SUPREME COURT OF QUEENSLAND

CITATION:	*Honour v Faminco Mining Services Pty Ltd as Trustee for the Faminco Trust (In Liquidation) & Anor* [2009] QCA 352
PARTIES:	**CLINTON JOHN HONOUR** (applicant/respondent) **v** **FAMINCO MINING SERVICES PTY LTD AS TRUSTEE FOR THE FAMINCO TRUST (IN LIQUIDATION)** ABN 5517 147 163 (first respondent/appellant) **MOUNT ISA MINES LTD** ACN 009 661 447 (second respondent/appellant) **OSM GROUP PTY LTD** (respondent/not a party to the appeal)
FILE NO/S:	Appeal No 480 of 2009 Appeal No 501 of 2009 SC No 51 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	13 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2009
JUDGES:	Fraser and Chesterman JJA and P Lyons J Separate reasons for judgment of each member of the Court, Fraser JA and P Lyons J concurring as to the orders made, Chesterman JA dissenting
ORDERS:	**Appeals dismissed with costs**
CATCHWORDS:	LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – Where the appellants appeal against an order to extend the time for the respondent to commence proceedings in respect of an injury and related relief LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER – whether a material fact is of a

decisive character – whether the respondent should have sought appropriate advice as to his condition because of the matters which he knew of by the relevant date – whether on the information available at the relevant date, and with appropriate advice, a reasonable person would regard the facts which were then known as showing that an action by the respondent would have a reasonable prospect of success, and of resulting in an award of damages sufficient to justify the bringing of an action – consideration of s 30(1)(b) of the *Limitation of Actions Act*

LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – EVIDENCE TO ESTABLISH RIGHT OF ACTION – whether a material fact is within a potential claimant's means of knowledge – whether that claimant has taken reasonable steps to ascertain a material fact – whether the material fact of a decisive character relating to the right of action was not within the respondent's means of knowledge until the relevant date – whether it was reasonable for the respondent not to seek specialist opinion before the relevant date about his ability to continue to work in the mining industry – whether the respondent acted reasonably based on the information available to him at the relevant date and on appropriate advice given to him with respect to knowing that an action would have reasonable prospects of resulting in an award of general damages – consideration of s 30(1)(c) *Limitation of Actions Act*

District Court of Queensland Act 1967 (Qld), s92
Limitation of Actions Act 1974 (Qld), s 30, s 31
Personal Injuries Proceedings Act 2002 (Qld), s 57
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 275
Workers' Compensation and Rehabilitation Regulation 2003 (Qld), s 111

Castillon v P & O Ports Limited (No 2) [2008] 2 Qd R 219; [2007] QCA 364, considered
NF v State of Queensland [2005] QCA 110, considered
Pizer v Ansett Australia Limited [1998] QCA 298, considered

COUNSEL: R C Morton for the appellants
B A Harrison for the respondent

SOLICITORS: CLS Lawyers and Dibbs Barker for the appellants
McKays Solicitors for the respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of P Lyons J. I agree that the appeals should be dismissed with costs for the reasons given by his Honour.

[2] **CHESTERMAN JA**: The issues which arise in this appeal and the facts which give them context are set out in the judgment of P Lyons J. I gratefully adopt his Honour's exposition which allows me to express my reasons for allowing the appeals without detailed reference to the facts.

[3] The order made by the learned trial judge on 18 December 2008 was:

> "That the time limit for the (respondent) to institute proceedings as against the (appellants) in respect of injuries sustained … on … 16 March 2004 be extended up to and including … 23 December 2008 pursuant to the provisions of section 31 of *The Limitation of Actions Act 1974*." ("the Act")

[4] By s 31(2) of the Act:

> "… the court may order that the period of limitation for the action be extended so that it expires at the end of 1 year after that date and thereupon … the period of limitation is extended accordingly."

"That date" is the day on which the material fact of decisive character relating to the right of action comes within an applicant's means of knowledge. It must be subsequent to the second anniversary of the date on which the cause of action accrued (in this case 16 March 2006). Time can only be extended by a year from "that date". No greater extension is allowed.

[5] The application to extend time was argued on 8 December 2008. Judgment was given on 18 December pursuant to which time was extended to 23 December 2008. It is not apparent why 23 December was chosen as the terminus for the expiration of the limitation period. The Act takes as its reference point the time at which an applicant learns, for the first time, of the material fact of decisive character. When I say "learns" I mean when that fact comes within the applicant's means of knowledge.

[6] By s 30(1)(c) of the Act a fact is not within an applicant's means of knowledge at a particular time if, but only if, he does not know it and has taken all reasonable steps to find out the fact before that time.

[7] The learned trial judge found that the material fact was the opinion of Dr James, a psychiatrist whom the applicant consulted in about March 2008, that the treatment which the applicant had been advised to undergo to alleviate the symptoms of his Post Traumatic Stress Disorder:

> "… will not substantially benefit his current, increasingly strongly experienced avoidant responses, and … it will be ill-advised for (the respondent) again to contemplate hard rock mining. I think it wise that he should in fact respond to his avoidant symptoms by changing career from mining altogether."

[8] According to s 30(1)(b) of the Act a material fact will be of decisive character:

> "… if but only if a reasonable person knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing –
>
> (i) That an action on the right of action would (apart from the effect of the expiration of a period of limitation) have a reasonable prospect of success and

> result 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."

[9] It is accepted that Dr James' opinion is, or is capable of being, a material fact of a decisive character for the purposes of the Act. The question raised by the appeals is when the fact came within the respondent's means of knowledge. Time can only be extended by a year from that date.

[10] The respondent had to prove that he qualified for an extension of time. He therefore had to prove that the material fact of decisive character was not within his means of knowledge earlier than 12 months prior to the date on which he sought the extension of time. It is not enough that the applicant proves the fact was not known to him prior to that time. He must show, as well, that he had taken all reasonable steps to ascertain it.

[11] On 1 November 2007 the respondent's solicitors sent, on his behalf, a Notice of Claim for Damages pursuant to the *Workers' Compensation and Rehabilitation Act* 2003 ("WCR Act") to his employer, Faminco Mining Services Pty Ltd ("Faminco") and a Notice of Claim pursuant to the *Personal Injuries Proceedings Act* 2002 ("PIPA") to Mt Isa Mines Limited, the mine owner. The appellants submit, rightly in my opinion, that the contents of these notices, and the fact of their delivery, establish that the material facts of decisive character relating to the respondent's right of action was within his means of knowledge by that date. Without Dr James' opinion the respondent regarded the facts he knew as showing he had an action with reasonable prospects of bringing him an award of damages sufficient to justify bringing it, and that he ought to bring it in his own interests. The conclusion of the trial judge that it was not until March 2008 that a material fact, Dr James' opinion, was within his means of knowledge is not supported by a proper understanding of the evidence.

[12] The respondent argued before the learned trial judge that there was nothing in his work history or symptoms to indicate, prior to his receipt of Dr James' opinion, that the accident of 16 March 2004 would have permanent consequences for his health and affect his ability to earn income as he had before. In the words of the Act, he did not know, and the fact was not within his means of knowledge, that he had an action which would result in an award of damages sufficient to justify the bringing of an action and that, in his own interests, he ought to bring it.

[13] The judge so found. That was the critical finding. In my opinion it is wrong.

[14] There was much debate at first instance, and on the appeal, about the respondent's post accident earnings and whether they showed he had suffered a discernable diminution in earnings following his accident which should have indicated to him that he had suffered loss which could result in a substantial award of damages. The learned trial judge concluded his analysis of the evidence in these terms:

> "The incident occurred on 16 March 2004. The net weekly average for that financial year … was $847 approximately. Against that base

> it is far from clear that there has been any significant past economic loss to the end of 2007. If one assumes that the reduction in income in the year ended 30 June 2006 was entirely attributable to causes that can be traced to the … incident (and I am not sure that is established) then the prospective loss … was in the order of $14,000. That analysis ignores any argument that the changes of employment might well have resulted in some increase in average income … . The analysis … bears out (the respondent's) … testimony that he had not suffered any substantial loss over the years subsequent to the accident."

[15] The respondent was a poor historian when it came to his account of his employment and earnings subsequent to the accident. It is not precisely clear what occupations the respondent pursued following the accident, in what sequence or what he earned from them. There is some doubt about whether he ever returned to hard rock mining, although he may have done so for some time at Gympie. He told Dr James that he gave hard rock mining away in December 2004. He did not, as far as I can tell from the evidence, ever return to it after that. Certainly he took up coal mining some time in 2006 and remained in that occupation at least until December 2008. His tax returns were difficult to reconcile and did not provide any firm base for analysis. The trial judge managed to produce from the material a table of earnings which gave rise to the conclusion quoted above.

[16] There is, however, other evidence which on its face does establish that the respondent suffered substantial losses in income in the years following the accident. The respondent set out details of his earnings pre and post accident in a Notice of Claim sent to Mt Isa Mines pursuant to the provisions of PIPA. They appear in the annexure to the Notice of Claim Part 2 which was sent on 30 June 2008. For reasons not explained the Notice of Claim Part 1 was sent, as I mentioned, on 1 November 2007. Part 2, which dealt with damages, was sent seven months later. There seems no reason not to accept the respondent's own assertion of his earnings compiled for the purposes of advancing his claim for damages. The figures[1] are said to be:

> "Particulars of the injured person's employment during the three years prior to the incident and the period since the incident."

This is a compilation from what the respondent said:

Pre-Accident

2000/01 Financial Year
Gross Earnings: $113,049
Net Earnings: $70,649

2001/02 Financial Year
Gross Earnings: $117,229
Net Earnings: $73,930

2002/03 Financial Year
Gross Earnings: $119,465
Net Earnings: $73,930

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1 (Appeal Book 342-347).

Post-Accident

2003/04 Financial Year
Gross Earnings: $42,167 (Does not include gross amount for Gympie Eldorado due to incorrect recording in tax returns)
Net Earnings: $38,149

2004/05 Financial Year
Gross Earnings: $86,476
Net Earnings: $58,488

2005/06 Financial Year
Gross Earnings: $41,622
Net Earnings: $29,666

2006/07 Financial Year
Gross Earnings: $98,501
Net Earnings: $69,651

2007/08 Financial Year (to 23 May, 2008)
Gross Earnings: $95,868.79
Net Earnings: $67,270.19.

[17] The figures show a substantial decline for the financial years 2003 – 2004, 2004 – 2005, and 2005 – 2006 from pre-accident earnings. It seems likely that some factor in addition to the accident affected the 2003 – 2004 figures because the respondent was injured nine months into that year. The decline from the previous year is more than 25 per cent. The figures show that in the years after the accident, in which the respondent had obtained employment as a coal miner, he was earning less than he had five years earlier as a hard rock miner. It is not to be supposed that the earnings of hard rock miners did not increase after June 2003. The extent to which they did is unknown.

[18] It cannot have been difficult to ascertain what hard rock miners earned in the financial years 2006 – 2007 and 2007 – 2008. The facts were within the respondent's means of knowledge. He did not make the inquiry.

[19] That this is so appears from his answers to questions which appear in the Notice of Claim delivered to Mt Isa Mines Ltd on 30 June 2008.[2] In answer to question 35:

> "Is the work the injured person does or their weekly earnings different because of the incident?"

the applicant said:

> "Yes"

and gave the following details:

> "The injured person is now working in an underground coal mine. He is uncertain as to whether or not the pay that he is currently receiving … differs from the earnings that he would have been capable of making had he continued working in hard rock mining."

[20] In answer to question 54:

> "At this stage, is the injured person in a position to make an offer for the settlement of their claim?"

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2 (Appeal Book 395 – 416).

He said "no" and explained why:

> "The injured person is unable to quantify his losses to date. He is unable to quantify any claim for past economic loss because he will require comparative information in terms of wages rates for hard rock mining as opposed to underground coal mining. He will make these inquiries after the determination of the application for extension of time…"

A similar answer was given to question 45.

[21] The evidence was confused as to when and why the respondent changed occupations after the accident. There was suggestion that for reasons of his own he took time off work. Notwithstanding the imprecision to which these lacunae gave rise the figures set out in the Notice of Claim should be taken at least as prima facie evidence of the respondent's diminished earnings after, and as a result of, his accident. They were put in the Notice of Claim for that purpose.

[22] The "Notice of Claim for Damages" sent to Faminco by the respondent's solicitors on 1 November 2007 was in a statutory form which bore the notation:

> "NOTICE OF CLAIM FOR DAMAGES
>
> *Workers Compensation and Rehabilitation Act 2003* – section 275
>
> This is an approved form under section 275 of the *Workers' Compensation and Rehabilitation Act 2003*."

[23] That section provides:

> "275 Notice of Claim for Damages
>
> (1) Before starting a proceeding in a court for damages, a claimant must give notice under this section …
>
> (2) …
>
> (3) The notice must include the particulars prescribed under a regulation.
>
> (4) …
>
> (5) …
>
> (6) The notice must be accompanied by a genuine offer of settlement or a statement of the reasons why an offer of settlement can not yet be made."

[24] In section 5 of the Notice, "Amount and Calculation of Damages" the respondent's solicitors set out the following:

"Provide full particulars of the nature and extent of the amount of damages sought under each head of damage claimed and the method of calculating each amount.

Head of damage	Method of calculation	Amount ($)
General Damages Interest on general damages		$75,000.00 $2,250.00

Past economic loss	@ 2.79% for 3 years	$100,000.00
Interest on past economic loss	@ 9%	$8,100.00
Past loss of superannuation	@ 9%	$9,000.00
Future economic loss		$200,000.00
Future loss of superannuation	@ 2.7% for 3 years	$18,000.00
Special damages (paid by WorkCover)		$ NK
Interest on special damages		$550.00
Future/recurring expenses		$44.55
Fox v Wood damages		$5,000.00
Gross Settlement Amount		$417,944.55
Less contributory negligence (%) (from schedule B)		$ Nil
Less contributory negligence from a third party (from schedule B)		$ Nil
Less WorkCover statutory payments		$ Nil
Plus professional legal costs (if applicable)		$ Nil
Plus outlays (supported by documentary evidence)		$ Nil

NET SETTLEMENT AMOUNT		$417,944.55

[25] Counsel for the appellants argued that the "net settlement amount" set out in the table was the "genuine offer of settlement" required by s 275(6) but it is not clear that is the case. The subsection appears to require a separate document which "accompanies" the Notice. There is no evidence that such a document was ever prepared or sent. The tabulated amounts seem rather to be a response to the command in subsection (3) that the Notice include particulars prescribed under a regulation. Section 111(1)(c)(ii) of the *Workers' Compensation and Rehabilitation Regulation* 2003 provides that a Notice must contain "full particulars of the amount of damages sought under each head of damage claimed and the method of calculating each amount." Whether the amounts set out in section 5 of the Notice are the particulars required by subsection 3 or the offer mandated by subsection 6 they give rise to the unavoidable inference that by 1 November 2007 the respondent and his solicitors believed he had a substantial claim for damages. In my opinion no other conclusion about the document is reasonably open.

[26] The learned trial judge said this about the Notice:

> "[43] It should be immediately observed … that this was not a Notice of Claim for Damages lodged pursuant to the provisions of the *Workers' Compensation & Rehabilitation Act 2003*. Rather, it was a document albeit in that form that was lodged on the advice of the applicant's solicitors in an attempt to commence to negotiate the claim despite the expiration of the limitation period. The inference that I draw is that the supposed calculation of damages was more done in hope of setting out the ambits of the claim rather than reflecting in any sense the evidence then available to support the claim. Certainly no one on the (appellants') side attempted to demonstrate on what basis the figures set out the offer could possibly have been supported by the known evidence."

[27] With great respect to the learned trial judge that reasoning cannot be accepted. For a start there is no basis at all for not regarding the Notice of Claim for Damages as being what it purports to be. It is in the statutory form. It describes itself as a Notice required by, and given pursuant to, s 275 of the WCR Act. It does not lose that character because it was "lodged on the advice of the (respondent's) solicitors", or in an attempt to commence negotiations. Nor is there any basis for the inference drawn by his Honour "that the supposed calculation of damages was more done in hope … than reflecting in any sense the evidence then available to support the claim." Nothing was said by anyone in a position to know what was the provenance of the figures set out in section 5 of the Notice. There is nothing to rebut the inference which arises naturally from the inclusion of the figures in the Notice that they are what they say: the amount claimed by the respondent under each head of damages. There is no evidence he did not believe the truth of what he claimed.

[28] The respondent's solicitor swore three affidavits but none says anything relevant about the figures, or why the Notice was completed and sent to Mt Isa Mines.

Ms Wessel says only that she sent it. The only other evidence appears in paragraph 68 of the respondent's affidavit in which, after deposing to the sending of the Notice he continued:

> "I am informed by my solicitors and do verily believe that WorkCover Queensland has a policy whereby they are prepared to negotiate claims where the limitation of action period has expired, subject to the reservation that the application to extend time has to proceed if the matter does not resolve."

This paragraph says nothing about why the Notice was sent. It does not cast doubt on the figures. One may speculate that it was to open negotiation for a settlement of the respondent's claim. That would be unremarkable. The whole purpose of such notice is to facilitate settlement of claims. The WCR Act says so expressly. The obvious inference is that the respondent thought he had a claim worth negotiating. There is nothing at all in the respondent's affidavit, or his solicitor's, to justify a finding, by inference or otherwise, that the amounts set out in the Notice did not reflect the evidence then available to support the claim. There is, I repeat no evidence whatsoever about the provenance of the figures.

[29] The third error in his Honour's reasoning is that it casts an onus on the appellants to demonstrate "on what basis the figures set out … could possibly have been supported by the … evidence." The respondent bore the onus of showing that he was entitled to an extension of time. If, in this case, that meant showing the figures had no foundation in fact, he did not do that.

[30] The learned trial judge's explanation for the Notice of Claim appears, with respect, to be little more than an apologia. In the absence of any different evidence from those in a position to know, the Notice, and its contents, should be taken at face value. It is a claim addressed to a statutory insurer asserting that by reason of the respondent's injury at work he had suffered loss computed to be a little over $400,000. If that state of affairs was not what the respondent, and his solicitors believed, if the Notice was a work of fiction its authors might have been expected to say so. They did not. The Notice must, therefore, be seen as cogent evidence that by 1 November 2007 the respondent and his solicitors believed they had a claim worth in excess of $400,000 which they hoped to negotiate to a settlement with the Workers' Compensation Board. The assertion that the respondent did not know, until March 2008, he did not know that he had a worthwhile cause of action sits uneasily with this fact.

[31] By 1 November 2007 the respondent had contacted both a general medical practitioner and a psychologist. He had been diagnosed as suffering from Post Traumatic Stress Disorder. He himself described symptoms referable to that disorder occurring since the accident. They made him abandon his earlier occupation of hard rock mining. Even in his alternative employment as a coal miner he continued to suffer distress and anxiety. His earnings, as the evidence appears to demonstrate, had declined with the change of employment. In that context it is the obvious inference with respect to the Notice of Claim for Damages that the respondent, and his solicitors, believed that he had a claim for damages worth several hundred thousand dollars. That would explain the sending of the Notice. There is no evidence to give rise to any other explanation.

[32] I note the suggested answer to the plain fact which appears from the Notice of Claim for Damages, that the respondent believed he had a valuable claim by

1 November 2007. The answer is that it should be inferred from the respondent's answers in the claim given to Faminco under PIPA, that he was not in a position to make an offer of settlement, that he cannot have believed the truth of that which he and his solicitors asserted in the other Notice of Claim. The answer cannot be accepted for several reasons.

[33] The first is that the respondent did not give it. If the notice was to be explained away the respondent had to provide the explanation. Sympathy for an injured workman is no substitute for evidence.

[34] The second ground for rejecting the answer is that if it were relied upon it would highlight the complete disregard the respondent had for his obligation to take reasonable steps to ascertain the facts relevant to his claim. It is not a proper basis for an application to extend time that the respondent should say he was ignorant of the facts because he did nothing to discover them.

[35] The third ground is that the figures which he did give regarding his post accident earnings themselves suggest the existence of recurring losses.

[36] The remarks of Keane JA (with whom Holmes JA and Wilson J agreed) in *Castillon v P & O Ports Ltd* [2007] QCA 364 are apposite:

> "[38] … they demonstrate a 'steady preponderance of opinion or belief' 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."

[37] The pronoun which commences the quote is a reference to the circumstances that Castillon had commenced proceedings before the discovery of what were said to be the material facts of a decisive character justifying an extension of time. That circumstance is absent here, but the Notice of Claim for Damages serves the same purpose as the institution of proceedings. Its relevance is that it indicated the respondent's belief that he had a worthwhile cause of action.

[38] There is another point relevant to whether the respondent discharged the onus of proving that he had taken all reasonable steps to ascertain the material fact of a decisive character. The fact is said to be Dr James' opinion expressed in March 2008. There is no reason for thinking that his advice would have been any different had he been consulted earlier. As it was the respondent did not consult Dr James until after he had been examined by Dr Whiteford at the request of the Workers' Compensation Board. The sequence appears to have been that following the delivery of the Notice of Claim for Damages the Board requested a psychiatric examination and nominated Dr Whiteford. That seems to have prompted the respondent's solicitors to themselves think that they should obtain a psychiatric opinion on the respondent's condition.

[39] To state the sequence is to emphasize the indolence of the respondent's approach to his claim. He consulted Dr McIntosh in May 2007 and was told that he had a

psychological disorder tentatively diagnosed as Post Traumatic Stress Disorder. He was referred to a psychologist for treatment. The respondent deposed that it was only in August 2007 when he first saw the psychologist that he understood he suffered Post Traumatic Stress Disorder but it appears from Dr McIntosh's referral[3] that on 17 May 2007 he made the tentative diagnosis of Post Traumatic Stress Disorder and recommended to the respondent that he seek treatment from a psychologist.

[40] In June 2007 the respondent "raised with (his solicitors) problems he had experienced relating to the incident in … May 2004." In what appears to be a draft affidavit the respondent said:[4]

> "On 4 June, 2007, I engaged Messrs McKays Solicitors to act on my behalf in a claim for damages for personal injuries resulting from an accident at work on or around 11 March 2004."

[41] The respondent's admission can only mean that early in June 2007 he knew he had a claim worth pursuing. He had been diagnosed, at least on a provisional basis, with a psychological disorder which had deprived him of the capacity to work as a hard rock miner and made it difficult for him to work as a coal miner. The retainer of solicitors must, at the least, mean that by early June 2007 the respondent wished to investigate whether he had a claim which would result in an award of damages sufficient to justify bringing the claim and whether in his own interests he ought to bring it.

[42] An account of what the respondent had suffered since the accident of March 2004 appears in Dr James' report. The respondent:

> "appears to have experienced to a significant degree symptoms which also fulfil the necessary criteria (for Post Traumatic Stress Disorder) namely:
>
> - Recurrent, intrusive recollections of the accident, both in dreams and in the waking state (flashbacks).
> - Avoidance behaviour, including … increasingly strong efforts to avoid places arousing recollections of the trauma, in particular, hard rock mining.
> - Persistent symptoms of increased arousal, including difficulty falling and staying asleep; irritability; difficulty in concentrating; and an exaggerated startle response.
>
> The disorder appears to be one of relatively late onset in terms of its more disabling consequences".

[43] The learned trial judge addressed the argument that the material fact, the diagnosis that his Post Traumatic Stress Disorder was permanent and would disable him from mining, was within his means of knowledge earlier than the receipt of Dr James' opinion in March 2008. His Honour said:

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3 (Appeal Book 89).

4 (Appeal Book 176).

> "[51] … the 'actual person' (referred to in s 30(1)(c) of the Act) in contemplation here has a post-traumatic stress disorder. That condition is not irrelevant to the assessment of what 'reasonable steps' can be expected of this applicant. …
>
> [52] (The respondent) deposed that the problems that he called 'emotional' were matters that he did not want to talk to people about and that he was uncomfortable to talk about. … Such avoidance behaviour is one of the criteria of the condition of post-traumatic stress disorder. The difficulties that (the respondent) had in bringing himself to seek advice is evidenced by his approach to the general practitioner and the solicitor whom he eventually consulted. In each case he consulted the practitioners about matters unrelated to his anxiety. It was only in the course of dealing with other problems that he mentioned the psychological difficulties that he was having."

[44] True as this may be it does not come to grips with the point in issue. Accepting that for some time the respondent struggled on hoping he might improve and stoically declining to seek assistance the fact is that in May 2007 he did ask for medical advice from Dr McIntosh and received the diagnosis. The next month he retained solicitors to advance his claim. Any failure thereafter to take reasonable steps to ascertain the facts relevant to his claim cannot be ignored on the basis of a reluctance to seek advice occasioned by his psychological disorder. The failure to consult a psychiatrist at about that time is inexplicable and has not been explained.

[45] In *NF v State of Qld* [2005] QCA 110 Keane JA said:

> "It is to be emphasized that s 30(1)(c) did not contemplate a state of knowledge of material facts attainable in the abstract, either by the exercise of 'all reasonable steps', or by the efforts of a reasonable person. It speaks of a state of knowledge attainable by an actual person who has taken all reasonable steps. The actual person postulated by s 30(1)(c) as the person who has taken all reasonable steps, is the particular person who has suffered particular personal injuries. Whether an applicant for an extension of time has taken all reasonable steps to find out a fact can only be answered by reference to what can reasonably be expected from the actual person in the circumstances of the applicant. It seems to me that, if that person has taken all the reasonable steps that she is able to take to find out the fact, and has not found it out, that fact is not within her means of knowledge".

[46] Accepting that the person in question who must have taken all reasonable steps is the respondent who was for a time made reluctant to seek help by reason of his disability the reluctance had been overcome by June 2007. Thereafter he did not take the obvious, reasonable, step of consulting a psychiatrist for a diagnosis and/or prognosis of Post Traumatic Stress Disorder, which he knew he had.

[47] It would have been reasonable, and appears unreasonable, not to have sought a psychiatric opinion when the solicitors were retained. If there was an explanation showing the omission to be reasonable it was not given in evidence by the respondent, who bore the onus of proof.

[48] At the very latest it should be inferred that the relevant fact was within the respondent's means of knowledge by 1 November 2007. That was the date on which he gave notice of his claim for damages in a sum exceeding $400,000. That fact establishes that the respondent believed he had a cause of action which satisfied s 30 of the Act.

[49] In that state of affairs the learned trial judge could not have extended time beyond 1 November 2008. The application was not argued until 8 December 2008. Judgment was given 10 days later. The respondent had not commenced an action so an extension of time to 1 November 2008 would have been futile. For that reason the application should have been dismissed.

[50] I would allow the appeal, set aside the orders made in the Trial Division on 18 December 2008 and order instead that the applications for an extension of time be dismissed. The respondent is to pay their costs of the applications and of the appeal.

[51] **P LYONS J:** Mr Honour was injured in an accident at work on 16 March 2004. On 18 December 2008, an order was made under s 31 of the *Limitation of Actions Act* 1974 (Qld) (*Limitation Act*), extending the time for him to commence proceedings against the appellants in respect of his injuries, to 23 December 2008, and for related relief. The appellants have appealed against that order.

Background

[52] Mr Honour is now 50 years of age. For approximately 25 years, which is most of his working life, he has worked as an underground miner in hard rock mines.

[53] In September 2003 he was employed by the appellant Faminco Mining Services Pty Ltd (*Faminco).* He commenced work at the Enterprise Mine, a mine owned and operated by the appellant Mount Isa Mines Pty Ltd, which at that time was known as XStrata Mount Isa Mines (*Xstrata).*

[54] On the evening of 16 March 2004, while Mr Honour was working underground in the mine, a rock fall occurred, as a result of which he was buried in material up to his waist. Although the Immediate Notification of an Incident form recorded that he was not injured, it appears that in fact Mr Honour suffered some injury to his lower back. Moreover, the incident itself was potentially very serious, and quite frightening. However, Mr Honour did not lose time from his work at the Enterprise Mine after the accident.

[55] In a period commencing about one or two months after the accident, and ending about 12 months later, Mr Honour experienced "flashbacks" of the incident on three occasions. In respect of one of them, he said that he became "very nervous and very anxious". Commencing a couple of months after the accident, he often had disturbed sleep, and would wake up with dreams of the accident or wake up sweating. However he stated that he was hopeful that these consequences would "settle down and go away". A friend of his told him that he might be depressed.

[56] It is a little difficult to be certain of the precise history of Mr Honour's employment in the period shortly after the accident. The learned primary judge seemed to accept that Mr Honour continued to be employed by Faminco until about July 2004. He then moved to Gympie, where he worked with Ian Kidd Mining as an underground

miner in a hard rock mine for about six months. Subsequently, he worked as a construction supervisor for TK Drill & Blast at Gympie, working above ground. The duration of this employment is uncertain but it may have been until about October or November of 2005. At some point, Mr Honour had a break from work for a few months. It seems likely that this was subsequent to his employment with TK Drill & Blast, and around the end of 2005.

[57] In early 2006, Mr Honour commenced employment as an underground coal miner with BMA at the Broadmeadow mine at Goonyella. He was so employed in May 2008, when he swore his first affidavit in these proceedings.

[58] Over time, Mr Honour became aware of feelings of irritability and short-temperedness towards others, mood swings, anxiety, and loss of confidence about underground mining and going underground. On 17 May 2007, he saw a general practitioner in Mackay about something else, but during the course of the consultation, spoke to him about these matters. He told him about the incident at the Enterprise Mine in March 2004. The doctor referred him to a psychologist.

[59] Mr Honour saw the psychologist on three occasions in about August 2007. She told him he was suffering from a post traumatic stress disorder as a result of the March 2004 incident. He states that this was the first time he had been diagnosed with any condition as a result of the incident. He says of the psychologist that he was very comfortable with her and that he found her very helpful; and that he was getting treatment so that he could keep his condition under control.

[60] Meanwhile, in June 2007, he had consulted solicitors on a family law matter. He raised with them the problems he had experienced as a result of the incident in the Enterprise Mine. That led to them forwarding a Notice for Claim for Damages to WorkCover and Faminco, and a notice under the *Personal Injuries Proceedings Act* 2002 (Qld) (*PIPA*) to Xstrata, on 1 November 2007.

[61] Solicitors acting for WorkCover arranged for Mr Honour to see a psychiatrist, Professor Harvey Whiteford, on 23 January 2008. Professor Whiteford diagnosed Mr Honour as suffering from "mild generalised anxiety", related to having to discuss the circumstances of the accident of March 2004. He also considered that Mr Honour displayed residual manifestations of a post traumatic stress disorder. He considered Mr Honour's long-term prognosis to be fair, and that his condition was stable, but that it was unlikely to remit completely. However, he thought that Mr Honour would benefit from five sessions of cognitive behaviour therapy. He considered that Mr Honour had a "mild" impairment, but that his condition did not prevent him continuing to work as a miner, notwithstanding that it had changed the type of work he had been doing. As the learned primary judge noted, Professor Whiteford did not suggest that Mr Honour could not return to hard rock mining once he had the benefit of the suggested cognitive behaviour therapy.

[62] Mr Honour's solicitors arranged for him to be seen by another psychiatrist, Dr James, on 18 March 2008. Dr James diagnosed Mr Honour as suffering from a post traumatic stress disorder, which was mild to moderate in severity. He considered that it was one of "relatively late onset in terms of its more disabling consequences", which he considered not to be unusual in persons of a "characterologically stoic nature, less inclined to complain", such as Mr Honour. He recommended that Mr Honour have further treatment by a psychologist,

including Eye Movement Desensitisation and Reprocessing (*EMDR)*, but that this treatment would not substantially benefit him. Dr James considered that Mr Honour had developed "increasingly strongly experienced avoidant responses", and that "the aversive stimulus has increasingly generalised over time, so that it now involves mining of all kinds". The EMDR would not substantially benefit Mr Honour's avoidance responses, and he recommended that Mr Honour should "respond to his avoidant symptoms by changing career from mining altogether". In his affidavit evidence, Mr Honour states that he intends to accept this advice, and change his career from mining in the short term.

[63] Mr Honour's solicitors also referred him to an orthopaedic surgeon, Dr Cook, whom he saw on 19 March 2008. Dr Cook diagnosed Mr Honour as having sustained a musculo-ligamentous injury and/or a soft tissue injury to the lumbosacral spine, especially the L5-S1 segment; aggravation to pre-existing degenerative changes in the lumbosacral spine; an injury to the left sacroiliac joint; and aggravation to pre-existing degenerative arthritis in the left sacroiliac joint. However, he recommended the injection of cortisone into the left sacroiliac joint, which would assist in determining whether pain in that joint was the result of an injury to it, or was referred from somewhere within the lower lumbar spine. Dr Cook thought that some of Mr Honour's backache was likely to be secondary muscle strain and fatigue from his work. Conservative treatment was recommended. It would seem that his physical condition did not preclude Mr Honour from continuing to work as an underground miner, but that his nerves and anxiety were such that he was more suited for working above ground. The physical injuries were considered to result in a five percent whole of person impairment in relation to the lumbosacral spine and left sacroiliac joint as a result of injuries sustained in the incident in March 2004.

[64] Dr James's report resulted in the application for an extension of time within which to commence proceedings under the *Limitation Act*. As will be seen, that required Mr Honour to establish that a material fact of a decisive character relating to the right of action was not within Mr Honour's means of knowledge until a year before the date to which it was sought to extend the limitation period. The precise formulation of the material fact (or facts) may be the subject of debate, which it is not necessary to resolve. It is sufficient to describe the material fact as being that Mr Honour should not, in Dr James's opinion, continue to work in any form of underground mining (and not just hard rock mining).

[65] It was not suggested either at first instance or in this appeal that Mr Honour did not satisfy the requirement that there be evidence to establish the right of action apart from a defence founded upon the expiry of the limitation period.[5] Nor was it suggested on either occasion that there was relevant prejudice to the appellants. Subject to the matters which are in issue in the appeal, it seems to have been accepted at first instance,[6] and in this appeal, that the matter relied upon by Mr Honour as the ground for his application was a "material fact."[7] The matters in dispute in the appeal are whether the material fact is "of a decisive character"; and whether it was not within Mr Honour's means of knowledge until the date ("the relevant date") which is a year before the date to which the limitation period was extended, that is, until 23 December 2007.

5 See s 31(2)(b) of the *Limitation Act*; reasons for judgment at first instance ("R J") [4]-[5].
6 R J [7].
7 R J [7].

[66] A decision on an application for an extension of a limitation period has been held for the purposes of s 92 of the *District Court of Queensland Act* 1967 (Qld) to be a decision on an interlocutory application.[8] However, it remains uncertain whether the present appeal is an appeal in the strict sense or an appeal by way of rehearing.[9] That does not seem critical to the outcome in the present case. In the case of an appeal by way of rehearing, the powers of the appellate court are only exercisable where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error.[10] In this case, there is no difference between the material before the Court on the appeal, and that which was before the Court at first instance.

Limitation Act provisions

[67] The following provisions of the *Limitation Act* are relevant:

30 Interpretation

(1) For the purposes of this section and sections 31, 32, 33 and 34—

(a) the material facts relating to a right of action include the following—

(i) the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;

(ii) the identity of the person against whom the right of action lies;

(iii) the fact that the negligence, trespass, nuisance or breach of duty causes personal injury;

(iv) the nature and extent of the personal injury so caused;

(v) the extent to which the personal injury is caused by the negligence, trespass, nuisance or breach of duty;

(b) material facts relating to a right of action are of a decisive character if but only if a reasonable person knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing—

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

(ii) that the person whose means of knowledge is in question ought in the person's own interests and taking the person's circumstances into account to bring an action on the right of action;

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8 *Lillicrap v Strange* [1994] 2 Qd R 133, applying *Merton Enterprises Pty Ltd v Nelson* (1988) 13 NSWLR 454.

9 *Kambarbakis v G & L Scaffolding Pty Ltd* [2008] QCA 262, where consideration was given to the effect of r 765 of the *Uniform Civil Procedure Rules* 1999 (Qld).

10 *Allesch v Maunz* (2000) 203 CLR 172, 180.

(c) a fact is not within the means of knowledge of a person at a particular time if, but only if—

(i) the person does not know the fact at that time; and

(ii) as far as the fact is able to be found out by the person—the person has taken all reasonable steps to find out the fact before that time.

(2) In this section—

appropriate advice, in relation to facts, means the advice of competent persons qualified in their respective fields to advise on the medical, legal and other aspects of the facts.

31 Ordinary actions

(1) This section applies to actions for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) where the damages claimed by the plaintiff for the negligence, trespass, nuisance or breach of duty consist of or include damages in respect of personal injury to any person or damages in respect of injury resulting from the death of any person.

(2) Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court—

(a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and

(b) that there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation;

the court may order that the period of limitation for the action be extended so that it expires at the end of 1 year after that date and thereupon, for the purposes of the action brought by the applicant in that court, the period of limitation is extended accordingly.

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

(a) before the commencement of this Act; or

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

Was the material fact of a decisive character?

[68] The grounds on which the appellants submit that the material fact was not of a decisive character may be summarised as follows:

(a) Mr Honour suffered significant symptoms commencing shortly after the accident (the flashbacks; and the disturbed sleep and dreams, which appeared to have continued at least until March 2008);

(b) A friend told him (at some unspecified time) that he had noted changes in Mr Honour;

(c) Mr Honour commenced working for TK Blast & Drill at a reduced income, in ordered to work above ground;

(d) He then had some months off work, which was related to his anxiety condition;

(e) He decided that because of the effects of the accident, he would (at least temporarily) cease hard rock mining and work as a coal miner;

(f) Prior to 17 May 2007, Mr Honour had "the whole constellation of symptoms referred to in paragraphs 47 and 48 of his affidavit"; these, or many of them, were described to his general practitioner on 17 May 2007;

(g) On any view, the injury to Mr Honour's back was sufficiently significant to justify the commencement of an action, with a likely award of general damages, of (at least) $30,000;

(h) Mr Honour had suffered significant economic loss prior to the relevant date;

(i) Prior to the relevant date, (and without the benefit of Dr James's opinion) it was apparent that it was likely that Mr Honour would suffer significant future economic loss; and

(j) Mr Honour and his legal advisers had formed the opinion by 1 November 2007 (a little under two months before the relevant date) that Mr Honour had a worthwhile cause of action.

[69] The learned primary judge considered that a significant matter on the question of decisiveness was whether Mr Honour should have appreciated prior to the relevant date that he had suffered, or was likely in the future to suffer, significant economic loss. He referred to an analysis of Mr Honour's tax returns that showed his income and tax for the financial year ending 30 June 2003 to the year ending 30 June 2007. It is sufficient to note the net income for each year, which was as follows:

Financial year	**Net income**
2003	$73,930
2004	$44,041
2005	$58,478
2006	$29,666
2007	$69,651

[70] His Honour also noted that while Mr Honour left hard rock mining to see if that assisted in dealing with his symptoms, there is no evidence that he knew at that time that he could never return to it. Rather, his evidence, which his Honour appears to have accepted, was to the opposite effect. Further, his Honour did not accept that the net income for 2003 established Mr Honour's "sustainable earning capacity" prior to the accident.

[71] Without the benefit of Dr James's report, his Honour considered that the likely damages would not exceed $50,000, which was within the jurisdiction of the Magistrates Court. Such a claim was not worth pursuing.

[72] Finally, he did not consider that the notices which were issued on 1 November 2007 demonstrated that the material fact was not decisive. He considered that the

calculation of damages in them was "more done in hope as setting out the ambits of the claim rather then reflecting in any sense the evidence then available to support the claim."[11] He attributed the decision to send these notices, rather than to commence an action, to the "complete lack of evidence to support a substantial action."[12]

[73] Section 30(1)(b) of the *Limitation Act* formulates two conditions for determining whether a material fact relating to a right of action is of a decisive character. One is that the fact (along with other facts known to the potential claimant) would be regarded as showing that an action would, but for a defence based on the *Limitation Act*, have a reasonable prospect of success, and of resulting in an award of damages sufficient to justify the bringing of the action. The second is that the fact (along with other facts known to the potential claimant) would be regarded as showing that the potential claimant should, in that person's own interest and taking that person's circumstances into account, bring an action on the right of action. Each condition is to be regarded from the point of view of a reasonable person; and that person is taken to be a person who has taken "the appropriate advice on those facts." Both conditions must be satisfied before the material fact is said to have a decisive character.

[74] It follows that the material fact is not of a decisive character if, before knowing that fact a reasonable person would know facts that that person would regard (having taken appropriate advice) as showing that an action would (ignoring the effect of limitation period) 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 that the potential claimant ought, in that person's own interests and taking that person's circumstances into account, bring an action on the right of action. However, if, without knowledge of that fact, a reasonable person, having taken appropriate advice, would not regard the facts known to that person as showing that an action would (ignoring the effect of the limitation period) have a reasonable prospect of success, and of resulting in an award of damages sufficient to justify the bringing of an action, then the fact is of a decisive character. Further, if, without knowledge of the material fact, a reasonable person, having taken appropriate advice, would not regard the facts known to that person as showing that the potential claimant ought in that person's own interest and taking that person's own circumstances into account, bring an action, then the material fact is not of a decisive character.

[75] The evidence did not establish that Mr Honour had suffered significant economic loss prior to the accident. On the evidence, Mr Honour continued to work as an underground miner in hard rock mines until after 30 June 2004, and without any impact on his income from the accident. Yet in the 2003 year his net income was just under $74,000, and in the 2004 year it was just over $44,000. The explanation for that appears to be the nature of mining work. The learned primary judge noted that Mr Honour had, prior to commencing work with Faminco, been employed in the same mine for ten years. He was then retrenched, and his employment had been under a series of short-term contracts.

[76] The income earned by Mr Honour in the 2005 and 2007 financial years is plainly comfortably within the range of incomes that Mr Honour might have expected to

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[11] R J [43].
[12] R J [45].

earn working as an underground miner in a hard rock mine. Indeed, for part of the 2005 year, he worked in that capacity. His income in this year, and in 2007, when he did not work in a hard rock mine, substantially exceeded the income he earned in the 2004 year, when he worked underground as a hard rock miner, and his income was unaffected by any injury he suffered in the March 2004 incident.

[77] It seems likely that the income in the 2006 year was affected by a period for which Mr Honour chose not to work. In part, the explanation for that decision appears to have been to have a holiday and to have a break and see his family; but his anxiety was also a relevant consideration.[13] The history of his employment in recent years leaves some doubt that had he chosen to seek work in this period, he was certain to get it. Any claim for past economic loss would be for a quite modest amount, and affected by some uncertainties.

[78] It is true that by some time in 2005, Mr Honour had stopped working in hard rock mines. For reasons which have been discussed, the information available at the relevant date did not demonstrate that this was likely to result in significant economic loss. Indeed, there was no reason to think that the change was permanent. As has been noted, Mr Honour did not regard it as a permanent change. By the relevant date, he had consulted a general practitioner and a psychologist. Neither had indicated that he could not work underground in a hard rock mine, or that his condition would not improve. Indeed, the general practitioner had referred him to the psychologist and Mr Honour had found the treatment of the psychologist to be helpful.

[79] In summary, by the relevant date, the facts demonstrated that as a result of the incident in March 2004, Mr Honour may have suffered some relatively small past economic loss; and that he had in fact ceased to work in underground hard rock mines. However, save for a relatively brief period, he had been in continuous employment since March 2004; and for a period approaching two years, he had been employed underground in a coal mine where his earnings were not significantly different from his highest earnings in hard rock mining, and were substantially better than what he had earned in that type of mining in 2004. He had had limited treatment, and had found it helpful. It is unlikely that on the information available to Mr Honour, and with the benefit of appropriate advice, a reasonable person would regard the available information as showing that an action relating to the March 2004 incident would have reasonable prospects of resulting in any substantial award of damages for future economic loss. The learned primary judge's conclusions on this issue have not been shown to be in error.

[80] Clearly, by the relevant date, it was evident that Mr Honour's mental state had for some time been affected by his experience in March 2004. However, it had not prevented him from working for nearly all of the intervening period. While no doubt somewhat distressing, it was not seen to have raised great concerns with his general practitioner. There is no suggestion that the general practitioner considered that Mr Honour's ability to continue working as a miner might be affected. He did not refer him to a psychiatrist. Rather, he sought the opinion of a psychologist as to counselling and assessment for a possible post traumatic stress disorder. As has been mentioned, the psychologist provided that assessment, and some treatment which appears to have been beneficial. On the basis of information available at the

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13 See R J [16].

relevant date, and with appropriate advice, it is unlikely that a reasonable person would regard the facts as showing that an action would have reasonable prospects of resulting in an award of general damages related to Mr Honour's mental state, sufficient to justify the bringing of an action.

[81] Similar conclusions might be reached about Mr Honour's physical injuries. By the relevant date, they had not troubled Mr Honour to the point where he sought any treatment of them. In the history of symptoms given to Dr Cook, Mr Honour referred to increased lower back pain after March 2004, though there had been some episodes of lower back pain prior to the incident. When the pain was bad, Mr Honour took medication that could be purchased without a prescription. While some activities aggravated his back pain, his pain was eased by a night's rest in bed, or by laying on a firm, flat surface. Mr Honour told Dr Cook that he had learnt to manage his pain reasonably well. It is worth noting that the notice which was sent on 1 November 2007 to WorkCover and Xstrata, in that part of the form which required particulars of injuries, made no mention of a back injury. Nor, in the part of the form which sought the identification of current symptoms, were any physical symptoms identified.

[82] The evidence available, without the benefit of Dr Cook's report (which was obtained after the relevant date), did not suggest any significant physical injury likely to result in a substantial award of general damages. Even with the benefit of Dr Cook's report, what appears is a diagnosis of a five percent whole of person impairment, with some uncertainty about that diagnosis, in a person who had symptoms of lower back pain prior to March 2004; and who, throughout the period since then, had not been prevented from working at any time by his physical condition.

[83] What is critical, however, is not the separate consideration of each of the potential heads of damages, but whether a consideration of them, taken together, would lead a reasonable person with the benefit of appropriate advice to regard them as showing that an action would have a reasonable prospect of resulting in an award of damages sufficient to justify the bringing of a claim; and as demonstrating that Mr Honour, in his own interest, ought to have commenced an action. Looked at in that way, the most that could be said is that there was some prospect of recovering a relatively small amount for past economic loss, and the potential for some relatively small amount for general damages, with no real basis for a claim for damages for future economic loss. It is unlikely that the appropriate advice would have been that Mr Honour was likely to recover substantial damages as a result of an action; still less that Mr Honour, in his own interest, and taking his circumstances into account, ought to institute proceedings in respect of the March 2004 incident.

[84] In that context, the learned primary judge made reference to evidence in another case that a partner in a firm of solicitors routinely advised clients working in the mining industry that personal injuries claims under $60,000 may not be worth pursuing; and to the observations of Muir J (as his Honour then was), that there was no reason to believe that this advice would not have been similar to that which would have been given by other solicitors exercising due care and skill, having regard to the limited potential return, litigation-induced stressors, the cost of the proceedings, and the possibility of failure.[14] There is good reason for this caution,

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[14] See *Jocumsen v Thiess Pty Ltd & Anor* [2005] QCA 198 at [37].

not least because of potential legal costs. The costs regime under the *PIPA* actively discourages claims where the amount awarded is less then $50,000. Thus, if the amount awarded is less then $30,000, there is a very real prospect that no costs will be awarded; and if the amount awarded is more then $30,000 but less then $50,000, there is a very real prospect that the costs awarded will be significantly less than the costs incurred by a plaintiff in bringing proceedings.[15]

[85] Costs in actions against an employer are regulated by the *Workers' Compensation and Rehabilitation Act* 2003 (*WCR Act*) claimant whose work-related impairment is assessed at less then 20 percent will not recover costs unless that claimant recovers damages which exceed the claimant's written final offer, and then only from the day of the written final offer.[16] There are limitations on the recovery of costs for interlocutory applications, and on the power to award costs against an employer in favour of another defendant.[17] There is, accordingly, some additional risk about covering costs in such cases.

[86] In the present case, at least two defendants were in contemplation. The claim against one would be regulated by the *PIPA*; and the claim against the other by the *WCR Act*. The costs considerations which have been mentioned are likely to have affected a person giving appropriate advice about whether, on the basis of the facts as known at the relevant date, Mr Honour, in his own interests and taking his own circumstances into account, should have brought an action.

[87] As has been mentioned, on 1 November 2007, a notice of claim for damages under the *WCR Act* was sent by Mr Honour's solicitors to Faminco. The claim was made on the standard form. Item 58 required the claimant to provide full particulars of the nature and extent of the amount of damages sought under each head of damage claimed, and the method of calculating each amount. The calculation was provided, totalling $417,944.55. The form describes the total as a "settlement amount". Mr Honour's evidence was that he was told by his solicitors that WorkCover Queensland has a policy whereby it is prepared to negotiate claims where the limitation period has expired. Counsel for the appellants submitted that item 58 (part of the notice) was to be characterised as a response to the requirement in s 275(6) of the *WCR Act*. That provides that the notice "must be accompanied by a genuine offer of settlement or a statement of the reasons why an offer of settlement can not yet be made." The submission suggests that either Mr Honour or his solicitor realised at the time the notice was completed that he had a claim for substantial damages. Although Mr Honour was cross-examined about this notice in the proceedings at first instance, he was not cross-examined about item 58. His solicitor provided three affidavits, but was not required for cross-examination.

[88] It is by no means obvious that item 58 was prepared by the solicitor, or signed by Mr Honour, with the provisions of s 275(6) of the *WCR Act* in mind. The heading to the item in the form tends to suggest otherwise. The item did not suggest that Mr Honour could choose not to provide the "full particulars" required if he was not in a position to make a genuine offer of settlement. Indeed, there was only the faintest of references to an offer to settle, and no mention of the requirement that an offer to settle be genuine. The answer in item 58 would, on its face, appear simply to be no more than a statement of the highest amounts that may possibly be recovered.

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15 See s 57 *PIPA*.

16 See s 316 (1)-(3).

17 See s 316 (4)-(6).

[89] Item 58 in the Notice of Claim sent to Faminco may be contrasted with item 54 of part 2 of the Notice of Claim under the *PIPA*, sent to Xstrata at some later time. That item commences as follows, "AT THIS STAGE, IS THE INJURED PERSON IN A POSITION TO MAKE AN OFFER FOR THE SETTLEMENT OF THEIR CLAIM?" The response was "no", which was followed by an explanation. The explanation was in effect that Mr Honour was unable to quantify his losses because he did not have sufficient information to do so, and needed to make inquiries. The explanation referred to Mr Honour's attempts to seek employment outside the mining industry altogether, which, it was said, would assist him "more realistically (to) detail his losses… once he can establish just what his earning capacity outside the industry currently is."

[90] In my view, the provision of a statement of particulars of the nature and extent of the amount of damages sought by Mr Honour as provided in item 58 is rather different to the institution of legal proceedings. One reason is that the provision of that information did not carry with it the risk of an order for costs which results from the institution of legal proceedings.

[91] The appellants rely on the significance attached by Keane JA to the commencement of proceedings in *Castillon v P & O Ports Ltd (No 2)*.[18] I have indicated a view about the difference between the commencement of legal proceedings and the provision of the answer to item 58. Beyond that, it does not seem to me to be correct to characterise an observation about the significance of an event in a particular case as a general proposition about the significance of any similar event in any other case. It should be noted that in *Castillon*, the applicant had been unable to work for most of the time since his accident. Well before the proceedings were commenced, he had formed the view that he had a worthwhile cause of action, and his solicitors had taken a step to enable him to make a common law claim. An examination of the information available before the proceedings were commenced revealed that there was then "a critical mass of information within the plaintiff's means of knowledge…which justified bringing the action".[19] In my respectful opinion, these matters are relevant to the consideration by Keane JA of the significance of the commencement of proceedings in that case.

[92] In any event, the ultimate question is whether, on the information available at the relevant date, and with appropriate advice, a reasonable person would regard the facts which were then known as showing that an action by Mr Honour would have a reasonable prospect of success, and of resulting in an award of damages sufficient to justify the bringing of an action; and as showing that Mr Honour ought, in his own interests and taking his own circumstances into account, to bring such an action. The material in item 58 of the Notice of Claim might have been used as a basis for cross-examination of Mr Honour or his solicitor to identify facts known on 1 November 2007 which would lead a reasonable person to come to the conclusions identified in s 30(1)(b) of the *Limitation Act*. Neither appellant took that course at the hearing. It is far from clear that the particulars represented the solicitor's view of the likely amount of the claim. Indeed, it seems unlikely that they did.

[93] Again, it has not been established that the learned primary judge was in error in his conclusion that the notice of contribution sent to Faminco did not reflect a view that

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18 [2008] 2 Qd R 219 at [34].

19 *Castillon* at [34].

on the material available in November 2007, Mr Honour had good prospects of success in an action for a substantial award of damages, or that otherwise the material facts known to Mr Honour at the relevant date were of a decisive character.

Means of knowledge

[94] In essence, the appellants submit that because of the matters which Mr Honour knew by the relevant date, acting reasonably, he should have sought appropriate advice as to his condition, and that it is likely that had he done so, he would have received a diagnosis of post traumatic stress disorder, and a recommendation not to continue in the mining industry, consistent with that given by Dr James in March 2008.

[95] The appellants rely on a passage from the judgment of Thomas JA in *Pizer v Ansett Australia Limited*,[20] to the effect that the question whether a fact is within the means of knowledge of a potential claimant is to be determined on the footing that the person had, by the time when it is alleged that the fact is within that person's means of knowledge, taken all reasonable steps to ascertain it.

[96] Section 30(1)(c) of the *Limitation Act* has the effect that a fact is not within the means of knowledge of a potential claimant at a particular time if both of two conditions are satisfied. One is that the person does not know the fact at the time. The second is that, to the extent the fact is capable of being found out by the person, that person has taken all reasonable steps to find out the fact before that time. The first condition is established in the present case.

[97] The effect of the second condition was stated by Keane JA in *NF v State of Queensland* as follows:[21]

> "It is to be emphasized that s 30(1)(c) does not contemplate a state of knowledge of material facts attainable in the abstract, either by the exercise of 'all reasonable steps', or by the efforts of a reasonable person. It speaks of a state of knowledge attainable by an actual person who has taken all reasonable steps. The actual person postulated by s 30(1)(c) as the person who has taken all reasonable steps, is the particular person who has suffered particular personal injuries. Whether an applicant for an extension of time has taken all the reasonable steps to find out a fact can only be answered by reference to what can reasonably be expected from the actual person in the circumstances of the applicant. It seems to me that, if that person has taken all the reasonable steps that she is able to take to find out the fact, and has not found it out, that fact is not within her means of knowledge for the purpose of s 30(1)(c) of the Act…"

[98] Section 30(1)(c) does not make the conduct of the hypothetical reasonable person the standard by which it is to be determined whether a fact is within the means of knowledge of a particular applicant. Nor does it posit the taking of appropriate advice, unlike s 30(1)(b). The focus is clearly on the potential claimant, in this case, Mr Honour; and the making of reasonable inquiries by him.

[99] It is necessary to keep in mind the material fact, namely, that Mr Honour should not continue to work in underground mining, in the opinion of a medical specialist such

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20 [1998] QCA 298 at [15].
21 [2005] QCA 110 at [29].

as Dr James. It is to be noted that he had managed to continue working in this industry for some years after the incident, and at least until May 2008, well after the relevant date. It is also to be noted that when he saw his general practitioner, and subsequently the psychologist in 2007, there is no suggestion that either expressed the view that there was a real risk that he could not continue to work as an underground miner. Nor, it seems, did Professor Whiteford come to that view.

[100] It is also relevant to note that the symptoms of the post traumatic stress disorder which Dr James had diagnosed, include "avoidance behaviour", which involves attempts to avoid thoughts, feelings and conversations associated with the incident; and that Dr James considered Mr Honour to be a person of a "characterologically stoic nature, less inclined to complain… (but rather) 'to just get on with it'".

[101] Finally, it should be noted that Dr James records that the disorder is one of "relatively late onset in terms of its more disabling consequences."

[102] The evidence indicates that it was reasonable for Mr Honour not to seek specialist opinion earlier about his ability to continue working in the mining industry. It also rather strongly suggests that, had an opinion been sought much earlier than when he saw Dr James, there is a substantial prospect that Mr Honour would not have been advised that he should not continue to work as an underground miner.

[103] Again, it has not been demonstrated that the conclusion of the learned primary judge on this issue is in error.

Conclusion

[104] The appeals should be dismissed, with costs.