parapet causing the left hand rear parapet to dislodge and topple onto the plaintiff.

[21] The plaintiff alleges his injuries, loss and damage were caused or contributed to by the negligence of the defendants. Relevantly, for present purposes, the plaintiff alleges Synergy JV was in possession, occupation and control of the site and therefore vicariously liable for the negligence of its employees and of their agents in the performance of the construction contract.

[22] The particulars of negligence relied upon by the plaintiff include that the duties to be undertaken required the establishment of exclusion zones and the undertaking of risk assessments. It is alleged that Synergy JV breached its duty in failing to establish an exclusion zone, failing to undertake an adequate written risk assessment and failing to institute and establish a safe system of unloading trucks by mobile crane.

[23] In their defence, filed 22 July 2016, Synergy JV deny they were liable in negligence to the plaintiff for his alleged injuries. They allege the plaintiff was escorted to the delivery point by Paul Pulkkimen "who was supplied to Synergy JV by TES to provide supervision services on the site". Synergy JV also denies the plaintiff was directed by Synergy JV. He was directed by Pulkkimen.

[24] Synergy JV further allege they engaged TES by written contract to supply Pulkkimen for the purpose of supervision and that they had a safe system of work which, if it had been adopted and insisted upon by Pulkkimen in his supervisory role, would have ensured the incident did not occur that day. Any failure of Pulkkimen to require the exclusion zone and adherence to any safe work system is not attributable to them as a matter of law.

[25] Synergy JV alleges TES were required to supply a leading hand to supervise the carrying out of the works and that Pulkkimen was not fit for the task of leading hand, ought not to have been supplied by TES and that TES failed to exercise reasonable care and skill in so supplying Pulkkimen.

[26] On 8 August 2016, Synergy JV filed a third party notice against TES. The statement of claim relies on the contractual obligations of TES to supply competent supervisors to Synergy JV for the performance of supervisory duties on the construction site.

[27] On 6 October 2016, TES filed its defence to that third party notice. The plaintiff filed his reply to Synergy JV' defence on 26 August 2016.

[28] On 29 August 2016, the plaintiff's solicitors requested TES's solicitors advise whether TES would consent to be joined as a defendant in the plaintiff's proceeding. In response, TES's solicitors sought a draft of the proposed application and supporting affidavit. That draft was supplied on 17 November 2016.

[29] On 22 November 2016, TES's solicitors advised that TES could not consent to be joined as a defendant. The application to join TES was filed on 23 December 2016.

The application

[30] The plaintiff asserts there was a material fact relevant to any cause of action against TES which was not within his means of knowledge until 26 February 2016. That material fact was that "the Synergy JV parties would allege that TES as a contractor, based on the terms of its contract, was responsible for the plaintiff's injuries and loss" as that contract cast responsibility for safety supervision on TES as an independent contractor.

[31] The plaintiff, through his solicitor, asserts that whilst he was aware that Pulkkimen had been supplied by TES to Synergy JV to work as a supervisor on the construction site, it was only after notification on 26 February 2016 that Synergy JV had served a Contribution Notice on TES, in which it was alleged that TES pursuant to a contract entered into between Synergy JV and TES, was obliged to supply skilled labour, and/or supervisors and to ensure that such personnel complied with such safety rules and participated in risk assessment, planning and formulating safety documentation, that he first became aware of the existence of a subcontract between Synergy JV and TES. The thousands of pages of documentation provided to him pursuant to Right to Information requests prior to that date did not contain that contract and did not provide any means of knowing that Synergy JV had such a contract.

[32] Whilst documentation received as part of the disclosure process contained references to the supervisor provided by TES, a review of that documentation as a whole revealed that the supervisor, whilst employed by TES, asserted he was supervising pursuant to work instructions given by Synergy JV's structural supervisor and that he at all times took directions and instructions from Synergy JV's structural supervisor. That assertion was supported by a statement from Synergy JV's structures supervisor who said, relevantly, that he gave directions and instructions to the entire workforce including the TES workforce and its supervisors. Synergy JV's own documents styled "Incident Report Closeout Summary" also referred to TES's supervisor as Synergy JV's structures supervisor.

[33] The plaintiff submits there is otherwise evidence to establish a right of action against TES and a consideration of the discretionary factors favours an extension of the time to commence proceedings against TES. There is no material prejudice to TES from such

an order. TES is already joined as a third party by Synergy JV. TES participated in the compulsory conference procedure prior to commencement of the proceeding.

[34] TES submits a consideration of the material as a whole establishes that there was no material fact of a decisive character not within the means of the plaintiff's knowledge prior to 26 February 2016. The plaintiff had received copies of relevant documentation by October 2014. The allegations of negligence against TES are drawn from those documents. Those documents plainly indicated that TES was a subcontractor who had provided the relevant supervisor. In those circumstances, the plaintiff was aware of all relevant facts which would have caused a reasonable person to conclude a right of action existed against TES as the employer of that relevant supervisor.

[35] The respondent submits a consideration of the affidavit material relied upon by the plaintiff reveals there is no newly learned material fact of a decisive character. At best, the plaintiff asserts the consequence of a consideration of those material facts was not realised by him until after receipt of the contribution notice. Facts already known constitute a material fact of a decisive character. Further, a newly discovered fact will not be of a decisive character if on the state of the evidence at a particular time the plaintiff, if appropriately advised, should have pursued an action before the discovery of that new fact.

[36] The plaintiff further asserts that at no stage prior to 26 February 2016 did Synergy JV respond to his notices of claim with an assertion they were not proper respondents by reason of their engagement of TES to supply supervisory services on the site. In the absence of such a contention, there was no reason to make enquiries with Synergy JV in relation to TES where the documentation provided to that date indicated Pulkkimen was working at all times at the direction of Synergy JV.

Law

[37] Section 31 of the Act provides:

> "31 **Ordinary actions**
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> (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 accordingly.

(3) This section applies to an action whether or not the period of limitation for the action has expired—

(a) before the commencement of this Act; or

(b) before an application is made under this section in respect of the right of action."

[38] A material fact relating to a cause of action is of a decisive character:

"… if, but only if, a reasonable man knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing –

(i) that an action on a right of action would, apart from the effect of the expiry of the period of limitation, have reasonable prospects of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action;

(ii) that the person whose means of knowledge in question ought in his own interests in taking his circumstances into account to bring an action on the right of action."

[39] The two pre-conditions for a material fact being of a decisive character are to be assessed from the point of view of a reasonable person who has taken "the appropriate advice on those facts".[1] Both conditions must be satisfied if the material fact is to have a decisive character.

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[1] *Honour v Faminco Mining Services Pty Ltd* [2009] QCA 352 at [73].

[40] A determination of whether an applicant satisfies the requirements of s 31 of the Act requires a step by step approach. First, to inquire whether the facts of which the applicant was unaware were material facts. Second, if they were, to ascertain whether they were of a decisive character. Third, if so, whether those facts were within the means of knowledge of the applicant before the specified date.[2]

[41] If, before knowing the material fact, a reasonable person would know facts that that person would regard, having taken appropriate advice, as showing that an action would have a reasonable prospect of success and result in an award of damage sufficient to justify the bringing of that action and that the potential claimant ought in that person's own interests and taking that person's circumstances into account bring an action, the material fact is not of a decisive character. However, if, without knowledge of that fact, a reasonable person, having taken the appropriate advice, would not regard the facts known to that person as showing that an action would have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action, the fact is of a decisive character.[3]

[42] A fact is only within the means of knowledge of a plaintiff when the steady preponderance of opinion or belief of a person who had taken all reasonable steps to ascertain that fact would have believed that that was so.[4]

[43] However, the establishment that there was a material fact of a decisive character relating to the right of action that was not within the applicant's means of knowledge before the requisite date does not of itself mean the limitation period is to be extended pursuant to that section of the Act. The applicant must also establish there is a prima facie case of liability against the respondent and that the discretion to extend the limitation period ought to be exercised in that applicant's favour. The exercise of that discretion requires consideration to be given to all the circumstances, including any prejudice to the respondent.

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2 *Dick v University of Queensland* [2000] 2 Qd R 476 at [26].
3 *Honour* at [74].
4 *Dick* at 488 [35].

[44] As to that consideration, Keane JA (with whom Williams JA and Holmes J (as the Chief Justice then was) agreed) said in *NF v State of Queensland*:[5]

> "The *Brisbane South* decision is concerned to ensure that an extension of time under the Act should not become the occasion for a trial which is unfair to the defendant. It is authority for the following propositions:
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> (a) the onus is upon the applicant who has satisfied the conditions in s 31(2) of the Act to show good reason for the exercise in his or her favour of the discretion vested in the court by that provision;
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> (b) the principal consideration which guides the exercise of that discretion is the concern whether a claim, which is prima facie out of time, may yet be fairly litigated;
>
> (c) if a fair trial is unlikely, the discretion conferred by s 31(2) should not be exercised in the applicant's favour."

[45] In *Moriarty v Sunbeam Corporation Limited*,[6] Macrossan J (as he then was) said of a material fact relevant to the nature and extent of the personal injuries sustained:

> "… an applicant for extension discharges his onus not simply by showing that he has learnt some new fact which bears upon the nature or extent of his injury and would cause a new assessment in a quantitative or qualitative sense to be made of it. He must show that without the newly learnt fact or facts he would not, even with the benefit of appropriate advice, have previously appreciated that he had a worthwhile action to pursue and should in his own interests pursue it."

Discussion

[46] Prior to expiry of the ordinary limitation period on 7 December 2014, the plaintiff was aware that the supervisor of the unloading process which resulted in his catastrophic injuries was an employee of TES who had been provided by TES to Synergy JV to work on the site. The fact that the supervisor was employed by TES and that TES was providing labour work for Synergy JV was apparent from a consideration of the voluminous material supplied pursuant to Right to Information requests in October 2014.

[47] In addition to that information, there was material available to the plaintiff which indicated that the supervisor supplied by TES was being given work instructions and directions by Synergy JV's structural supervisor. This material included a statement

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5 [2005] QCA 110 at [44].
6 (1988) 2 Qd R 325 at 333.

from Pulkkimen, a statement from Synergy JV's structures supervisor, Geoff Hill and Synergy JV's own documentation in relation to the incident which referred to Pulkkimen as Synergy JV's "structures supervisor".

[48] Whilst a consideration of that material could have caused a reasonable person in the plaintiff's position to conclude that TES may be a party liable for the actions of the supervisor provided by it to the site, I am not satisfied a consideration of that material as a whole should have caused a reasonable person in the plaintiff's position, having received appropriate legal advice, to conclude that a proceeding brought against TES, would have a reasonable prospect of success and result in an award of damages sufficient to justify the bringing of that action.

[49] The material as a whole supported the reasonable conclusion that the TES supplied supervisor was at all times acting under the direction and supervision of the Synergy JV's structures supervisor.

[50] Whilst the documentation referred to Pulkkimen as a "TES employed site supervisor" hired "to organise unloading of trucks" and stated that Pulkkimen directed the plaintiff where to park and further noted there was no evidence Pulkkimen had been trained in risk management processes, that no exclusion zone had been established by him and that Pulkkimen was not exercising proper control of the site, Pulkkimen in his own statement asserted that he was employed to assist the Synergy JV superlight structure supervisor, was given work instructions by Synergy JV's structures supervisor and took his directions and instruction from that supervisor. Synergy JV's structures supervisor, Geoffery Hill, also gave a statement to the effect that he gave directions and instructions to the entire workforce including the TES supplied supervisors. Synergy JV's own incident report referred to Pulkkimen as Synergy JV's structures supervisor.

[51] Whilst one of the investigation reports specifically referred to there being no evidence the TES's employed site supervisor had been trained in risk management processes, a consideration of the material as a whole, including the statement from Synergy JV' own structures supervisor, would not have caused a reasonable person in the plaintiff's position, having taking appropriate advice, to conclude proceedings against TES were likely to result in an award of damages sufficient to justify the bringing of such

proceedings. The preponderance of evidence supported the conclusion that Synergy JV was responsible for the overall supervision of the TES supplied supervisor who was supplied by a labour hire company providing some part of the workforce to Synergy JV.

[52] That position changed on 26 February 2016 when the plaintiff's solicitors, for the first time, received notification that Synergy JV asserted that TES had been engaged not merely to provide labour hire services but to provide a supervisor "who was competent to perform the contract works, to establish and enforce an exclusion zone in the lifting area, and to ensure that the lifting process was undertaken appropriately.

[53] Knowledge of the fact that TES had contractual responsibilities in the provision of the supervisors undertaking the construction work was a material fact of which the plaintiff was unaware. That material fact was of a decisive character. Without it the plaintiff, even having taken appropriate advice, would not have regarded the facts known by him as showing that a proceeding against TES would have a reasonable prospect of resulting in an award of damages sufficient to justify the bringing of that action.

[54] That fact was not within the plaintiff's means of knowledge before 26 February 2016. On the material the plaintiff had and Synergy JV's response to the notices of claim, there was no reason for the plaintiff through his legal representatives to have sought further documentation, namely, a copy of the contract between TES and Synergy JV.

[55] The plaintiff has established that a material fact of a decisive character relating to the right of action was not within his means of knowledge until a date after the commencement of the year last preceding the expiration of the period of limitation for the action. The plaintiff has also established there is evidence of the right of action apart from a defence founded upon the expiration of a period of limitation. TES did not assert otherwise.

[56] The fact the plaintiff has established the requirements of s 31 of the Act does not, however, entitle the plaintiff to an order for an extension of time unless this Court is satisfied by a consideration of the whole of the circumstances it is appropriate to do so. The onus is on the plaintiff to show good reason for the favourable exercise of the discretion.

[57] Relevant factors include any relevant prejudice to TES and a consideration of all of the surrounding circumstances including any delay on the part of the plaintiff in the bringing of the application. A further relevant factor is whether a fair trial can be had in the circumstances.

[58] Having considered all of the surrounding circumstances, I am satisfied in the exercise of the discretion, the plaintiff has shown good reason to grant the extension. TES is already a party to the proceeding, in that it has been joined as a third party by Synergy JV. TES has been a participant in the pre-proceeding process, participating in the compulsory conference process prior to the institution of these proceedings. There is no reason why a trial would not be fair. TES does not assert any material prejudice.

[59] Further, the plaintiff has not unreasonably delayed in bringing the application. Upon being apprised of the contents of the contribution notice, the plaintiff's solicitors immediately sought TES's consent to being joined as a defendant in this proceeding. The plaintiff thereafter provided a draft application and supporting affidavit in response to TES's request for consideration of that material. Upon TES indicating it would not consent, the plaintiff promptly filed the present application.

[60] A consideration of the circumstances also provides satisfactory explanations for the failure to comply with the statutory requirements of PIPA.

Conclusions

[61] The plaintiff has established all of the requirements necessary for an extension of time pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld). The limitation period for the bringing of proceedings against TES should be extended to 27 February 2017.

[62] The plaintiff has also shown reasonable excuse for the failure to comply with the statutory requirements of PIPA.

Orders

[63] For the abovementioned reasons, on 23 February 2017 I granted the plaintiff's application. I made orders in terms of the draft, initialled by me and placed with the papers.