SUPREME COURT OF QUEENSLAND

CITATION:	*Castillon v P&O Ports Ltd* [2007] QCA 364
PARTIES:	**LEONARD CASTILLON** (plaintiff/respondent) **v** **P&O PORTS LIMITED** ACN 000 049 301 (defendant/applicant)
FILE NO/S:	Appeal No 3395 of 2007 DC No 445 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application - Civil
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	26 October 2007
DELIVERED AT:	Brisbane
HEARING DATE:	30 August 2007
JUDGES:	Keane and Holmes JJA and Wilson 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 granted** **2. Appeal allowed** **3. Judgment below set aside** **4. Plaintiff to pay defendant's costs of appeal to be assessed on the standard basis**
CATCHWORDS:	LIMITATION OF ACTIONS – POSTPONEMENT OF THE BAR – EXTENSION OF PERIOD – CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES – KNOWLEDGE OF MATERIAL FACTS – MATERIAL FACTS OF DECISIVE CHARACTER – where plaintiff commenced action for damages for negligence against defendant out of time – where plaintiff's first application for extension of time refused on basis that at the relevant date plaintiff had sufficient knowledge of material facts of decisive character to conclude that he had a worthwhile cause of action – where plaintiff's second application for extension of time granted on basis of documentation not previously disclosed – whether second application should have been granted ESTOPPEL – FORMER ADJUDICATION AND MATTERS OF RECORD OR QUASI RECORD – FORMER ADJUDICATION – ISSUE ESTOPPEL – GENERAL MATTERS – whether determination on first application that

plaintiff had within his means of knowledge by the relevant date all the material facts of a decisive character relating to his cause of action created an issue estoppel

Limitation of Actions Act 1974 (Qld), s 30, s 31
WorkCover Queensland Act 1996 (Qld), s 305

Blair v Curran (1939) 62 CLR 464, applied
Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2) [1967] 1 AC 853, applied
DA Christie Pty Ltd v Baker [1996] 2 VR 582, distinguished
Greenhalgh v Bacas Training Limited & Ors [2007] QCA 327; Appeal No 3493 of 2007, 5 October 2007, distinguished
Hall v Nominal Defendant (1966) 117 CLR 423, distinguished
Hintz v WorkCover Queensland & Anor [2007] QCA 72; Appeal No 6032 of 2006, 16 March 2007, cited
Moriarty v Sunbeam Corporation Limited [1988] 2 Qd R 325, applied
Nominal Defendant v Manning (2000) 50 NSWLR 139, distinguished
Sugden v Crawford [1989] 1 Qd R 683, applied
State of Queensland v Stephenson (2006) 226 CLR 197, applied

COUNSEL: D V C McMeekin SC, with R M Treston, for the applicant
R J Douglas SC, with J L Rosengren, for the respondent

SOLICITORS: Bruce Thomas Lawyers for the applicant
PCF Law for the respondent

[1] **KEANE JA:** In 2003, the plaintiff commenced an action for damages for negligence against the defendant. On 30 March 2007, the learned primary judge made orders in favour of the plaintiff including an order extending the limitation period in relation to the plaintiff's claim for damages in respect of bilateral carpal tunnel syndrome until one day after the action was commenced. This order was made pursuant to s 31 of the *Limitation of Actions Act 1974* (Qld) ("the Act").

[2] The defendant seeks leave to appeal against this decision pursuant to s 118(3) of the *District Court of Queensland Act 1967* (Qld), leave being necessary because the decision of the learned primary judge was not a final judgment.

[3] The defendant contends that leave should be granted because the decision of the learned primary judge is inconsistent with the earlier decision of Rackemann DCJ in 2005, whereby his Honour refused to grant an extension of the limitation period to the plaintiff.[1] Rackemann DCJ made a declaration in the plaintiff's favour declaring, in effect, that the Act did not operate as a bar to the plaintiff's action. The defendant appealed to this Court, and the declaration in the plaintiff's favour was set aside.[2] There was, however, no appeal by the plaintiff against the refusal of an extension of time by Rackemann DCJ.

---

1 *Castillon v P & O Ports Ltd* [2005] QDC 180.
2 *Castillon v P & O Ports Limited* [2006] 2 Qd R 220.

[4] The defendant contends that the plaintiff's further application for an extension of time was an abuse of process, and that the further application should have been dismissed on that ground. That was said to be because, in the 2005 proceedings, it had been determined that the plaintiff had within his means of knowledge, prior to the critical date of 27 November 2001, all the material facts of a decisive character relating to his cause of action.

[5] I pause here to note that in the 2005 proceedings, and in the proceedings below and in this Court, it was common ground that 27 November 2001 was the critical date[3] on the basis that this date was the beginning of the year before the date on which the operation of s 305 of the *WorkCover Queensland Act 1996* (Qld) ("the WorkCover Act") required that the limitation period applicable to the cause of action should not have expired. If the limitation period had expired as at 27 November 2002, no order could have been made under s 305 of the WorkCover Act.

[6] There is, it is said, a conflict of judicial opinion as to whether the bringing of a second interlocutory application in such circumstances is an abuse of process which should be dismissed as such.[4] It is said on behalf of the defendant that clarification of this conflict of opinion warrants the grant of leave.

[7] On the hearing of the application, the defendant sought leave to advance further arguments. These were to the effect that the decision of Rackemann DCJ gave rise to an issue estoppel, or engaged the principle in *Port of Melbourne Authority v Anshun Pty Ltd*, [5] either of which precluded the making of a decision by the learned primary judge in favour of the plaintiff. In my respectful opinion, it is not necessary to enter upon a discussion of these issues.

[8] That is because, I think, the interests of the due administration of civil justice are sufficiently engaged to warrant the grant of leave to appeal in order to enable this Court to determine whether the decision of 30 March 2007 has wrongly deprived the defendant of a defence otherwise available to it under the Act.[6] In order to discuss this question, I must first summarise the history of the plaintiff's claim and the course of proceedings. I will then set out the reasons of the learned primary judge before discussing the arguments agitated in this Court.

The plaintiff's claim

[9] In my reasons for judgment in the earlier appeal, I summarised the history of the plaintiff's claim up to that time. What follows in that regard is drawn largely from that summary.[7]

[10] The plaintiff worked for the defendant as a machine operator for many years. On 6 December 1999, the plaintiff made an application to WorkCover for workers' compensation in respect of "bilateral carpal tunnel syndrome".

[11] In response to the question in the standard form of application for workers' compensation, the plaintiff indicated that the injury occurred over a period of time, and stated that he first consulted a doctor for his condition on 2 December 1999. In

---

3 *Castillon v P&O Ports Limited* [2007] QDC 054 at [47] – [49].

4 *Nominal Defendant v Manning* (2000) 50 NSWLR 139; *D A Christie Pty Ltd v Baker* [1996] 2 VR 582; *Commonwealth v Albany Port Authority* [2006] WASCA 185 at [71] – [72].

5 (1981) 147 CLR 589.

6 Cf *Pickering v McArthur* [2005] QCA 294 at [3].

7 *Castillon v P & O Ports Limited* [2006] 2 Qd R 220 at [6] – [14].

response to the request, "Please detail what you were doing at the time of your injury and how your injury happened", the plaintiff wrote: "Driving heavy fork-lift; front end loaders; Hyco; and other machinery over a period of 27 years". The plaintiff indicated on the form that he stopped work because of this injury on 26 November 1999 at 2.30 pm. In answer to the question "Have you previously suffered any similar injury?" the plaintiff responded in the affirmative, saying in addition: "Reported condition to local doctor one year ago".

[12] It is common ground between the parties that the application form completed by the plaintiff describes an injury which occurred over a period of time. Rackemann DCJ found that the plaintiff had consulted a general practitioner, Dr Wong, in 1997 in relation to numbness in his hands.[8]

[13] On 22 May 2001, WorkCover issued a notice of assessment which described the date of injury as 2 December 1999. In June 2001, the plaintiff decided to accept this assessment for the purposes of an action for damages. It is apparent that, at this time, the plaintiff regarded an action for damages as worthwhile. There is no suggestion that the failure to commence an action for more than a year resulted from any doubts on the part of the plaintiff or his lawyers that an action would be worthwhile.

[14] On 1 November 2001, the plaintiff made a further application to WorkCover for workers' compensation in respect of an injury to "shoulder, wrist, hand" which was said to have occurred over a period of time.

[15] On 15 July 2002, the plaintiff applied to WorkCover for a damages certificate in relation to an injury described as "chronic pain syndrome and adjustment disorder with depressed mood". On 8 August 2002, WorkCover issued a conditional damages certificate for that condition. It was common ground between the parties that this certification referred to the injury the subject of the claim of 6 December 1999.

[16] WorkCover also issued a notice of assessment and a conditional damages certificate in respect of the injury the subject of the plaintiff's application for workers' compensation of 1 November 2001. For present purposes it is not necessary to be further concerned with that aspect of the matter.

[17] On 21 November 2002, the plaintiff sought leave to bring proceedings for damages for personal injuries against the defendant pursuant to s 305 of the WorkCover Act[9] despite non-compliance by the plaintiff at that stage with the requirements of s 280 of the WorkCover Act. This leave was granted by a consent order filed on 27 November 2002. After receipt of the plaintiff's application, the solicitors for the defendant had written to the plaintiff's solicitors on 25 November 2002 advising them that the defendant did not agree that the limitation period applicable to the plaintiff's claim in respect of this injury would expire on 2 December 2002 and stating: "It appears to us that the limitation period may in fact have already expired some time ago".

---

8 *Castillon v P & O Ports Ltd* [2005] QDC 180 at [43].

9 It was common ground that, notwithstanding the repeal of the WorkCover Act by the *Workers' Compensation and Rehabilitation Act* 2003 (Qld), the issues which arise in these proceedings are still to be resolved by the application of the provisions of the WorkCover Act.

[18] The plaintiff's claim and statement of claim were filed on 15 August 2003. The defendant pleaded in its defence that the injury in question was sustained "on or prior to 1 December 1999 and not thereafter". This position was maintained, aside from a change in the date to 2 December 1999, in the amended defence filed at a later date.

The first application

[19] The plaintiff applied in September 2004 for, inter alia, an order seeking to extend the limitation period pursuant to s 31 of the Act. The application for this relief was dismissed in June 2005 by Rackemann DCJ on the basis that the plaintiff had, within his means of knowledge prior to 27 November 2001, all the material facts of a decisive character relating to the nature and extent of his injury and that it was in his own interests to pursue the action.[10] As I have mentioned, the plaintiff did not appeal from this decision.

[20] Rackemann DCJ held that the plaintiff had sufficient knowledge of facts material to his cause of action to conclude, prior to 27 November 2001, that he had a worthwhile cause of action. In his reasons for judgment, Rackemann DCJ canvassed in detail the evidence adduced before him (including cross-examination of the plaintiff). His Honour concluded his summary of the evidence and stated his findings in the following passage:

> "On 22 May 2001 WorkCover issued the Notice of Assessment with respect to the bilateral carpal tunnel syndrome injury. On 6 June 2001 the plaintiff signed 'Box A' to indicate that he agreed with the degree of permanent impairment, but only after his solicitor wrote in 'for the purposes only of moving on to a common law claim'. On 12 June 2001 the plaintiff's solicitors wrote to WorkCover enclosing the executed Notice of Assessment and advising:
>
> > 'You will note that our client agrees with the degree of permanent impairment for the purposes only of moving on to a common law claim.
> >
> > We request you to forward to our office the Damages Certificate within seven days from the date of this letter.
> >
> > We will commence preparation of our client's Notice of Claim for damages and deliver to your office in the near future.'
>
> **The plaintiff's solicitors then referred the plaintiff to yet another orthopaedic surgeon, Dr Halliday, for a medico legal report. His report, dated 29 June 2001 advised the plaintiff's solicitors, amongst other things, that**:
>
> (i) the complainant continued to suffer symptoms as is possible with a small percentage of patients with marked carpal tunnel syndrome at diagnosis;
>
> (ii) his condition was permanent;
>
> (iii) his work activities continue to aggravate his underlying condition;
>
> **(iv) Mr Castillon reports that he will be unable to perform his normal work because of his ongoing carpal tunnel syndrome and its**

---

[10] *Castillon v P & O Ports Ltd* [2005] QDC 180 at [56].

associated shoulder pain. He is not able to work in his present employment;

(v) it is likely that he will not be able to return to his normal mode of activity;

(vi) he would benefit from retraining in another field, although he is resistant to that suggestion;

(vii) there is no specific rehabilitation to recommend for Mr Castillon in order to return as a crane operator. His symptoms are too easily aggravated. He would benefit from retraining in a different occupation;

(viii) there is no surgical procedure indicated in this case.

In his evidence, the plaintiff said that 'I never seen hardly any of the reports' and that Dr Halliday told him 'you will gradually get back to your old self once you slowly just build up your hand muscles and stuff'. That seems unlikely given the terms of Dr Halliday's report and I was not satisfied as to the reliability of the plaintiff's evidence in this regard.

On 12 September 2001, the plaintiff was examined by Leslie Stephenson, an occupational therapist. In a report to the plaintiff's solicitors dated 30 October 2001 the plaintiff's position was summarised, in part, as follows:

> '**Mr Castillon is having a lot of trouble coping physically**. He reports escalation of pain in his hands after the first 5-10 minutes of work. He is also upset about being overlooked for promotion, in favour of much younger and less experienced employees. He does not feel at all confident of his ongoing job security, although his main problem relates to his inability to cope physically with the work.
>
> His work requires him to constantly grip and manipulate steering knobs and gearsticks when operating the various machines. He works an eight hour day, with two 30 minute refreshment breaks. He has no other breaks. He spends seven hours in the machines. He is taking 3 panadols in the morning and 3 panadols in the afternoon to get through his work. He is finding that the medication is becoming less effective, and he is worried that he will have to increase the dosages. He is aware that medically this is not advisable, but he cannot afford not to be working. He feels trapped by his predicament.
>
> Mr Castillon is extremely worried about his future outlook and appears to be on the brink of having to give up work. If he did not have problems with his hands, there is no reason why he could not have continued with his work, or returned to any of his previous occupations. **In my view, the nature of the work which Mr Castillon is currently performing will only continue to aggravate his symptoms over time, and I**

> **do not believe any of his previous occupations would be any more suitable. In light of his ongoing symptoms, lack of suitable alternative skills, and his WorkCover history, there appears every chance Mr Castillon will face premature retirement from the workforce within the very near future. He is currently 50 years of age. Had it not been for his condition, there does not appear to be any reason why he would not have worked until his planned retirement age of 65 years.'**

It seems that, at least by this stage, it was within the plaintiff's means of knowledge that he was suffering from permanent injury which was likely to prevent him from continuing in his position. That was likely to result in significant economic loss. The plaintiff had tried to address that by seeking lighter duties, but had been unsuccessful. The plaintiff had all the relevant facts of a decisive nature concerning the nature and extent of the personal injury. Indeed, he had engaged solicitors and, in cross-examination, confirmed that in June 2001 he had decided to sue for the injuries. There was no suggestion, in the evidence, that his solicitors had given advice that he should not do so, that such an action would not be worthwhile, or that there was any absence of a material fact of a decisive character concerning the nature and extent of the personal injury. Indeed the plaintiff did not disclose what, if any, advice he had from his solicitors or the course of his instructions.

That the plaintiff decided to continue to try to fulfil the tasks of his employment until 2003 is understandable. He is a person who appears to be motivated to work. He had financial commitments to meet and, in the absence of an offer of alternative employment, tried to persist as long as possible. It is also understandable that, notwithstanding having been told, by at least 2001, that there was no other position for him if he could not continue as a crane driver, he would nevertheless continue to persuade his employer, including through representations by his union. Indeed he continues in those endeavours. That does not however, lead to a conclusion that the plaintiff did not have within his means and knowledge a material fact of a decisive character until 2003.

While the plaintiff contends that, until that point, he considered that he would always be able to manage his duties and that it was only in 2003 that he 'finally concluded that my time as a crane operator might be nearing an end', I am satisfied that is not the case. Indeed, in cross-examination, he conceded that certainly by September 2001 when he saw Ms Stephenson, he was of the view that he would not be able to continue as a Hyco driver in the future. While in the period to 2003 he might have harboured a hope that he would be able to persist to a point where his employer would offer him equally remunerative employment with lighter duties, he had within his means of knowledge, by November 2001, all the material facts of a decisive

> **character relating to the nature and extent of the injury and that it was in his own interests to pursue action.** The case is, in my view, different from that of *Bougoure v State of Queensland* [2004] QCA 485 to which counsel for the applicant referred." [11] (emphasis added)

[21] It will have been seen that Rackemann DCJ rejected as unworthy of belief the plaintiff's evidence that it was only in 2003 that the plaintiff finally concluded that his time as a crane operator might be nearing an end. That view of the evidence was amply justified by the reports of Dr Halliday and Ms Stephenson which had been obtained by the plaintiff's solicitors. It is, therefore, clear that there was ample support for the finding of Rackemann DCJ that, at least by 30 October 2001 when the plaintiff's solicitors received Ms Stephenson's report, it "was within the plaintiff's means of knowledge that he was suffering from permanent injury which was likely to prevent him from continuing in his position."

[22] It will also have been noted that Rackemann DCJ accepted that the plaintiff had been seeking, and was continuing to seek, alternative kinds of work with the defendant. These efforts had not been successful, either by 27 November 2001, or by the time Rackemann DCJ heard the plaintiff's application. As at 27 November 2001, the prospects that the plaintiff would be re-assigned to lighter duties within the defendant's organisation were distinctly uncertain.

[23] It is convenient to note here that it was common ground in this Court that in the period between December 1999 and the final termination of the plaintiff's employment in December 2004, the plaintiff had actually attended at work with the defendant for only seven months between mid to late 2002 and February 2003 when the plaintiff tried to return to his duties as a crane operator.

The second application

[24] On 18 January 2007, the plaintiff applied again for an extension of the limitation period. The basis for the second application was said to be the non-disclosure by the defendant of documents which had not been available to the plaintiff at the time of the application before Rackemann DCJ.

[25] All of this documentation post-dated 27 November 2001. Indeed, it post-dated the plaintiff's last day at work in February 2003. It included material which bore on the attempts by the parties to re-assign the plaintiff to light duties; and it also included his letter of termination on 17 December 2004 notifying the plaintiff that his services had been terminated. It was said in this Court that the relevance of this lately disclosed documentation was to cast doubt on the findings of Rackemann DCJ referred to above because it bolstered the plaintiff's account that he "always" expected to be retained in the employment of the defendant so that Rackemann DCJ erred in concluding that the plaintiff had the means of knowledge that he had a worthwhile action against the defendant prior to 27 November 2001.

[26] The learned primary judge concluded that Rackemann DCJ had erred. It is necessary to set out the relevant passage from the learned primary judge's reasons at some length, emphasising the more important aspects of her Honour's reasons. Her Honour said:

---

11 [2005] QDC 180 at [50] – [56].

"The complaint that Mr Castillon could and should have raised the termination of his employment with P&O is initially attractive. Certainly, this occurred before Rackemann DCJ delivered his decision on the first application. However, the hearing of evidence had concluded and, while there were further appearances before His Honour to deal with some procedural matters, Ms Treston agreed these were not opportunities for further evidence to be led. Mr Castillon could well have asked for that indulgence but the outcome of that request could not be certain.

Further, balanced against that omission, if that is a proper description of Mr Castillon's failure to raise the issue, is a greater omission by P&O which is of significance to the discretion I am asked to exercise. **When the first application was heard, P&O had not disclosed all relevant documents contained in its personnel file in relation to Mr Castillon. P&O's counsel submitted the further material, whilst voluminous, would have added nothing to the material before His Honour. I do not accept that. Rather, the material would have brought into sharp relief a matter that His Honour placed considerable reliance upon in reaching his finding that, at a time earlier than the critical date, Mr Castillon had within his means of knowledge material facts of a decisive character.**

His Honour found by September 2001 Mr Castillon knew he was suffering from a permanent injury which was likely to prevent him from continuing in his position as a crane driver and which was also likely to result in significant economic loss, which he had, unsuccessfully, tried to address by seeking lighter duties. It was that combination of material facts, including his lack of success in obtaining alternate duties, on which his finding rested. In support of his conclusion that Mr Castillon knew his attempts to obtain redeployment had been unsuccessful, His Honour referred to a meeting Mr Castillon had with a manager of P&O sometime before September 2001 during which he was advised that if he could not work as a crane driver there was no other position for him in the company.

However, **His Honour did not have before him all P&O's documents that bore on the question of Mr Castillon's future with the company if he could not continue to drive a crane. Mr Castillon continued to earn income from his employment with P&O until some time in the 2004/5 financial year. During that time, material from the personnel file discloses ongoing attempts by Mr Castillon and others on his behalf, including his medical advisers and trade union officials, to explore alternative duties and positions within P&O. P&O continued to respond to these approaches by requiring Mr Castillon to undergo further medical assessments and to explore alternative duties for him.** As late as November 2003, some two years after the latest critical date, P&O sought from Dr Novic, one of the Doctors who had assessed Mr Castillon, clarification of what office duties Mr Castillon would be able to perform and in what timeframe he would be able to perform marshalling and deck foreman duties. **Indeed, my reading**

of the material leads me to conclude that it was not until September 2004 that human resource officers of P&O formed the view that Mr Castillon's employment with P&O should be terminated.

Had all the relevant material been before His Honour, he is likely to have reached a different conclusion as to when the combination of facts known to Mr Castillon assumed the character of being decisive. Those documents were not within Mr Castillon's control. It was P&O's obligation to disclose them. Its failure to do so is unexplained. In such circumstances, this court's discretion should not be exercised to prevent a second application being made to extend the limitation period.

(c) Is the termination of his employment a material fact of a decisive character s31(2)(a)?

There was no controversy between the parties that facts relevant to the economic consequences of the condition are material as that concept is used in s31(2)(a). Nor was it contested that termination of his employment was material. Nor could it have been. The economic consequences of the condition substantially increased once Mr Castillon's employment was terminated. The controversy ranged on whether this material fact had a decisive character, in light of other material facts known to Mr Castillon before the latest critical date: particularly, that he could not continue to work as a crane driver and, as P&O alleges, his knowledge that there was no other position for him in the company.

The High Court has recently considered what is required by s31(2)(a). In *State of Queensland v Stephenson* at [19] the majority of the Court, Gummow, Hayne & Crennan JJ, confirmed the approach adopted by Davies JA in his judgment in the Court of Appeal decision in *Stephenson v State of Queensland*. Davies JA said:

> 'It may be accepted that there is but one point when a fact comes within the applicant's means of knowledge. But to say that assumes the subject of the verb 'was' or, more completely, 'was not within the means of knowledge of the applicant', in s31(2)(a), is 'fact' or 'possibly material fact'...The subject of the verb 'was' in that paragraph of s31, in my opinion, is the compound phrase 'material fact of a decisive character relating to the right of action'. Thus the question is not when all material facts came within the means of knowledge of the applicant. It is when all material facts of a decisive character relating to the right of action came within his means of knowledge.'

Applying that approach to the circumstances of this case, if the termination of his employment is a material fact of a decisive character, Mr Castillon should succeed in his application. P&O say that is not a material fact of a decisive character as, prior to the critical date, it was clear to Mr Castillon that he had no future with P&O and that he ought to commence proceedings in his own interests. That argument is based on the finding made by Rackemann DCJ that he would not be redeployed. That finding,

as I have previously canvassed, was based on incomplete material and the question must be approached afresh taking into account all relevant material.

It is evident that, before the latest critical date, Mr Castillon was aware that there were difficulties in redeploying him to lighter duties. He had even been told there was no position in the company for him if he did not work as a crane driver. However, he did not receive consistent messages from P&O on this issue, nor did P&O act on the basis that he had no future with the company. Mr Castillon's employment was not terminated and he was not told it would be terminated until after the latest critical date.

Mr Castillon was aware that other P&O employees who had been injured were redeployed and was hopeful that he could achieve the same result. A number of doctors whom he consulted at P&O's request informed P&O that he could undertake lighter or alternative duties. Throughout the period from the latest critical date to the termination of his employment, Mr Castillon and P&O continued to discuss options for his full recovery or redeployment either directly in meetings or indirectly through correspondence involving doctors and other health professionals. As late as November 2003, P&O was seeking medical advice as to alternate duties Mr Castillon could undertake. It was not until September 2004 that P&O received a definitive medical report (of Dr McCartney) that Mr Castillon was unable to perform any role as a stevedore.

So while there was a possibility that Mr Castillon would not be retained as an employee of P&O in any capacity, there was also a possibility that that [sic] he would be redeployed. Whatever view is taken about which possibility was more likely, there was no certainty before the latest critical date. **A possibility is not a material fact (*Broken Hill Pty Co Ltd v Waugh*). The possibility that he would not continue with P&O did not become a material fact until his employment was actually terminated.**

That Mr Castillon could, and in this case did, commence proceedings earlier than this point is not the question. The question is whether a reasonable person would consider that he ought to do so. In my view, taking into account all relevant material from the personnel file, the 'conjunction of circumstances' that would lead a reasonable person to 'regard the facts as justifying and mandating that an application be brought in the applicant's own interests' (*State of Queensland v Stephenson* at [30]) occurred after the latest critical date. That is, it arose when his employment with the company was terminated because of his inability to work as a crane driver and P&O's apparent inability to find alternative duties or a different role within the company."[12] (emphasis added)

---

12 *Castillon v P&O Ports Limited* [2007] QDC 054 at [56] – [67].

The arguments in this Court

[27] The defendant argues that the learned primary judge should have declined to hear the second application on the ground that it was an abuse of process for the plaintiff to bring a further application when there had been no appeal from the refusal of the plaintiff's first application for an extension of time by Rackemann DCJ. The defendant also argues that the findings of Rackemann DCJ meant that the plaintiff was estopped from seeking to relitigate the issue.

[28] As is apparent from the reasons of the learned primary judge set out above, her Honour treated this issue as a matter of discretion. Her Honour exercised that discretion against the defendant because the second application was supported by documentation which the defendant should have disclosed but failed to disclose before the first application was decided.

[29] The plaintiff argues that it would be a reproach to our rules of procedure if an earlier application, decided erroneously against a party because of the other party's failure to fulfil its obligations of disclosure, could stand as an immoveable bar to the success of a second application founded on more complete and accurate evidence. The defendant argues that this is not such a case. The defendant points out that much of what is contained in the documentation lately disclosed by it concerns facts of which the plaintiff must have been aware and which he could have brought forward before Rackemann DCJ. The most obvious of these facts is the fact of the termination of the plaintiff's employment in December 2004 which the learned primary judge regarded as a material fact of a decisive character. The plaintiff clearly knew of this fact at the time of the first application.

[30] The defendant argues that the lately disclosed material could have made no difference to the decision reached by Rackemann DCJ. There is obviously something to be said for this contention. The plaintiff clearly knew that his employment had finally been terminated at the time of the first application. The lately disclosed material shows that, while the parties continued to address the possibility of redeploying the plaintiff within the defendant's organisation, the difficulties in doing so were repeatedly acknowledged. The documentation gives little reason for optimism that the plaintiff would have been able to be re-assigned to light duties prior to 27 November 2001. If this material had been put before Rackemann DCJ, it would have tended to confirm that the plaintiff's prospects of redeployment by the defendant as at 27 November 2001 were uncertain at best. Nor was there any suggestion in the documentation that, if the plaintiff was re-assigned to lighter duties, his remuneration would remain at the level he earned as a crane operator.

[31] In my respectful opinion, however, it is not necessary to rule upon the defendant's arguments in relation to abuse of process, issue estoppel or the *Anshun* principle. I consider that the learned primary judge erred in coming to a view of the operation of s 31(2) of the Act in the circumstances of this case which was contrary to that taken by Rackemann DCJ.

[32] Section 31(2)(a) of the Act empowers the court to extend the period of limitation for an action where:

> "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".

[33] Section 30(1)(b) makes provision in relation to what is "a material fact of a decisive character" in the following terms:

> "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 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".

[34] In the plaintiff's second application at first instance, the plaintiff argued successfully that the material fact of a decisive character was the fact of the termination of the plaintiff's employment with the defendant on 17 December 2004. In my respectful opinion, quite apart from the circumstance that this fact was obviously known to the plaintiff at the time his first application was heard and determined, the plaintiff had ample basis for concluding that his inability to work as a crane driver and the uncertainty attending his prospects of re-assignment were such as to give rise to a worthwhile cause of action prior to 27 November 2001. That later information may have enabled the plaintiff to show that his right of action was "more worthwhile" than it might have previously been thought to be, but it does not alter the circumstance that, in accordance with the evidence supporting the findings of Rackemann DCJ, there was a critical mass of information within the plaintiff's means of knowledge prior to 27 November 2001 which justified bringing the action.

[35] That the critical mass of information available to the plaintiff may have been augmented by knowledge about the defendant's views of the prospects of the termination of his employment was beside the point. In *Moriarty v Sunbeam Corporation Limited*,[13] Macrossan J said:

> "In cases like the present, 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. This is what the application of the test of decisiveness under s 30(b) comes down to: *Taggart v The Workers' Compensation Board of Queensland* [1983] 2 Qd R. 19, 23, 24 and *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234, 251 per Deane J."

---

[13] [1988] 2 Qd R 325 at 333.

[36] In *Sugden v Crawford*,[14] Connolly J said:

> "Implicit in the legislation is a negative proposition that time will not be extended where the requirements of s 30(b) are satisfied without the emergence of the newly discovered fact or facts, that is to say, where it is apparent, without those facts, that a reasonable man, appropriately advised, would have brought the action on the facts already in his possession and the newly discovered facts merely go to an enlargement of his prospective damages beyond a level which, without the newly discovered facts, would be sufficient to justify the bringing of the action …"

With great respect to the learned primary judge, none of the reasoning set out at [26] above explains, either why the evidence did not support the finding of fact made by Rackemann DCJ that the plaintiff had sufficient information to warrant his bringing an action in his own interests before 27 November 2001, or why this view of the facts was not both correct and decisive of the application. This case is to be contrasted with the recent decision of this Court in *Greenhalgh v Bacas Training Limited & Ors*.[15] There the material fact of a decisive character, namely the existence of "unequivocal evidence of unavoidable economic loss",[16] was not within the means of knowledge of the plaintiff in that case until he received a medical report which stated for the first time that his "occupation as a mechanic was ineluctably and permanently jeopardised by his injury."[17]

[37] The learned primary judge's reasons attribute to Rackemann DCJ "a finding that [the plaintiff] would not be redeployed" which was erroneous because it was based on incomplete information. As is apparent from the reasons of Rackemann DCJ which I have set out at length above, his Honour did not make a finding that, as at 27 November 2001, the plaintiff would not be re-assigned to light duties. In truth, Rackemann DCJ referred, accurately as it happens, to the circumstance that the plaintiff had not been redeployed and that attempts to redeploy him were ongoing. Those efforts were ultimately not successful; but the important point for present purposes is that the fact, as it was rightly found to be, that the plaintiff could no longer work as a crane operator, and the uncertainty surrounding his prospects of redeployment, meant that he had already suffered substantial compensable damage. The differences of degree in his vulnerability to dismissal by the defendant (and consequential unemployability) reflected in the matters referred to by the learned primary judge, and particularly the actual termination of the plaintiff's employment, were not apt to falsify the conclusion of Rackemann DCJ that the plaintiff's knowledge of the adverse economic consequences of his injury justified bringing an action (as he had decided to do in June 2001) well before he was actually dismissed. The learned primary judge's observation that "a possibility is not a material fact", in reference to the possibility that he would not be redeployed, reflects a failure to recognise that the plaintiff's vulnerability in the labour market and his evident inability to continue as a crane driver were, indeed, facts material to the quantum of damages recoverable by the plaintiff.[18]

---

14 [1989] 1 Qd R 683 at 685.
15 [2007] QCA 327.
16 [2007] QCA 327 at [18].
17 [2007] QCA 327 at [19].
18 *Hart v Consolidated Meat Group Pty Ltd* [2005] QSC 89; *Langton v West & Suncorp Metway* [2006] QSC 234.

[38] Next, while it is true that the circumstances that the plaintiff had, in fact, commenced proceedings before the "new information" emerged, and, indeed, had decided to commence proceedings in June 2001, are not decisive of the question posed by s 31(2)(a) of the Act, those circumstances are relevant for two reasons. First, they are relevant to dispel any suggestion that there were circumstances which might reasonably have led to a view that it was not in the plaintiff's own interests to commence proceedings at the time which they were, in fact, commenced. Secondly, they demonstrate a "steady preponderance of opinion or belief"[19] on the part of the plaintiff and his advisers that the information in their possession concerning the extent of the plaintiff's loss was sufficient to warrant the commencement of proceedings. They are circumstances which, at least, call for a clear explanation as to why the "conjunction of circumstances", and the plaintiff's awareness of them, was not such as to justify and require the bringing of an action in the plaintiff's own interest.

[39] That the plaintiff had decided to commence, and actually commenced, proceedings are circumstances which serve to highlight the difficulty involved in the learned primary judge's conclusion that Rackemann DCJ erred in his crucial finding because he was not aware of the documents lately disclosed by the defendant which show a degree of equivocation on the part of the defendant as to its willingness and ability to continue the plaintiff's employment. In concluding that Rackemann DCJ erred in his assessment that the plaintiff had the means of knowledge of sufficient facts to justify an action for damages as worthwhile, the learned primary judge seems to have assumed that the recently disclosed information would have led to a reasonable assessment, prior to 27 November 2001, that an action was not worthwhile. That assumption by the learned primary judge is not self-evidently true. It was not supported by analysis demonstrating that the plaintiff's inability to continue as a crane operator and the defendant's undisclosed equivocation over its willingness and ability to continue to employ the plaintiff in other duties meant that the economic loss component of an action for damages would reasonably be regarded as insufficient to justify bringing an action.

[40] Her Honour's assumption is, in truth, counter-intuitive: the facts that the plaintiff had decided in June 2001 to commence an action, and had actually commenced an action before the final termination of his employment, serve to emphasise, at a practical level, the real difficulty in the way of the conclusion that the plaintiff did not know that he had a worthwhile cause of action until his employment was finally terminated. The plaintiff and his legal advisers apparently made an assessment that an action for damages was worthwhile having regard to the facts of which they were aware, including the facts relating to the impairment to the plaintiff's earning capacity and his vulnerability in the employment market, whether or not the plaintiff continued in employment with the defendant. It may be said that, on an objective view, they were in error in their assessment; but that error is not demonstrated by treating the termination of the plaintiff's employment as a material fact because, even if it is regarded as a material fact, it was not of a decisive character.

[41] The learned primary judge's focus upon termination of employment as a material fact of a decisive character unknown to the plaintiff until it occurred was a distraction from the crucial point that, while the termination of the plaintiff's

---

19 *Wood v Glaxo Australia Pty Ltd* [1994] 2 Qd R 431 at 442.

employment might have added to the quantum of the plaintiff's damages, this "new fact" did not falsify the earlier finding that he had a sufficient basis for reasonably deciding that he had a worthwhile claim against the defendant at a much earlier point in time. The decision of the High Court in *State of Queensland v Stephenson* cited by her Honour does not obviate the need to consider whether the plaintiff was in possession of a critical mass of information prior to 27 November 2001 in accordance with the approach in *Moriarty v Sunbeam Corporation Limited* and *Sugden v Crawford*. The point made by the High Court in *State of Queensland v Stephenson*[20] was that unless the material facts assume a decisive character in the assessment of a reasonable person before the critical date, the one year period referred to in s 31(2) will not have begun to run. As was said recently in this Court in *Hintz v WorkCover Queensland & Anor*,[21] the decision of the High Court in *State of Queensland v Stephenson* does not cast doubt on the authority of the decisions in *Moriarty v Sunbeam Corporation Limited* and *Sugden v Crawford*.

[42] In *State of Queensland v Stephenson*,[22] the High Court held that it is only where an applicant for an extension of time knows, or has the means of knowledge, that a material fact is of a decisive character that time begins to run against the applicant under s 31(2) of the Act. In this regard, Gummow, Hayne and Crennan JJ said:

> "The ascription to material facts of the character of 'decisive' looks to the response of an actor. It is here that the exegesis supplied by para (b) of s 30(1) comes into play. The court is to consider the response of 'a reasonable person' in the manner explained in that paragraph. The particular claimant is to enjoy the advantage conferred by the provision in s 30(1) for the making of an extension order only by satisfaction of criteria which look to the response of a reasonable person. In this way, s 30(1) assists and controls an understanding of the compound conception in s 31(2).
>
> …
>
> The better view is that the means of knowledge (in the sense given by para (c) of s 30(1)) of a material fact is insufficient of itself to propel the applicant outside s 31(2)(a). For circumstances to run against the making of a successful extension application, the material fact must have 'a decisive character'. Whether the decisive character is achieved by the applicant becoming aware of some new material fact, or whether the circumstances develop such that facts already known acquire a decisive character, is immaterial. It is true to say, as the plaintiffs submit in their written submissions, that in a sense none of the material facts relating to the applicant's right of action is of a decisive character until a reasonable person 'knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing' the features described in subparas (i) and (ii) of s 30(1)(b). Whether that test has been satisfied *at a particular point in time* is a question for the court.
>
> The practical result of this construction is that an applicant always has at least one year to commence proceedings from the time when his or her knowledge of material facts (as defined in s 30(1)(a)) coincides with the circumstance that a reasonable person with the

---

20 (2006) 226 CLR 197 at 206 - 207 [23] – [27].

21 [2007] QCA 72 at [38] – [39].

22 (2006) 226 CLR 197 esp at 206 – 208 [22] – [30].

> applicant's knowledge would regard the facts as justifying and mandating that an action be brought in the applicant's own interests (as in s 30(1)(b)). If this conjunction of circumstances first occurs before the commencement of the last year of the limitation period, no application for an extension can be brought; the applicant has the benefit of at least one year before the limitation period expires and is required to act within that time. If the conjunction occurs after the commencement of that last year, the court is empowered, if the other criteria in s 31 are satisfied, to extend time for one year from the date of that conjunction of circumstances."[23]

[43] On the plaintiff's behalf, it was argued in this Court that it was only upon disclosure of the recently disclosed documentation that the "decisive character" of the extent of the plaintiff's economic loss could be appreciated. But, for the reasons I have given, that argument cannot be accepted because the response of a reasonable person in the plaintiff's position prior to 27 November 2001 would have been the same as the response of the plaintiff manifested by his decision in June 2001 to commence proceedings.

[44] In my respectful opinion, the learned primary judge had no sufficient basis for arriving at a conclusion different from that of Rackemann DCJ. On the evidence, the plaintiff knew, or had the means of knowledge of, sufficient facts to enable him to conclude that an action for damages was worthwhile at a time before 27 November 2001.

Conclusion and orders

[45] The decision below materially prejudiced the defendant's legal position to the extent that, without sufficient basis, it deprived the defendant of a defence under the Act. The application for leave to appeal should be granted.

[46] The learned primary judge erred in concluding that the plaintiff did not have within his means of knowledge a material fact of a decisive character relating to his right of action until after 27 November 2001. The appeal should be allowed and the judgment below set aside.

[47] The plaintiff must pay the defendant's costs of the appeal to be assessed on the standard basis.

[48] **HOLMES JA:** I have had the advantage of reading the reasons for judgment of Keane JA and gratefully adopt his Honour's account of the respective judgments of Rackemann DCJ and the learned primary judge, and the evidence on which they were based. While I agree with his Honour's reasoning, I am also of the view that the learned primary judge should have declined to entertain the respondent's application for an extension of the limitation period on the basis of issue estoppel arising from Rackemann DCJ's determination that:

> "[the respondent] had within his means of knowledge, by November 2001, all the material facts of a decisive character relating to the nature and extent of the injury and that it was in his own interests to pursue action."

---

[23] (2006) 226 CLR 197 at 207 – 208 [25], [29] – [30].

The view of the learned primary judge, that no issue estoppel could arise because a second application was not precluded, is explicable in light of broad statements made in some of the authorities, but bears further examination.

Issue estoppel in interlocutory proceedings

[49] The fact that a determination is made in the course of interlocutory proceedings is not conclusive of whether it may give rise to an issue estoppel. The seminal statement of the law relating to issue estoppel is that made by Dixon J in *Blair v Curran*:[24]

> "A judicial determination directly involving an issue of fact or of law disposes once for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion, whether that conclusion is that a money sum be recovered or that the doing of an act be commanded or be restrained or that rights be declared. The distinction between *res judicata* and issue estoppel is that in the first the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and has no longer an independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact or law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order."[25]

It will be seen that that statement is not directed to the form of the proceedings in which the "judicial determination directly involving an issue of fact or of law" is made.

[50] Issue estoppel in an interlocutory context was raised and discussed in the *Carl Zeiss Stiftung v Rayner & Keeler Ltd* decisions, in a series of applications in the English courts, concerning, at least in part, an East German council's authority to instruct solicitors on the plaintiff's behalf. In his speech in *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)*[26] Lord Guest identified the requirements of issue estoppel:

> "(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final, and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

(A formulation adopted by the High Court in *Kuligowski v Metrobus*). [27]

[51] Lord Guest expanded on the quality of finality: it meant "final and conclusive on the merits".[28] In the case before the House of Lords, the appeal was, ultimately, from a decision of Cross J, dismissing a summons to stay proceedings and holding that the council was the proper body to authorise the plaintiff's passing off action. The question was raised as to whether an earlier decision by a West German court in an

---

24 (1939) 62 CLR 464.
25 At 531-532.
26 [1967] 1 AC 853 at 935.
27 (2004) 220 CLR 363 at 373.
28 [1967] 1 AC 853 at 935.

action seeking restraining orders, that the council lacked authority to represent the plaintiff, created an estoppel. The plaintiff was entitled, Lord Guest said, to raise a change of circumstances affecting its capacity to sue; the West German decision was therefore not final and conclusive.

[52] In *Carl Zeiss Stiftung v Rayner & Keeler Ltd & Others (No 3)*,[29] the question had evolved; it was now whether the decision of Cross J affirming the council's capacity to give instructions on the plaintiff's behalf created an issue estoppel. Buckley J distinguished between an interlocutory order which involves no final decision of any issue, because something remains to be determined before the decision is effected or because it is subject to alteration by the court or tribunal making it (as, for example, an interim injunction); and a decision which, although interlocutory, is final and binding.[30] To the extent that it concerned the authorisation of the plaintiff's action, the relevant determination did have the necessary final and binding quality; the defendants could not have sought another stay of the action on that ground and they conceded as much; but it did not bear directly on the issues raised by the litigation before Buckley J so as to give rise to an estoppel.

[53] The second of Buckley J's indicators of lack of finality, that the decision is subject to subsequent alteration, begs the question of how one determines what decisions may be revisited. It shares the circularity which bedevils attempts in many of the authorities to articulate when a decision possesses the necessary finality to create an issue estoppel: if a further application may be made, the decision is not final, but whether a further application may be made depends on whether an issue estoppel arises.

[54] Lord Guest's tripartite test was applied by the House of Lords in *"The Sennar" (No 2)*,[31] with some further consideration of what constituted a decision "on the merits" in the context of issue estoppel:

> "a decision on the merits is a decision which establishes certain facts proved or not in dispute, states what are the relevant principles of law applicable to such facts and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned."[32]

On those criteria, a Dutch Court of Appeal's decision that an exclusive jurisdiction clause in a bill of lading applied to the appellants' claim, although procedural insofar as it was a decision concerning that court's jurisdiction, was nonetheless a decision on the merits. It created an issue estoppel which barred the appellants from proceeding in an English court.

[55] Closer to home, the New Zealand Court of Appeal, in *Joseph Lynch Land Co Ltd v Lynch*,[33] accepted, at least in principle, that an interlocutory judgment could found a subsequent issue estoppel; the question was,

> "concerned not so much with the character of the earlier decision, ie whether it should be regarded as final or interlocutory . . .[but] rather whether in the circumstances it is reasonable to regard the earlier

---

29 [1969] 3 All ER 897.
30 At 910.
31 [1985] 2 All ER 104.
32 At 111.
33 [1995] 1 NZLR 37.

> decision as a final determination of the issue which one of the parties now wishes to raise."[34]

That said, the court urged caution in coming to the conclusion that an estoppel had been created by a decision given in an interlocutory context.

[56] In *Makhoul v Barnes*[35] the full Federal Court described as "too broadly expressed" the proposition (expressed by a single judge in an earlier decision) that the determination of an issue determined in interlocutory proceedings could not give rise to an issue estoppel. The Court referred to *Carl Zeiss Stiftung (No 3)* and *Joseph Lynch Land Co* as indicating that the correct approach was to consider whether the earlier decision ought to be regarded as a final determination of the issue, rather than focussing on the nature of the proceedings.[36]

[57] In *Santos v Delhi Petroleum Pty Ltd*[37] Lander J, with whom the other members of the South Australian Full Court agreed, considered the question. It was relevant, but not decisive, his Honour said, that the decision was made in an interlocutory application. The question must be answered:

> "[not] by reference to whether the application is interlocutory or otherwise but by reference to the order itself and whether it amounts to a final determination such that it is not only impractical to bring the issue before the court but impermissible."[38]

An issue resolved on an interlocutory application could, if it finally determined the issue between the parties, give rise to an issue estoppel. That view was cited with approval by the New South Wales Court of Appeal in *Inasmuch Community Inc v Bright*.[39]

[58] Decisions made for the purpose of determining whether an order is final rather than interlocutory so as to give a right of appeal are not, as Handley JA, writing extra-curially has pointed out,[40] necessarily of assistance. As much can be seen from the rationale given in *Carr v Finance Corporation of Australia Ltd [No 1]*[41] for the approach taken in that context. Gibbs CJ observed that the test in *Licul v Corney*,[42] of whether the judgment or order appealed from finally determined the rights of the parties, required the court to have regard to the legal, as opposed to the practical, effect of the judgment. Otherwise uncertainty would result, and in some instances the court would have to investigate the facts and the course of the proceeding in order to determine the practical effect of the order;

> "an inquiry quite inappropriate when the only issue is whether a right of appeal exists."[43]

Mason J similarly regarded the disadvantage of having to undertake

---

34 At 43.
35 (1995) 60 FCR 572.
36 At 583.
37 [2002] SASC 272.
38 At para [400].
39 [2006] NSWCA 99 at [60].
40 Handley K, "Res Judicata: General Principles and Recent Developments" (1999) 18(3) Aust Bar Rev 214.
41 (1981) 147 CLR 246 at 248.
42 (1976) 180 CLR 213.
43 (1981) 147 CLR 246 at 248.

> "an examination of the grounds on which the application to set aside was made, the grounds on which it was refused and the formation of a judgment as to the impact of the grounds of refusal on the prospects of bringing a second application"[44]

as militating against such an approach to classification in determining whether an appeal lay as of right. But such an exercise is, in contrast, appropriate in determining whether an issue estoppel exists; then, it is necessary to consider precisely what was decided and its actual effect in binding the parties.

Finality in extension of time cases

[59] The respondent relied on a series of decisions which, he said, confirmed that issue estoppel did not apply to applications for extension of time for bringing proceedings. It is convenient to begin with *DA Christie Pty Ltd v Baker*.[45] In that case Hayne JA (as he then was) and Charles JA held that an order dismissing an application for extension of time under s 23A of the *Limitation of Actions Act 1958* (Vic) did not finally determine any matter inter partes and created no issue estoppel. Section 23A provides that the court, subject to considerations such as length of, and reasons for, delay, prejudice and whether the plaintiff acted promptly and reasonably, may, if it decides that it is "just and reasonable so to do", order an extension of the limitation period.

[60] Hayne JA put the question thus:

> "… whether there is any issue estoppel turns, in part, upon whether there has been a final determination of any issue between the parties. If all that the dismissal of the first application means is that the court has concluded that on the material then advanced no order for extension should be made, it is apparent that an order dismissing the application determines no issue between the parties that is raised on the second application for on that second application the issue would be different – whether any extension of time should be made on the new and different material then before the court. If, however, the true characterisation of the order dismissing the first application is that it is a determination of whether an extension of time should be granted to the applicant within which that applicant might bring an action complaining of a cause of action otherwise statute barred, it might perhaps be said that the dismissal of the application finally determined an issue which would arise in the course of the second application."[46]

Describing the first as the "narrow question" and the second as the "broader question", he posited that the application of issue estoppel could be determined by deciding which of the two questions the first court had determined.

[61] Hayne JA then turned to consider the decisions of the High Court in *Hall v Nominal Defendant*[47] and *Carr v Finance Corporation of Australia Ltd [No 1]*.[48] (Both cases

---

44 At 256.
45 [1996] 2 VR 582.
46 At 599.
47 (1966) 117 CLR 423.
48 (1981) 147 CLR 246 at 248.

were relied on by the respondent here as confirming the interlocutory nature of decisions such that of Rackemann DCJ.) *Hall* concerned whether an appeal lay as of right against an extension of time for the institution of proceedings against the Nominal Defendant. Section 65A(3) of the *Traffic Act 1925* (Tas) gave the court a discretion to extend time for instituting proceedings for such further period as it thought fit. Barwick CJ, dissenting, considered that since all the relevant facts must exist at the time of the application, its dismissal entailed a finding that the applicant either could not adequately explain his failure to sue, or that, notwithstanding his explanation it was not just to extend the time. Those were questions which could not be re-litigated, so that the order dismissing the application was final.[49] Successive applications for extensions of time for the taking of a step in an action or setting aside a default judgment were to be distinguished, because in those circumstances "the matter is under the control of and generally within the discretion of the court in which the action is brought."[50]

[62] Taylor and Owen JJ, in contrast, considered that the order dismissing the application to extend time did not conclude the applicant's right to bring an action and was not final. It did not operate to prevent the applicant from making a further application for an extension of time, although such an application was likely to be fruitless without additional relevant facts. Windeyer J, while prepared to assume that for practical purposes the applicant would be precluded from making another application, considered that the interlocutory character of the proceedings was more important than the result; so that he, too, concluded that the order was interlocutory.

[63] Hayne JA also referred to the judgments of Gibbs CJ and Mason J in *Carr's* case, which concerned the status of an order, made under the *Supreme Court Rules 1970* (NSW), refusing to set aside a default judgment. Gibbs CJ considered the order interlocutory, because it was open to the defendant to apply again to have the judgment set aside. Mason J regarded the first instance proceeding as correctly characterised by Barwick CJ in *Hall*: a matter "under the control of and generally within the discretion of the court in which the action is brought". Given the existence of that discretion, there was no justification for imposing any rule that refusal of an application constituted a complete bar.[51] Neither Gibbs CJ nor Mason J, Hayne JA noted, had departed from what was said in *Hall's* case.

[64] There was, Hayne JA considered, no real basis for distinguishing between an application for an extension of time of the kind with which the Tasmanian legislation was concerned and an application under s 23A of the *Limitation of Actions Act*. The decisions in *Hall's* case and *Carr's* case dictated a conclusion that a second application could be made under s 23A, notwithstanding the dismissal of the earlier application, and it followed from that fact that there was no final determination of any matter between the parties.[52]

[65] Charles JA agreed with that conclusion. Brooking JA, on the other hand, having reviewed cases in which interlocutory decisions in a variety of applications had given rise to issue estoppel, contrasted two situations. The first was where, as in a review of weekly workers' compensation payments, the statute required the issue to be determined as at the date of hearing, so that further applications could be made

---

49 (1966) 117 CLR 423 at 430.

50 At 429.

51 (1981) 147 CLR 246 at 256.

52 *DA Christie Pty Ltd v Baker* [1996] 2 VR 582 at 601.

requiring determinations at a later time when the facts might have altered; the issues on the successive reviews would not be the same. In contrast was the situation described by Barwick CJ in *Hall*, where the facts relevant to the application had crystallised at the time it was made, so that there was no reason to give an unsuccessful applicant further opportunities.

[66] Adopting the approach of Gibbs CJ in *Carr's* case, Brooking JA accepted that an order dismissing an application under s 23A did not as a matter of law finally dispose of the rights of the parties, since the disappointed applicant could apply again. But a case such as that before the court, where there had been no change in circumstances, merely an augmentation of the material relied on, although a second application might be made, the earlier dismissal could still give rise to an issue estoppel. This was not an ordinary interlocutory application governed by the court's own practice and procedure, as to which it was arguable that it remained open to the court to exercise its discretion. It was an application under a statute empowering an extension of the limitation period if the court considered it just and reasonable to do so; an issue which could be caught by the principle of issue estoppel. If that were not so, Brooking JA said, he agreed with Hayne JA that the making of the second application was, in the circumstances, an abuse of process.

[67] In *Nominal Defendant v Manning*[53] the relevant application was made under s 52(4) of the *Motor Accidents Act 1988* (NSW), which precluded commencement of proceedings outside prescribed time limits "except with the leave of the court in which the proceedings are to be taken". After the dismissal of his first application for leave to commence an action out of time, the respondent had made a second, successful application supported by evidence which could have been placed before the court in the earlier proceedings. The Nominal Defendant's appeal was not argued on the basis of issue estoppel, but the question received some passing reference. Mason P described the order dismissing the first application as interlocutory, and thus presenting no bar to a second application. Foster AJA expressed his view in wider terms: because the first application was interlocutory, the doctrine of issue estoppel could have no relevance. Heydon JA (as he then was) said this:

> "Respondents have a very strong entitlement to finality once a trial on the merits has occurred and all appellate processes are exhausted, and their entitlement is protected by the various doctrines related to res judicata. But their entitlement to finality is less compelling in relation to applications to extend time with a view to ensuring a trial on the merits in due course."[54]

In the result, Mason P concluded, following Hayne JA and Brookings JA in *DA Christie Pty Ltd*, that as a general rule, a further application where there was no change in circumstances but merely an addition of material, would constitute an abuse of process. Heydon JA and Foster AJA took a different view, rejecting any such general position and dismissing the appeal.

[68] The respondent urged upon us the decision of the Full Court in *Meddings v The Council of the City of Gold Coast*[55] as binding authority for the proposition that issue estoppel did not preclude a second application for an extension of the

---

53 (2000) 50 NSWLR 139.

54 At 154-155.

55 [1988] 1 Qd R 528.

limitation period. In that case, the court was concerned with the characterisation of an order refusing to extend a limitation period under s 31 of the *Limitation of Actions Act 1974* (Qld) as interlocutory or final for the purpose of determining whether a right of appeal existed. No reasons had been given at first instance; the District Court judge apparently stated that he was not satisfied that the plaintiff did not know at the material time that the defendant Council was the necessary person to sue.

[69] The practical effect of the order, McPherson J observed, was to deprive the applicant of her right of action, but the determination of the actual outcome could not determine the character of the proceedings; otherwise the existence of a right of appeal would vary according to the failure or success of the application. Applying *Hall*, *Licul v Corney* and *Carr*, it was the legal effect of the order which must be considered. In theory, the applicant in that case could make another such application on the same or similar material, doomed to failure though it might be. The order dismissing her application had no direct effect on her action because she could still go to trial, although she would inevitably be met by a defence that the claim was statute barred. The Court held that the order was interlocutory, so that no appeal lay from it as of right.

Conclusions

[70] In each of *Hall*, *DA Christie Pty Ltd*, and *Manning*, the relevant legislation required simply the judge's exercise of discretion, with regard to various criteria, as to the extension of time. (*Carr*, although not concerned with an extension application, similarly involved an exercise of discretion, in that case under the court's rules of practice.) In contrast, s 31(2) of the *Limitation of Actions Act 1974* (Qld) sets a threshold which must be met before the court's discretion to order an extension of the period of limitation arises. It must first appear 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…".

[71] What was decided by Rackemann DCJ in this case was that the respondent failed at the threshold because he had all material facts of a decisive character relating to the right of action within his means of knowledge by the critical date. That was a positive finding, not an exercise of discretion and not merely a failure to reach a prescribed state of satisfaction on the material before him. It is unnecessary to consider whether the exercise of the statutory discretion under s 31 ought to be regarded as more amenable to creating issue estoppel than the exercise of discretion in a matter "under the control of and generally within the discretion of the court" (the distinction raised by Brooking JA in *DA Christie Pty Ltd*). The resolution of the s 31(2)(a) issue against the respondent precluded the exercise of any discretion at all.

[72] The respondent contended that to hold that issue estoppel applied in this case would require over-ruling the decision of the Full Court in *Meddings v The Council of the*

City of Gold Coast.[56] I do not think that is so, for two reasons. Firstly, *Meddings* was not concerned with issue estoppel or the actual effect of any determination in binding the parties; it was purely concerned with characterisation, in a different context, of the legal effect of an order refusing an extension of time. Secondly, it was a case of absence of satisfaction on the material then before the court as to a necessary matter, a state of affairs which was, at least in theory, capable of being remedied by further material.[57] In contrast, Rackemann DCJ determined the issue of when the relevant material facts came within the knowledge of the applicant. Once the respondent's state of knowledge was positively found to exist at the given date, no further material could properly be advanced to change that finding. There was no fresh decision, consistent with that of Rackemann DCJ, which could be made on that issue with the assistance of further information; new material could only produce a different result by showing that the original decision was wrong.

[73] In terms of Lord Guest's test of finality, Rackemann DCJ's decision established the facts, identified the relevant statutory provision and applied it to them, and concluded that there was no discretion to extend the limitation period. Adopting Hayne JA's classification, the decision was not limited to the narrow question of whether on the material then before the court the extension should be granted; it determined the broader question, that an extension of time could not be granted at all.

[74] Rackemann DCJ's determination was, in my view, a judicial determination of fact so as to "[dispose] once and for all of the issue", notwithstanding that it was made in an interlocutory proceeding. It resolved questions of rights as between the parties: its consequence was that the respondent had no right to seek an extension of the limitation period or to claim damages in respect of any cause of action arising prior to 27 November 1999 (three years prior to the making of the s 305 order). The respondent was estopped by that determination from seeking a new finding under s 31(2)(a) in his favour.

[75] It is unnecessary to consider the existence of any discretion to relieve the respondent from the issue estoppel, of the kind recognised in *Arnold v National Westminster Bank Plc*[58] as available to prevent injustice; for the reasons given by Keane JA, the disclosure of the later material as to the prospects of the respondent's redeployment could have no bearing on Rackemann DCJ's determination.

[76] The learned primary judge should not have embarked on a reconsideration of the question already decided.

[77] I agree with the orders proposed by Keane JA.

[78] **WILSON J:** I respectfully agree with the orders proposed by Keane JA for the reasons given by His Honour and for the further reasons given by Holmes JA.

---

56 [1988] 1 Qd R 528.

57 Indeed, it is doubtful that a state of non-satisfaction can ever give rise to an issue estoppel: see the discussion in *Kuligowski v Metrobus* (2004) 220 CLR 363 at 385-6.

58 [1991] 2 AC 93.