# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Gillies v Dibbetts* [2000] QCA 156 |
| PARTIES: | **KAROLYN GILLIES**<br>(plaintiff/appellant)<br>**v**<br>**HANS EMILE LUDOLF DIBBETTS and JOANNA WILHELMINA DIBBETTS**<br>(first defendants/first respondents)<br><br>**JASON MARK THURLBY and RUTH ELIZABETH THURLBY**<br>(second defendants/second respondents)<br><br>**MERCANTILE MUTUAL INSURANCE AUSTRALIA LTD** ACN 000 456 799<br>(second third parties) |
| FILE NO/S: | Appeal No 8722 of 1999<br>SC No 6522 of 1998 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 5 May 2000 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 7 March 2000 |
| JUDGES: | McPherson and Thomas JJA, Wilson J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made. |
| ORDER: | **Appeal allowed.**<br>**(1) Order that the orders of the primary judge be set aside;**<br>**(2) Order that the amended plaint be renewed until 30 June 2000;**<br>**(3) Direct that the appellant re-serve the amended plaint on the first and second respondents;**<br>**(4) Direct that within 28 days of being served with the amended plaint pursuant to s 185 of the *Workers' Compensation Act* 1990 WorkCover Queensland may apply to have service upon it set aside;**<br>**(5) Direct that the appellant serve a copy of the order of this Court on WorkCover Queensland at the same time as** |

**the amended plaint is served on it;**
**(6) Order that at the expiration of 28 days from the filing of an affidavit of service upon WorkCover Queensland or upon the determination in its favour of any application by it to have service upon it set aside (whichever is the later), steps purportedly taken since 28 January 1997 be deemed valid and effectual as though they had been taken after service of the amended plaint on WorkCover Queensland;**
**(7) Order that the appellant pay the costs of the first and second respondents of and incidental to the applications before the primary judge to be assessed on the standard basis;**
**(8) Order that the first and second respondents pay the appellant's costs of the appeal;**
**(9) Order that the first and second respondents be granted an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973.**

CATCHWORDS: PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – service of plaint – requirement for service on the Workers' Compensation Board of Queensland under *Workers' Compensation Act* 1990 – service of amended plaint joining second defendants and making new allegations of employment relationship not effected – no power to excuse non-compliance with service requirement of statute – subsequent steps nullities – whether Court empowered under *Uniform Civil Procedure Rules* to renew process to allow service on statutory insurer – power to make orders about the conduct of proceedings – relevant factors – prejudice to insurer - whether statutory insurer should be served with applications to renew – orders on appeal

*Boocock v Hilton International Co* [1993] 1 WLR 1065, considered
*Brealey v Board of Management Royal Perth Hospital* (1999) 21 WAR 79, considered
*Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, referred to
*Brown v Coccaro* (1993) 10 WAR 391, applied
*Crawford v Brisbane Gas Co. Ltd* [1979] Qd R 226, referred to
*Jones v Jebras and Hill* [1968] 1 Qd R 13, referred to
*Jones v Sexton* [1941] QWN 25, considered
*Leal v Dunlop Bio-Processes International Ltd* [1984] 1 WLR 874, considered
*Moore v Boyne Smelters Limited* [1998] 1 Qd R 649, referred to
*Moore v Downey* [1955] QWN 34, considered
*Singh (Joginder) v Duport Harper Foundries Ltd* [1994] 1 WLR 769, applied

*Symes v Ryan* [1943] QWN 40, considered
*Tyson v Morgan* [2000] 1 Qd R 100, referred to
*Van Leer Australia Pty Ltd v Palace Shipping KK* (1980) 180 CLR 337, applied

*Appeal Costs Fund Act* 1973 s 15
*Workers' Compensation Act* 1990 s 185, s 191
*Motor Vehicles Insurance Regulation* 1937 reg 9
*Supreme Court Rules* 0.9 r.1, 0.93 r. 22
*Uniform Civil Procedure Rules* r 24, r 7, r 367, r 371

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| COUNSEL: | J G Crowley QC with P B De Plater for the appellant<br>G D O'Sullivan for the first respondents<br>D J Campbell for the second respondents |
| SOLICITORS: | Watling Roche Lawyers for the appellant<br>McMahons for the first respondents<br>Paul Clough for the second respondents |

[1] **McPHERSON JA:** I have read and agree with the reasons of Wilson J. I also agree with the orders proposed by her Honour.

[2] **THOMAS JA:** I agree with the reasons of and orders proposed by Wilson J.

[3] **WILSON J:** This is an appeal by the plaintiff against the decision of the primary judge dismissing an application for renewal of an amended plaint and temporarily staying the action.

[4] The appellant was a swimming instructor at the Caboolture Olympic Pool where she sustained injuries to her head, cervical spine and right hip on 10 November 1995. She alleges that she slipped on water on the floor which had leaked from a drinks machine or refrigerator.

[5] She commenced proceedings against Mr and Mrs Dibbetts (the first respondents) by the issue of a plaint out of the District Court at Maroochydore on 13 August 1996. Three causes of action were relied upon - breach of occupier's duty of care, breach of statutory duty and breach of contract of employment.

[6] The plaint was duly served on the Workers' Compensation Board of Queensland pursuant to s 185 of the *Workers' Compensation Act* 1990 on 20 August 1996. Shortly thereafter the Board by its solicitors wrote to the solicitors for the appellant denying that the first respondents were insured by it and seeking particulars of the alleged employment relationship. The appellant's solicitors replied on 10 September 1996 –

> "Our client was employed by the Defendants as a swimming instructor. She was to work each week day over a 4 week block. Our client dealt with Jason Thurlby who acted as a lifeguard at the pool. It was also Mr Thurlby that arranged all payments. It was our client's understanding that Mr Thurlby was assisting in the management of the pool and that she was at all times employed by the Defendants. Our client was paid approximately $20.00 per day that she worked. She was paid in cash at the end of the week."

[7] The Board declined to be joined as a defendant and did not take over the conduct of the litigation on behalf of Mr and Mrs Dibbetts. The first respondents joined Mr and Mrs Thurlby as first third parties, a number of insurers as second third parties and the Board as third third party. They discontinued the third party proceedings against the Board on 21 January 1997.

[8] On 28 January 1997 the appellant filed an amended plaint joining Mr and Mrs Thurlby as second defendants. It began –

> "1. At all material times the First Defendants and/[sic] Second Defendants:-
>
> (a) Carried on the business of a swimming school from the "Caboolture Olympic Pool" in premises situated at Cnr King Street and Bellmere Road, Caboolture, in the State of Queensland ("the premises");
>
> (b) Traded under the firm name or style of "Caboolture Olympic Pool".
>
> 2. Alternatively, at all material times, the Second Defendants operated a swimming school from the said premises.
>
> 3. Alternatively, at all material times, the First and/or Second Defendants carried on the business of a swimming school at the said premises.
>
> 4. At all material times the Plaintiff:
>
> (a) Was a member of the public who attended the said premises at the invitation of the Defendants; and/or
>
> (b) Was employed by the First Defendant and/or Second Defendants as a swimming instructor."

[9] Thus, the appellant made three (alternative) allegations as to her employment - that she was employed by the first respondents, that she was employed by the first and second respondents jointly, and that she was employed by the second respondents. The latter two were fresh allegations, and necessitated the service of the amended plaint on the Board. However, this was not done. On 4 February 1997 a copy of the amended plaint was sent to the solicitors who had acted for the Board when it was a third party. This was ineffective as service. Needless to say the appellant did not

file an affidavit of service of the amended plaint on the Board before purporting to take any further step in the action. See s 185(1)(d) of the Act.

[10] For almost two years the parties purported to take various interlocutory steps in the action without regard to the appellant's non-compliance with the mandatory requirements of s 185. On 29 June 1998 Derrington J made an order transferring the action to the Supreme Court. On 4 December 1998 Byrne J reviewed a number of personal injuries cases; he made an order, in terms of a draft prepared by the appellant, referring this action to mediation. The order included a provision that WorkCover Queensland (the successor to the Board) pay 20% of the costs of the mediation.

[11] On 7 January 1999 the solicitors for WorkCover wrote to the appellant's solicitors:-

> "We refer to your recent correspondence and telephone calls.
>
> We do not act for any party in this action. We did act for Workers' Compensation Board of Queensland as Third Third Party. The proceedings against the Third Third Party were discontinued by notice filed 22 January 1997.
>
> From correspondence which we continue to receive from other parties we note that a mediation was ordered by Byrne J. Unless some step has been taken since January 1997 to join WorkCover in the action, and we are not aware of any such step, the proposed mediation will not involve us.
>
> As we have no further instructions from WorkCover in the matter we do not propose to discuss the issues. If you have any submissions to make please put them in writing and we will submit them to WorkCover."

After further correspondence, WorkCover participated in the mediation which took place on 12 February 1999. A compromise was not reached.

[12] The appellant tendered a certificate of readiness to the respondents in March 1999. The second respondents' solicitor responded –

> "It has come to my attention that the amended Plaint which commenced the action against my clients has not been served on the Workers Compensation Board in accordance with the requirements of section 185 of the Workers Compensation Act 1990. I note that the original plaint (which did not include my clients as defendants) was so served.
>
> I am of the opinion that your failure to comply with the requirements of section 185 (so far as they relate to my clients) creates an effective clog which precludes any further action being taken against my clients.
>
> In the circumstances I do not propose to sign the tendered Certificate of Readiness or to take any further action until the requirements of

> section 185 have been complied with.
>
> If any application is brought seeking an extension of time to serve the Workers Compensation Board, I request that notice also be given to me so that my clients can make submissions at that time."

This was a tactical move on the part of the second respondents. On the hearing of this appeal their counsel said –

> "….tactically it's much better for the second defendants if the action is won just on occupier's liability."

[13] The appellant served the amended plaint on WorkCover on 7 July 1999 and filed an affidavit of such service on 2 August 1999. Of course by then the amended plaint was stale: *Uniform Civil Procedure Rules* r 24(1).

[14] On 23 July 1999 the second respondents filed an application to stay the action against them. They were to be supported by the first respondents and the second third parties. The appellant filed a cross application for orders –

> "1. That all steps in this action since 4 February 1999 [sic]* be deemed to have been taken after the 9th day of August, 1999;
>
> 2. That the requirement for a Request for Trial Date to be filed in this action be dispensed with;
>
> 3. That the trial be expedited and that the Plaintiff be given a date for hearing forthwith;
>
> 4. Such further or other order in the premises as to the Honourable the chamber Judge shall seem meet;
>
> 5. That the costs of and incidental to this application be costs in the cause."

* This was clearly an error: the date should have been 4 February 1997.

The appellant's application was not served on WorkCover.

[15] On the hearing of the applications the appellant sought leave orally nunc pro tunc to renew the amended plaint from 28 January 1998 and again from 28 January 1999, and an order nunc pro tunc waiving compliance with rule 24(5) of the *Uniform Civil Procedure Rules*. The primary judge rejected the oral request for nunc pro tunc orders, but dealt with the question of renewal of the amended plaint under paragraph 4 of the appellant's application.

[16] Non-compliance with the mandatory requirements of s 185 of the *Workers' Compensation Act* 1990 resulted in all intervening steps being nullities, at least with respect to the second respondents, but arguably also with respect to the first respondents, because of the fresh allegation of joint employment: see cases on

regulation 9 of the *Motor Vehicles Insurance Regulations* 1937 such as *Jones v Sexton* [1941] QWN 25; *Symes v Ryan* [1943] QWN 40 and *Moore v Downey* [1955] QWN 34.

[17] The service on WorkCover in July 1999 was ineffective because the process was stale. The primary judge refused to renew the amended plaint. He adverted to differences between rule 24 of the *Uniform Civil Procedure Rules* and order 9 rule 1 of the former *Supreme Court Rules*, doubting whether the new provision contemplates the making of consecutive orders at the one time. He was particularly concerned that delay could result in prejudice to WorkCover. It was nearly four years since the incident. The circumstances of the employment if any were vague and indefinite: there was a number of possible scenarios some involving liability on the part of the Board with the right of recourse against the employer. His Honour concluded –

> "The failure of the plaintiff to alert the Board at an early stage of those possible scenarios has affected the Board's capacity to make all the necessary enquiries to determine its possible liability with respect to her claim. The fact that the plaintiff has been unable to positively identify her employer, if any, to date clearly indicates that it will be difficult for the Board to make appropriate enquiries on the issue; certainly it will be more difficult to conduct that investigation now than it would have been 3 or 4 years ago.
>
> The Board has knowledge of a claim with respect to the first defendants but that does not mean that it is not prejudiced with respect to all the claims now being made. In *Musumeci* [1976] Qd R 135 the predecessor of the Board paid out Workers' Compensation but that did not of itself mean that there was "good reason" for renewing the writ.
>
> Having regard to all the circumstances of this case I am not satisfied that the plaintiff has shown there is "good reason" for renewing the claim (amended plaint) pursuant to r 24."

[18] The primary judge dismissed the appellant's application and on the second respondents' application ordered that the action be stayed until further order determining which causes of action, if any, against the first and second respondents might proceed.

[19] Rule 24 of the *Uniform Civil Procedure Rules* provides –

> "**Duration and renewal of claim**
>
> **24 (1)** A claim remains in force for 1 year starting on the day it is filed.
>
> **(2)** If the claim has not been served on a defendant and the registrar is satisfied that reasonable efforts have been made to serve the defendant or that there is another good reason to renew the claim, the registrar may renew the claim for further periods of not

more than 1 year at a time, starting on the day after the claim would otherwise end.

**(3)** The claim may be renewed whether or not it is in force.

**(4)** However, the court's leave must be obtained before a claim may be renewed for a period any part of which falls on or after the 5th anniversary of the day on which the claim was originally filed.

**(5)** Before a claim renewed under this rule is served, it must be stamped with the court's seal by the appropriate officer of the court and show the period for which the claim is renewed.

**(6)** Despite subrule (1), for any time limit (including a limitation period), a claim that is renewed is taken to have started on the day the claim was originally filed."

Like its predecessor, O 9 r 1 of the *Supreme Court Rules*, it deals with the situation where there has been a failure to serve a defendant. In cases under the old rules the Court invoked O 93 r 22 ("Practice where not prescribed") to order renewal of a writ to allow service on a statutory insurer with a right to elect to defend. See, for example, *Moore v Boyne Smelters Limited* [1998] 1 Qd R 649 and *Crawford v Brisbane Gas Co Ltd* [1979] Qd R 226. In so doing, the Court approached the applications for renewal as if the requirements of O 9 r 1 otherwise applied. The new rules do not contain a provision similar to O 93 r 22, but they contain a much wider power to make orders about the conduct of a proceeding, rule 367, which is in these terms –

"**Directions**

**367** (1) The court may make any order or direction about the conduct of a proceeding it considers appropriate, even though the order or direction may be inconsistent with another provision of these rules.

(2) In deciding whether to make an order or direction, the interests of justice are paramount.

(3) Without limiting subrule (1), the court may at any time do any of the following in relation to a trial or hearing of a proceeding –

(a) require copies of pleadings for use by the court before the trial or hearing;
(b) limit the time to be taken by the trial or hearing;
(c) limit the time to be taken by a party in presenting its case;
(d) require evidence to be given by affidavit, orally or in some other form;
(e) limit the number of witnesses (including expert witnesses) a party may call on a particular issue;
(f) limit the time to be taken in examining, cross-examining or re-examining a witness;

(g) require submissions to be made in the way the court directs, for example, in writing, orally, or by a combination of written and oral submission;
(h) limit the time to be taken in making an oral submission;
(i) limit the length of a written submission or affidavit;
(j) require the parties, before the trial or hearing, to provide statements of witnesses the parties intend to call.

(4) In addition to the principle mentioned in subrule (2), in deciding whether to make an order or direction of a type mentioned in subrule (3), the court may have regard to the following matters –
(a) that each party is entitled to a fair trial or hearing;
(b) that the time allowed for taking a step in the proceeding or for the trial or hearing must be reasonable;
(c) the complexity or simplicity of the case;
(d) the importance of the issues and the case as a whole;
(e) the volume and character of the evidence to be led;
(f) the time expected to be taken by the trial or hearing;
(g) the number of witnesses to be called by the parties;
(h) that each party must be given a reasonable opportunity to lead evidence and cross-examine witnesses;
(i) the state of the court lists;
(j) another relevant matter.

(5) If the court's order or direction is inconsistent with another provision of these rules, the court's order or direction prevails to the extent of the inconsistency.

(6) The court may at any time vary or revoke an order or direction made under this rule."

[20] The court may make an order renewing an originating process so that it may be served upon a statutory insurer if it is in the interests of justice to do so. The court should have regard to the provisions of r 24 which would ordinarily apply to the renewal of originating process so that it may be served on a defendant.

[21] Under r 24 the Registrar may renew a claim "for further periods, of not more than a year at a time, starting on the day after the claim would otherwise end." Although the rule refers to renewal for "not more than a year at a time," the court may renew it for a greater period in exercise of its general power to extend a time set under the rules: r 7; *Brown v Coccaro* (1993) 10 WAR 391; *Singh (Joginder) v Duport Harper Foundries Ltd* [1994] 1 WLR 769 at 775.

[22] Service of stale process is not a nullity, but an irregularity: r 371(1). See *Van Leer Australia Pty Ltd v Palace Shipping KK* (1980) 180 CLR 337. The Court may waive the irregularity under r 371 (see *Leal v Dunlop Bio-Processes International Ltd* [1984] 1 WLR 874; *Boocock v Hilton International Co* [1993] 1 WLR 1065; *Brealey v Board of Management Royal Perth Hospital* (1999) 21 WAR 79), but it should do so only if it is proper to renew the process.

[23] Prejudice to the person to be served as the result of the delay is a factor relevant to the determination of whether there is "good reason" to renew process. See *Jones v Jebras and Hill* [1968] Qd R 13; *Tyson v Morgan* [2000] 1 Qd R 100. Delay is usually suggestive of some prejudice by reason of deterioration in the scope or quality of witnesses' recollections of relevant events, even if the documentary evidence remains in tact. See *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 551 per McHugh J.

[24] WorkCover was not served with the appellant's application, and none of the parties led any evidence from it. This was not a case where the statutory insurer might be thought to have no knowledge of facts and circumstances relevant to the plaintiff's claim. The Board had been served with the original plaint. It was made a third party at the same time as Mr and Mrs Thurlby were made third parties. Although proceedings against it had been discontinued more than two years earlier, the plaintiff's solicitor swore that –

> "Workcover Queensland (as it is now known) has been kept appraised [sic] of the progress of this action and had solicitors present at the mediation on 12 February 1999."

However, he gave no particulars of what information WorkCover was given or when.

[25] While the primary judge's findings in relation to prejudice were, in my view, largely speculative and unable to be sustained, this is a case where WorkCover ought to be given the opportunity to argue matters of prejudice, if any.

[26] Many applications to renew process are made because the plaintiff has been unable to serve the defendant, and so many orders renewing process are made ex parte. A person affected by such an order made ex parte might apply to have it set aside and thus be afforded an opportunity to ventilate issues of prejudice. However, where the application for renewal is made after ineffective service, it should ordinarily be made on notice to the person who would be affected by an order for renewal.

[27] Counsel for the appellant told this Court that his client was seeking orders having the effect of "validating" the service on WorkCover which was effected in July 1999. However, an order regularising the service of the stale amended plaint would not overcome the other hurdles posed by s 185. In order to satisfy the requirements of that section, it would be necessary for the plaintiff to re-serve the defendants, to serve WorkCover within 28 days of serving the defendants, and to file an affidavit of service upon WorkCover. The court has no power to excuse non-compliance with s 185: see s 191.

[28] Rules of court are intended merely to assist in the just resolution of disputes, and not to confine the process unduly. On the other hand procedural certainty is an aspect of that process, and this Court should not give its imprimatur to the blithe conduct of litigation without regard to what are quite basic and well known requirements. The very broad powers given to the Court by the *Uniform Civil Procedure Rules* should be used judiciously to achieve the result which is fair and just in all the circumstances.

[29] There are two broad options open to this Court - to set aside the order of the primary judge dismissing the appellant's application and to leave it to the plaintiff to make another application on notice to WorkCover, or to craft orders renewing the amended plaint but allowing WorkCover, once served with it, an opportunity to apply to have the service set aside. On balance I prefer the latter because it would allow something to be salvaged from the embers of this litigation.

[30] The orders I propose are as follows:

(1) that the orders of the primary judge be set aside;

(2) that the amended plaint be renewed until 30 June 2000;

(3) a direction that the appellant re-serve the amended plaint on the first and second respondents;

(4) a direction that within 28 days of being served with the amended plaint pursuant to s 185 of the *Workers' Compensation Act* 1990 WorkCover Queensland may apply to have service upon it set aside;

(5) a direction that the appellant serve a copy of the order of this Court on WorkCover Queensland at the same time as the amended plaint is served on it;

(6) that at the expiration of 28 days from the filing of an affidavit of service upon WorkCover Queensland or upon the determination in its favour of any application by it to have service upon it set aside (whichever is the later), steps purportedly taken since 28 January 1997 be deemed valid and effectual as though they had been taken after service of the amended plaint on WorkCover Queensland;

(7) that the appellant pay the costs of the first and second respondents of and incidental to the applications before the primary judge to be assessed on the standard basis;

(8) that the first and second respondents pay the appellant's costs of the appeal;

(9) that the first and second respondents be granted an indemnity certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973.