SUPREME COURT OF QUEENSLAND

CITATION:	*Pugin v WorkCover Qld* [2005] QCA 66
PARTIES:	**JENNIFER VERONICA PUGIN** (applicant/applicant/appellant) v **WORKCOVER QUEENSLAND** (respondent/respondent)
FILE NO/S:	Appeal No 8768 of 2004 DC No 3146 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	18 March 2005
DELIVERED AT:	Brisbane
HEARING DATE:	8 March 2005
JUDGES:	McPherson and Keane JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal dismissed save in relation to the s 285 point in relation to which application for leave to appeal granted but appeal dismissed** **2. Applicant to pay respondent's costs of the application and appeal to be assessed**
CATCHWORDS:	WORKERS' COMPENSATION - PROCEEDINGS TO OBTAIN COMPENSATION - PRELIMINARY REQUIREMENTS - CLAIM AND DELAY IN MAKING CLAIM - GENERALLY - applicant unsuccessfully sought leave to bring proceedings for workers' compensation despite non-compliance with s 280 of the *WorkCover Queensland Act* 1996 (Qld) ("WCQA") - alternatively sought declaration that respondent estopped from denying the claim for damages by reason of the expiry of the limitation period - applicant applying for leave to appeal from decision below - history of claim dogged by procedural mistakes - respondent advised that applicant's second notice of claim did not comply with the WCQA - respondent did not give written notice as required by s 282(3) WCQA - after expiration of limitation period respondent wrote letter stated to be pursuant to s 285 WCQA and advised that liability denied for claim because

limitation period expired - stated in letter that nothing in the correspondence constituted a waiver of the client's non-compliance with the requirements of the WCQA - whether relief against expiration of limitation period available under s 308 WCQA - whether respondent waived compliance with requirements of s 280

APPEAL AND NEW TRIAL - APPEAL - PRACTICE AND PROCEDURE - QUEENSLAND - WHEN APPEAL LIES - BY LEAVE OF COURT - GENERALLY - application for leave to appeal under s 118(3) *District Court of Queensland Act* 1967 (Qld) - where point not raised below - nature of Court's jurisdiction - where Court must be satisfied that decision below attended with sufficient doubt to warrant reconsideration - whether point not raised below can be considered on an application for leave to appeal

District Court of Queensland Act 1967 (Qld), s 118(3)
WorkCover Queensland Act 1996 (Qld), s 280, s 282, s 285, s 308

Commonwealth v Verwayen (1990) 170 CLR 394, distinguished
Decor Corporation Pty Ltd v Dart Industries Inc (1991) 33 FCR 397, considered
Haynes v Hirst (1927) 27 SR(NSW) 480, cited

COUNSEL: J A Griffin QC, with G J Cross, for the applicant/appellant
G W Diehm for the respondent

SOLICITORS: Watling Roche Lawyers (Caboolture) for the applicant/appellant
Bruce Thomas Lawyers for the respondent

[1] **McPHERSON JA:** I have read and agree with the reasons of Keane JA. I would dismiss the application for leave to appeal except in relation to the question under s 285 of the *WorkCover Queensland Act 1996*, as to which the application should be allowed but the appeal dismissed. The applicant is ordered to pay the respondent's costs of and incidental to the application.

[2] **KEANE JA:** The applicant seeks leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) from orders of the District Court dismissing the applicant's originating application. The applicant had sought, by way of principal relief, leave pursuant to s 305 of the *WorkCover Queensland Act* 1996 (Qld) ("the WCQA") to bring proceedings despite non-compliance with s 280 of the WCQA, and alternatively, a declaration that the respondent is estopped "from denying the Applicant's claim for damages by reason of the expiration of the *Limitation of Actions Act*". The order dismissing the application to the District Court was made on 10 September 2004.

Background

[3] The applicant commenced employment with Steggles Limited ("Steggles") on 7 September 2000 as a process worker. She carried out tasks of a repetitive nature which are said to have resulted in bilateral carpal tunnel syndrome of both wrists.

[4] On 20 February 2001, the applicant ceased working with Steggles, and lodged an application for workers' compensation for an injury which she said occurred over a period of time but nominating as the date, 1 December 2000 (being apparently the date she first consulted a doctor for the condition). The respondent issued a notice of assessment dated 5 September 2001 in respect of an injury noted as having occurred on 1 December 2000 rather than over a period of time.

[5] The further history of the applicant's claim appears to have been dogged by procedural mistakes, both by her solicitors, and by the respondent. These mistakes do not appear to be material to the issues sought to be agitated on the application for leave to appeal to this Court, at least until August 2003.

[6] A notice of claim pursuant to s 280 of the WCQA dated 20 August 2003 was delivered to the respondent by the applicant's solicitors on 1 September 2003. The notice of claim asserts that the duties resulting in the applicant's injury commenced sometime in 2000, and that her symptoms commenced in October 2000.

[7] On 10 September 2003, the respondent's solicitors advised the applicant's solicitors that they were seeking instructions in relation to "compliance" and enclosed by way of disclosure the respondent's list of documents.

[8] On 16 September 2003, the respondent's solicitors wrote to the applicant's solicitors, and provided what was said to constitute the respondent's "response to [the applicant's] Notice of Claim pursuant to section 282" of the WCQA. The respondent contended that the applicant's notice of claim did not comply with the requirements of s 280 of the WCQA in respect of the particulars there referred to, and advised that the respondent did not waive non-compliance. The applicant did not respond to the respondent's contentions as to the deficiencies in the applicant's notice of claim.

[9] The respondent did not, within 30 days after the end of the period specified in s 282(2)(c) of the WCQA, give the applicant a written notice as required by s 282(3) of the WCQA. Such a notice should have stated that:[1]

> "(a) WorkCover—
>
> (i) is satisfied the claimant has complied with the relevant requirements; or
>
> (ii) is satisfied with the action taken by the claimant to remedy the noncompliance; or
>
> (iii) waives the noncompliance; or
>
> (b) WorkCover is not satisfied that the claimant has taken reasonable action to remedy the noncompliance, with full particulars of the noncompliance and the claimant's failure to remedy it."

[10] By letter dated 11 November 2003, the respondent's solicitors wrote to the applicant's solicitors relevantly in the following terms:

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[1] Section 282(3) of the WCQA.

> "This correspondence constitutes our client's response to your client's Notice of Claim pursuant to Section 285 of the *WorkCover Queensland Act*.
> WorkCover Queensland denies liability for your client's claim. Liability is denied on the basis that:
>
> (a) Your client's injury was sustained no later than 29 October 2000. The limitation period has expired, and your client has not served a compliant Notice of Claim under the *WorkCover Queensland Act* within the limitation period. As such, the claim is now statute barred;
>
> (b) The employer was not negligent, whether as alleged or at all;
>
> …
>
> WorkCover Queensland rejects your client's offer to settle. WorkCover Queensland offers to settle on the basis that your client withdraws the Notice of Claim for Damages and each party bear [sic] their own costs.
>
> Although we have expressed this correspondence to be written pursuant to Section 285 of the *WorkCover Queensland Act*, nothing in this correspondence constitutes a waiver of your client's non-compliance with the requirements of the *WorkCover Queensland Act*, nor an admission that your client has complied with the requirements of the *WorkCover Queensland Act*.
> …"

[11] It is common ground that the injury to the applicant occurred in the latter part of 2000. This has two consequences. The first is that the *WorkCover Queensland Amendment Act* 2001 has no application to the present case. The second consequence is that the limitation period applicable to that injury had expired when the application to the learned primary judge was decided.

The issues raised on the application

[12] It appears that on the application before the learned primary judge, the applicant did not press her application pursuant to s 305 of the WCQA. Presumably that is because, on any view of the date when the plaintiff's injury had been suffered, the limitation period had then expired, and an order under s 305 would have been of no utility.

[13] Insofar as it was argued before the learned primary judge that relief against the expiration of the limitation period was available under s 308 of the WCQA, on the footing that the notice of claim complied as and from 16 September 2003, that contention appears to have depended upon the proposition that the respondent was deemed to have waived non-compliance with the requirements of s 280. I will return to this contention after referring to the other issues sought to be agitated on appeal to this Court.

[14] In this Court, the applicant, for the first time, seeks to contend that the notice of claim given on behalf of the respondent on 1 September 2003 was always a compliant notice and that this Court should, in effect, declare that to be so. There are, in my view, difficulties with this suggestion. These difficulties arise by reason of the nature of this Court's jurisdiction under s 118(3) of the *District Court of Queensland Act*.

[15] It is well established that leave to appeal under s 118(3) will not usually be granted unless it appears that the decision from which it is sought to appeal is attended with sufficient doubt to warrant it being reconsidered, and also that, supposing the decision below to be wrong, substantial injustice will result if leave were refused: see *Decor Corporation Pty Ltd v Dart Industries Inc*.[2]

[16] The proceeding before this Court is an application for leave to appeal. The very concept of an appeal presupposes error on the part of the primary judge. The claim that the notice of claim was, from the outset, a complying notice, was not put to his Honour, so it can hardly be said that he erred in his disposition of it. It is not open to the applicant to invite this Court, for the first time, to determine that, in truth, the applicant's notice of claim was as at 1 September 2003 a compliant one for the purposes of s 280 of the WCQA and to make a declaration to that effect.

[17] This is not a case where a question of law is raised for the first time on appeal.[3] Rather, it is an attempt to make a new claim for relief. If the applicant now wishes to assert that the notice was always a complying notice, and to claim a declaration to this effect, this claim could and should be raised in fresh proceedings.

[18] The applicant seeks leave to appeal as well to invoke the application of doctrines of waiver or estoppel under the general law. These points were agitated before his Honour the learned primary judge. They were, in my respectful opinion, correctly rejected by him.

[19] So far as estoppel is concerned, there is no arguable basis in the evidence for concluding that the applicant acted in any way in reliance upon the belief that she had been given an assurance on the respondent's part, either that the notice required by s 280 which the applicant had purported to give was a compliant notice, or that the respondent would not plead the expiration of the limitation period as a defence should proceedings be commenced by the applicant out of time.

[20] Insofar as the applicant seeks to rely on waiver, and the decision of the High Court in *Commonwealth v Verwayen*,[4] the applicant is again confronted by the difficulty that the evidence does not disclose a statement by the respondent of its intention either to treat the applicant's notice of claim as compliant, or to abandon reliance on a limitation defence if the respondent's proceedings were commenced out of time.

[21] For these reasons, I consider that the applicant's contentions in relation to waiver and estoppel under the general law do not enjoy sufficient prospect of success to warrant the grant of leave to appeal.

Section 285 of the WCQA

[22] I return now to a consideration of the applicant's argument that the respondent is precluded, by its failure to comply with s 282(3) of the WCQA, and/or by the provision, by the respondent's solicitor's letter of 11 November 2003, of a response to the applicant's notice of claim pursuant to s 285 of the WCQA, from denying that a compliant notice had been given by the applicant under s 280 of the WCQA.

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2 (1991) 33 FCR 397 at 398 - 400, *Rayner v Whiting* [2000] 2 Qd R 552 at 553.

3 Cf *Crampton v The Queen* (2000) 206 CLR 161 at 172.

4 (1990) 170 CLR 394.

[23] The applicant's contention in this regard is that, either by reason of the respondent's non-compliance with s 282(3) of the WCQA, or by the operation of s 285 upon the respondent's letter of 11 November 2003, the applicant's notice is deemed to be compliant. It is fair to say that the applicant pressed the argument based on s 285 in oral submissions, but not the argument based on the respondent's non-compliance with s 282(3) of the WCQA. In any event, in my view, the respondent's non-compliance with s 282(3) of the WCQA cannot assist the applicant.

[24] The provision of the WCQA which facilitates the bringing of proceedings for damages for personal injury after the end of the period of limitation is s 308. It requires that, before the end of the period of limitation, the conditions in s 308(1)(a) and (b) must be satisfied. Relevantly, that requires either the giving of a complying notice of claim or a waiver of compliance with the requirements of s 280 by WorkCover.

[25] Section 285 of the WCQA provided:

> "**285.(1)** The claimant and WorkCover must endeavour to resolve a claim as quickly as possible.
>
> **(2)** WorkCover must give the claimant a written notice under subsection (4) within 6 months after—
>
> (a) WorkCover receives a complying notice of claim or waives the claimant's noncompliance with the requirements of section 280; [fn Section 280 (Notice of claim for damages)] or
>
> (b) the court makes an order under section 304; [fn Section 304 (Court to have made declaration about noncompliance)]or
>
> (c) the court makes an order under section 305. [fn Section 305 (Court to have given leave despite noncompliance)]
>
> **(3)** For subsection (2), for a worker with a terminal condition, WorkCover must give the claimant the written notice within 3 months.
>
> **(4)** The written notice must—
>
> (a) state whether liability in connection with the event to which the claim relates—
>
> (i) is admitted or denied; and
>
> (ii) if admitted—whether contributory liability is claimed from the worker or another party; and
>
> (iii) if liability is admitted—the extent, expressed as a percentage, to which liability is admitted; and
>
> (b) state whether WorkCover accepts or rejects any offer of settlement that may be made by the claimant; and
>
> (c) if the claimant did not make an offer of settlement in the notice of claim or WorkCover is rejecting the offer—contain a genuine offer or counter-offer of settlement, or a statement of the reasons why an offer or counter-offer of settlement can not yet be made; and
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> (d) be accompanied by copies of all medical reports, assessments of cognitive, functional or vocational capacity, or other material in WorkCover's possession not previously

given to the claimant that may help the claimant to make a proper assessment of the offer.

(5) WorkCover or the claimant to whom a written offer or counter-offer of settlement is made must respond in writing to the offer within 14 days after receiving it, indicating acceptance or rejection of the offer, unless a response to the offer is to be made under subsection (4)(b).

(6) The offer or counter-offer of settlement is made on a without prejudice basis and must not be disclosed to a court except on the issue of costs.

(7) An admission of liability by WorkCover under this section—

(a) is not binding on WorkCover at all if it is later shown at the trial in the proceeding for damages that the claimant has been relevantly guilty of fraud or attempted fraud; and

(b) is not binding on WorkCover at all if it is later shown that liability was admitted because of misrepresentation by any person; and

(c) is not an admission about the nature and extent of the claimant's loss or damage or that the claimant has sustained loss or damage, unless it specifically states otherwise; and

(d) does not entitle the claimant to apply for judgment, summary or otherwise, in a court of competent jurisdiction; and

(e) is confined to damages under the claim."

[26] When this section of the statute speaks of a complying notice, it must be speaking of a notice which is, in truth, a complying notice, that is to say, a notice which truly conforms to the requirements of the statute. As I have already said, on this application for leave to appeal, it would not be appropriate to proceed on the footing that the applicant's notice was truly a complying notice that being contrary to the basis on which the application was originally made to the learned primary judge; and indeed, the argument pressed by the applicant in the oral submissions made on her behalf was to the effect that the respondent was to be held to a statutory election made by its letter of 11 November 2003. The basis of this submission was that, by giving a notice or purporting to give a notice pursuant to s 285 of the WCQA, the respondent must be taken to have elected to treat the applicant's notice as a complying notice or waiving non-compliance with the requirements of s 280.

[27] In this regard, the applicant relies upon the statement of principle of Long Innes J in *Haynes v Hirst*[5] where his Honour said:

> "A party cannot, except in a strictly limited class of cases, protect himself against the legal consequences of his acts by stating that he does them without prejudice. No one, for instance, would suggest that a person could protect himself against liability for a breach of promise of marriage by taking the precaution of making the offer without prejudice. Nor can a debtor, who gives notice that he is about to suspend payment of his debts, protect himself against the consequences flowing from the commission of this act of

5 (1927) 27 SR(NSW) 480 at 489.

> bankruptcy, by giving such notice 'without prejudice': *In re Daintrey*; *Ex parte Holt* ([1893] 2 QB 116). Nor, in my view, could a person, having a right to sue either in tort or in contract in respect of a claim arising out of the one transaction, preserve his right to sue in tort after suing in contract, by prefacing his declaration by the averment that he sued in *assumpsit* without prejudice to his right to sue in tort. For similar reasons it appears to me that a purchaser, having the option of either repudiating the contract by reason of a defect in title, or of keeping it alive for the benefit of the other party as well as his own, cannot, while electing to treat the contract as subsisting and requiring the vendor to remove the objection and to alter his position to his detriment in attempting to do so, avoid the consequences flowing from this exercise of his election by stating that he does so without prejudice to his right to repudiate. In plain language a man can only elect once, and when once he has elected he is bound by his election and cannot again avail himself of his former option, merely because he claimed in the first instance to exercise his election without prejudice. A man, having eaten his cake, does not still have it, even though he professed to eat it without prejudice."

[28] The flaw in the applicant's attempt to apply this statement of principle here in order to categorize the respondent's letter of 11 November 2003 as involving an election between inconsistent rights is that it misconstrues s 285(2), which does not provide that: "WorkCover may only give the claimant a written notice if WorkCover has received a compliant notice or waived the claimant's non-compliance". Section 285(2) does not require WorkCover to make a choice between inconsistent rights. Section 285(2) is not at all concerned to confer rights on WorkCover or to require it to make a choice between inconsistent rights. Rather, it is concerned to oblige WorkCover to send a notice under s 285(4) no later than the specified date.

[29] Further as to the applicant's argument that there has been a deemed waiver of non-compliance with s 280 by the respondent's letter of 11 November 2003, I consider that when the WCQA speaks of a waiver of compliance, it is not speaking of a term defined by the statute. It is speaking of an actual waiver as that term is understood as a matter of ordinary language.

[30] As a matter of ordinary language, the communications from the respondent's solicitors could not have been clearer in expressing the respondent's refusal to waive the need for compliance by the applicant with the terms of s 280 of the WCQA. As to the applicant's argument that the respondent, by giving a notice under s 285 of the WCQA, must be deemed to have waived the need for compliance with s 280, it may be noted that, while s 285(2) contemplates waiver of non-compliance as a pre-condition of the respondent's **obligation** to give the notice required by s 285(4), it is not a condition of an **entitlement** in WorkCover to give the notice under s 285(4). Nor does it provide that the giving of that notice operates to deem a non-compliant notice to be compliant or to transmogrify an express non-waiver into a deemed waiver. For this reason the applicant's attempt to rely on the dicta of McHugh J in *Commonwealth v Verwayen*[6] is misconceived. McHugh J said:

> "Some of the cases which debar 'a person from raising a particular defence to a claim against him', however, stand outside the categories

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6 (1990) 170 CLR 394 at 497.

> of election, contract and estoppel. They are sui generis. They are cases where a statute has conferred a right on A., subject to the fulfilment of a condition for the benefit of B., and B. has waived the condition by taking the next step in the course of procedure without insisting on A. fulfilling the condition. In my opinion, the true basis of the decisions in these cases is that, where the existence of a statutory right depends upon the fulfilment of a condition precedent, a person entitled to insist on the fulfilment of that condition may dispense with its compliance unless it is enacted for the benefit of the public, and that person will be held to have waived compliance with the condition if he or she knowingly takes or acquiesces in the taking of a subsequent step in the course of procedure laid down by the statute after the time for the other person to fulfil the condition has passed."

[31] As I have observed, s 285(2) of the WCQA does not confer a right on the respondent to give a s 285(4) notice subject to observance of the conditions referred to in s 285(2)(a) - (c). It is concerned to compel it to give such a notice no later than the lapse of the prescribed time after those events. It cannot seriously be suggested that the respondent is not entitled to make an offer to settle in the terms of s 285(4) whenever it likes. It does not need statutory authority to do that. Rather, s 285(2) is concerned to prevent dilatoriness on the part of WorkCover from holding up the processing of workers' claims. To the extent that a dispute may exist between a claimant and the respondent as to whether notice under s 280 is a complying notice, the claimant has its remedies under s 291 and s 304 of the WCQA.

[32] In my view, the applicant's argument that there has been a deemed compliance or a deemed waiver of the need for compliance cannot be accepted.

Conclusion

[33] For the foregoing reasons I would dismiss the applicant's application for leave to appeal save in relation to the s 285 point, in relation to which I would grant leave to appeal but dismiss the appeal. I would order that the applicant pay the respondent's costs of the application and appeal to be assessed.

[34] **DOUGLAS J:** I have had the advantage of reading the reasons for judgment prepared by Keane JA and agree with them and with the orders proposed by his Honour.