# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Crompton v Buchanan & Ors* [2010] QCA 250 |
| PARTIES: | **JOHN WILLIAM CROMPTON, now known as JW BOETTCHER**<br>(plaintiff/appellant)<br>**v**<br>**MJ BUCHANAN, CI BUCHANAN AND LYNORA FARMING AND GRAZING PTY LTD (ACN 070 269 788) as Trustee trading as LYNORA FARMING**<br>(defendant/respondent) |
| FILE NO/S: | Appeal No 3491 of 2010<br>SC No 133 of 2000 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Cairns |
| DELIVERED ON: | 17 September 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 17 August 2010 |
| JUDGES: | Muir and White JJA and Mullins J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDERS: | **1. Allow the appeal.**<br>**2. Set aside the orders made below.**<br>**3. Renew the claim for the period from 12 October 2003 until 12 October 2009 and for one year from 12 October 2009.**<br>**4. Extend the time within which the respondent employer must be served with the claim and statement of claim pursuant to s 306(3)(b) of the *WorkCover Queensland Act* 1996 (Qld) to 28 days after judgment is delivered in this appeal.**<br>**5. The respondent pay the appellant's costs of and incidental to the appeal to be assessed.** |
| CATCHWORDS: | PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – TIME – DELAY SINCE LAST PROCEEDING – where appellant injured at work on 14 October 1999 – where appellant filed claim and statement of claim within limitation period on 12 October 2000 – where originating process never served on employer – where claim renewed for 12 months in 2001 and 2002 – where claim became stale on 12 October |

2003 – where successive solicitors of the appellant failed to protect his interests – where appellant was persistent in contact with solicitors – where significant investigation had been conducted in relation to the injury – where parties had prepared for and attended compulsory conference under the *WorkCover Queensland Act* 1996 (Qld) – where appellant's application to renew claim dismissed – whether there was a good reason to renew the claim – whether prejudice to appellant of being deprived of cause of action outweighed prejudice to respondent inherent in delay – whether a fair trial could be had – whether primary Judge's discretion miscarried

*Uniform Civil Procedure Rules* 1999 (Qld), r 5, r 24, r 367, r 389
*WorkCover Queensland Act* 1996 (Qld), s 279, s 280, s 291, s 306 (repealed)

*Batistatos v Road and Traffic Authority of NSW* (2006) 226 CLR 256; [2006] HCA 27, cited
*Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; [1996] HCA 25, cited
*Crompton v Buchanan & Ors* [2010] QSC 61, related
*Dempsey v Dorber* [1990] 1 Qd R 418, cited
*Gillies v Dibbetts* [2001] 1 Qd R 596; [2000] QCA 156, cited
*Muirhead v The Uniting Church in Australia Property Trust (Q)* [1999] QCA 513, cited
*Quinlan v Rothwell* [2002] 1 Qd R 647; [2001] QCA 176, cited
*Simpson v Saskatchewan Government Insurance Office* (1967) 65 DLR (2d) 324, cited
*Smith & Anor v Harvey-Sutton & Ors* [1998] QCA 232, cited
*The IMB Group Pty Ltd (in liq) v Australian Competition and Consumer Commission* [2007] 1 Qd R 148; [2006] QCA 407, cited
*Van Leer Australia Pty Ltd v Palace Shipping KK* (1980-1981) 180 CLR 337; [1981] HCA 11, cited
*Victa Ltd v Johnson* (1975) 10 SASR 496, cited

COUNSEL: P J Davis SC, with G D Beacham, for the appellant
D O J North SC, with R T Whiteford, for the respondent

SOLICITORS: Vandeleur & Todd for the appellant
MacDonnells Law for the respondent

[1] **MUIR JA:** I agree with the reasons of and orders proposed by White JA.

[2] **WHITE JA:** The appellant appeals a decision made in the Trial Division dismissing his application to renew his claim filed on 12 October 2000 pursuant to r 24(4)[1] of the *Uniform Civil Procedure Rules* 1999 (Qld) ('*UCPR*'). By further order the court dismissed the proceedings commenced by that claim.

[1] The primary Judge referred to r 21 in his reasons but it is plain that the reference should be to r 24(4) and nothing turns on what is a mechanical error.

**Overview**

[3] The appellant was employed by the respondent on its banana farm in Far North Queensland from May 1997 as a farm hand. He was then aged 21 years. On 14 October 1997 he sustained an injury to his left knee and was taken to the Innisfail Hospital. He was given time off work until 24 October but eventually resigned and returned to his home in Tasmania in December 1997. The appellant commenced employment on a farm at Forth in Tasmania on 20 February 1999 as a factory hand. On 15 June 1999 he injured the same knee in the course of his employment. The Tasmanian medical opinion was that the appellant had injured the medial cartilage in the left knee which was a recurrence of the injury he had sustained in Innisfail on 14 October 1997.

[4] The appellant sought to re-open his previous Queensland workers' compensation claim to include the Tasmanian injury. That was refused and various solicitors over the ensuing years sought to progress a damages claim with WorkCover.

[5] On 12 October 2000, two days before the expiration of the limitation period, the appellant's then solicitors filed a claim and statement of claim in the Supreme Court of Queensland which was thereafter stayed by operation of s 262(4) of the *WorkCover Queensland Act* 1996 (Qld).[2] It was not served on the employer. An unconditional notice of assessment issued on 18 December 2002 but it was not until 11 July 2008 that a Notice of Claim for Damages under s 280 was finalised and deemed compliant from 1 October 2008. The parties proceeded to a compulsory conference on 16 February 2009. The claim did not settle. The Supreme Court claim by this time was said to be stale although it had been renewed for 12 months by the Registrar in each of 2001 and 2002. It was in those circumstances that the appellant applied to have his claim renewed or, alternatively, sought leave to proceed pursuant to r 389. In response, the respondent filed a cross-application to have the proceedings dismissed for want of prosecution or dismissed under s 291 of the *WorkCover Queensland Act* 1996 (Qld).

[6] Before the primary Judge the respondent raised no allegation of actual prejudice but relied upon the prejudice inherent in the lengthy delay from the time of the initial injury in 1997.[3] On appeal Mr North SC, who appeared with Mr Whiteford, firmly emphasised the very real prejudice inherent in such a lengthy delay and the failure by the appellant to adhere to the philosophy of the *UCPR* for the "just and expeditious resolution of the real issues in civil proceedings"[4] together with the object of Chapter 5, Part 5 of the *WorkCover Queensland Act*[5] "to achieve early resolution of claims for damages".[6]

[7] Mr Davis SC, who appeared with Mr G Beacham, for the appellant, emphasised the genuine attempts that the appellant had made to prosecute his claim against numerous difficulties including dilatory solicitors, the devastation of Cyclone Larry on his home and family pressures. He accepted that the onus was on the appellant to demonstrate that there was good reason to renew the notice of claim.[7]

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2 This Act, reprint no. 1, applies to the appellant's claim.

3 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; [1996] HCA 25.

4 Rule 5.

5 Pre-Court Procedures.

6 *WorkCover Queensland Act* 1996 (Qld), s 279.

7 *Muirhead v The Uniting Church in Australia Property Trust (Q)* [1999] QCA 513.

He submitted that the underlying principle which governs the exercise of the discretion is whether, in all the circumstances, it is in the interests of justice that the claim should or should not be renewed.[8] In *Van Leer* Stephen J cited with approval observations of Bray CJ in *Victa Limited v Johnson* considering renewal of a writ which had become stale:[9]

> "… the Court has to consider whether other good reasons exist for the renewal. I will not attempt an exhaustive category of such reasons. That would probably be impossible and would certainly be undesirable. Prominent, however, amongst the matters for the consideration of the Court … will be the length of the delay, the reasons for the delay, the conduct of the parties and the hardship or prejudice caused to the plaintiff by refusing the renewal or to the defendant by granting it."

Stephen J also referred with approval to statements in the Canadian courts which took a similar approach to renewal to that of the South Australian Supreme Court. In particular, in *Simpson v Saskatchewan Government Insurance Office*, Culliton CJ said: [10]

> "… I believe the words 'for other good reason' … should be given a broad and liberal interpretation. The interpretation of these words in their literal sense gives to the Court a wide and unfettered discretion and in their application I know of no better reason for granting relief than to see that justice is done."

The approach in *Van Leer* was followed by this Court in *Muirhead v The Uniting Church in Australia Property Trust (Q).*[11]

[8] In order to examine the exercise of the discretion by the primary Judge, it is necessary to consider in some detail the chronology which is set out in the affidavit of Michael Kevin Cooper, the appellant's present solicitor. Mr Cooper obtained the information from the files maintained by the appellant's previous solicitors and from his own files. To the extent that he is able, the appellant confirms that account and provides some detail from his own perspective. Yvette Joy McLaughlin, the solicitor who has conduct of the matter on behalf of WorkCover and the respondent and who has been in charge of the file since 2001, has not disputed the facts in Mr Cooper's affidavit.

[9] Before the primary Judge the respondent contended that there were two principal periods of delay which remained unsatisfactorily explained, namely, between August 2003 and May 2008, and between 12 August 2008 and 20 August 2009. Notwithstanding that focus, in order to assess the overall delay and the relative prejudice to the parties it is necessary to consider as well the periods in respect of which the respondent makes no complaint.

**Injury on 14 October 1997 at Innisfail**

[10] The appellant sustained an injury to the medial cartilage in his left knee when his foot became caught under a banana tree lying on the ground as he was carrying a bunch of bananas to the loading trailer on the respondent's farm, where he was

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8 *Van Leer Australia Pty Ltd v Palace Shipping KK* (1980-81) 180 CLR 337; [1981] HCA 11.
9 (1975) 10 SASR 496 at 504.
10 (1967) 65 DLR (2d) 324 at 332.
11 [1999] QCA 513 at [4] per Pincus JA and [29] per Williams J.

employed as a farm labourer. The work instructions to labourers working on the farm required all felled trees to be cut into 300mm (one foot) billets. Had this occurred, the appellant contends, his foot could readily have moved the short billet without strain on his knee. The appellant immediately reported the incident at work and received treatment at the Innisfail Hospital. Through his workplace, the appellant made an application for workers' compensation benefits to WorkCover Queensland ("WorkCover") on 16 October 1997. The application was accepted and he was paid benefits until approximately 24 October 1997. He returned to work but resigned his employment shortly after due to continuing pain in his knee and returned to Tasmania in December 1997.

**Injury in Tasmania on 15 June 1999**

[11] The appellant commenced employment as a factory hand in Forth in Tasmania on 20 February 1999. On approximately 15 June that year he injured the same knee in an accident at work carrying a bag of onions. The doctor to whom he reported diagnosed an injury to the medial cartilage of the left knee. He was referred to Professor Einoder, an orthopaedic surgeon in Hobart, who concluded that the injury was a recurrence of the injury sustained on 14 October 1997.

[12] On 8 July 1999 the appellant made an application for workers' compensation to QBE Insurance Limited and at its request was examined by an orthopaedic surgeon, Mr RWL Turner, in Hobart. He was of the opinion that the appellant's symptoms were attributable to the original injury sustained in Innisfail. On that basis, workers' compensation was declined by the Tasmanian insurer.

**Application to re-open claim in Queensland**

[13] On 25 August 1999 the appellant wrote to WorkCover seeking to re-open his earlier claim. WorkCover obtained the medical reports from QBE Insurance Limited in respect of the Tasmanian injury on 7 September 1999, including the report of Mr Turner and one from a Dr O'Sullivan and a lengthy statement made by the plaintiff on 21 July 1999. Notwithstanding the opinions expressed in those reports, on 24 September 1999, WorkCover advised the appellant that it rejected his application because it was unable to conclude that the appellant's absence from work from 15 June 1999 was as the result of an injury within the meaning of the *WorkCover Queensland Act*.

**Progress of appellant's proceedings**

*(i) 5 October 1999 – 18 September 2003*

[14] The appellant consulted Tasmanian solicitors for advice and on 5 October 1999 those solicitors applied for a review of the WorkCover decision. A month later those solicitors provided WorkCover with a report from Professor Einoder dated 21 October 1999. On 16 December 1999, after review, WorkCover rejected the claim.

[15] On 13 and 21 December 1999 the Tasmanian solicitors wrote to Pescott Reaston, solicitors in Cairns, for the attention of Mr Joe Pinder, seeking advice in relation to the appellant's options. Ms Gandini of Pescott Reaston sent a preliminary advice on 12 January 2000. In response the Tasmanian solicitors asked that the necessary

steps be taken to appeal against WorkCover's decision to an industrial magistrate and to commence proceedings "at common law". The appeal was filed on or about 17 January 2000. Each time the appeal application was mentioned in early 2000, it was adjourned to the next call-over and, with the consent of both parties, was adjourned to the registry in April 2000.

[16] Earlier, on 19 January 2000, Ms Gandini sought a damages certificate pursuant to s 262 of the *WorkCover Queensland Act*.[12] Pescott Reaston was formally engaged by the Tasmanian solicitors. On 14 March 2000 those solicitors returned the appellant's completed notice of claim for damages.

[17] On 22 March 2000 Ms Gandini again sought a damages certificate as a matter of urgency from WorkCover[13] because the limitation period would expire in October 2000.

[18] On 22 March 2000 Ms Gandini acknowledged to the Tasmanian solicitors receipt of the completed notice of claim for damages and sought relevant income tax returns, group certificates and a medical report about the appellant prepared by the Innisfail Hospital. The solicitors supplied whatever documents the appellant had and a letter of authority directed to the Australian Taxation Office (if it were necessary) to obtain copies of any other documents and noted that the appellant was shortly to have surgery. The Tasmanian solicitors had themselves written to the Tax Office. On 10 April 2000 the Tasmanian solicitors sent copies of the relevant tax returns and assessments for the tax years 1996-1999, noting that the 1994-1996 returns had been requested from the Tax Office.

[19] On 12 April 2000 WorkCover sent a conditional damages certificate to Pescott Reaston. Over the next month or so, activity occurred in relation to this file including the supply of a further conditional damages certificate to include an injury to the anterior cruciate ligament of the left knee and a further medical report from Professor Einoder dated 13 July 2000. On 24 August 2000 Ms Gandini sent a brief to Mr Webb of counsel, requesting him to settle a claim and statement of claim and to give advices on liability, evidence and procedural matters under the *WorkCover Queensland Act*.

[20] Notwithstanding this promising start to processing the appellant' claim, the completed notice of claim for damages sent by the Tasmanian solicitors to Pescott Reaston had not been sent to WorkCover and on 14 September there was discussion between counsel, the Tasmanian solicitors and the Queensland solicitors about the need to do so. On 19 September the Tasmanian solicitors faxed an amended notice of claim for damages which had been re-sworn.

[21] Ms Gandini wrote to WorkCover noting that the conditional damages certificate did not cover all of the appellant's injuries, sought another certificate and requested its issue by 11 October 2000 as the limitation period was due to expire. WorkCover

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12 The appellant contends, uncontroversially, that he is a worker within s 253(1)(b) of the *WorkCover Queensland Act* 1996 (Qld), namely, "the worker, if the worker's application for compensation was allowed and the injury sustained by the worker has not been assessed for permanent impairment".

13 Pursuant to s 262, a claimant cannot seek damages until WorkCover gives a claimant a notice of assessment and the various requirements of Chapter 3 have been complied with. WorkCover may give a conditional damages certificate if there is an urgent need to bring proceedings and the permanent impairment has not been assessed or agreed.

complied with that request. The following day the notice of claim and statement of claim were filed on behalf of the appellant in the Supreme Court.

[22] Solicitors Williams Graham & Carman notified Pescott Reaston by letter dated 25 October 2000 that they acted for WorkCover and that the notice of claim for damages had been lodged prematurely because the appellant had not been assessed. They were of the view that the claim would be in abeyance until the industrial magistrate's appeal had been resolved and the appellant's injury assessed. It was not until January 2001 that Ms Gandini responded. She advised that the appellant had undergone further surgery and when a further medical report was available, she would list the industrial magistrate's appeal for hearing. Williams Graham & Carman responded in February that they did not have instructions to act on behalf of WorkCover in relation to the appeal and identified issues of non-compliance in the notice of claim for damages.

[23] Shortly afterwards, Mr Pinder wrote to the Tasmanian solicitors confirming that he would be commencing practice as Pinder Gandini as specialist personal injury lawyers and sought an authority from the Tasmanian solicitors to transfer the appellant's file from Pescott Reaston to Pinder Gandini. There is no record that WorkCover or its then solicitors, William Graham & Carman, were notified. On 24 May 2001 Ms Gandini sought further instructions and a week or so later the Tasmanian solicitors wrote indicating that they had sent a letter of authority. On 19 June 2001 the Tasmanian solicitors wrote to Pinder Gandini advising that the appellant would be attending upon Professor Einoder at the end of August for a final assessment and enclosed a number of documents including extracts from the records from the Innisfail Hospital dated 15 October 1997; a letter from the appellant's employer to GSS Investigation Services dated 24 August 1999; a DSS claim form completed by the appellant in December 1997; a medical certificate dated 15 October 1997 from the Innisfail Hospital; and a statement prepared for the DSS dated 18 December 1997. The Tasmanian solicitors indicated that the appellant had no other documentation in his possession.

[24] On 15 August 2001 Williams Graham & Carman enquired of Reaston Lawyers about the assessment of the appellant's injuries, to which there was no response. On 20 September 2001 Williams Graham & Carman wrote to Reaston Lawyers advising that WorkCover had directed them to hand their file to MacDonnells Solicitors in Cairns. On 1 October 2001 Ms Gandini wrote to the Registrar of the Supreme Court advising that the claim had not been served because it was stayed and sought renewal for a further year. It was renewed on 3 October 2001.

[25] According to Mr Cooper, the file indicated that Ms Gandini was absent from work from 2 October 2001 until 17 January 2002 and that Mr Pinder had conduct of the file during that period. On 10 October 2001 the Tasmanian solicitors wrote to Pinder Gandini enclosing a copy of a further report from Professor Einoder dated 3 September 2001. On 15 October 2001 MacDonnells enquired of Pescott Reaston whether the appellant wished to pursue any injury or aggravation of injury sustained in Tasmania, noting that the proceedings remained stayed pending completion of the pre-court procedures. There was no response to that letter. On 8 November 2001 MacDonnells wrote again to Pescott Reaston requesting confirmation that they continued to act for the appellant and seeking advice about the industrial magistrate's appeal. There was no response to that letter.

On 26 November 2001 MacDonnells again wrote to Pescott Reaston about their representation of the appellant and there was no response.

[26] On 13 December 2001 MacDonnells wrote to Pinder Gandini seeking advice as to whether that firm acted for the appellant and seeking information about the industrial magistrate's appeal. There was no response to that letter and a further letter was written on 4 January 2002. On 18 January 2002 Ms Gandini wrote to MacDonnells advising that her firm continued to hold instructions to act as local agent for the appellant and advised that the appellant intended to pursue the industrial magistrate's appeal but would not be able to do so until his injuries had stabilised. Ms Gandini wrote the same day to the Tasmanian solicitors identifying certain matters raised by counsel which remained outstanding and which were preventing the hearing of the industrial magistrate's appeal. Ms Gandini ceased work on the file and Mr Pinder took over its conduct.

[27] On 4 March 2002 the Tasmanian solicitors wrote to Pinder Gandini responding to matters raised in earlier correspondence. A month later they sent Pinder Gandini a report from Dr D Billet dated 18 March 2002 and other documents relating to his claim prepared by the appellant.

[28] On 24 April 2002 WorkCover wrote to the appellant at an address in Devonport, Tasmania advising him that an independent medical examination had been arranged with a Dr Phillips at the Devonport Community and Health Services on 30 May 2002. The appellant was unable to attend because he had relocated to Wangan, near Innisfail in Queensland. On 20 May 2002 the appellant contacted Pinder Gandini to speak to the person handling his file but there is no record in the file, according to Mr Cooper, that any contact was arranged. He advised the solicitors that he had relocated and gave his new contact details. On 23 May 2002 the Tasmanian solicitors advised Pinder Gandini of the appellant's new contact details in Queensland.

[29] The appellant deposes that he made numerous phone calls to Pinder Gandini when he returned to North Queensland in order to speak with Mr Pinder who he was told was looking after his file. He was never able to speak to him and on each occasion he was told that he was either "out … or … busy and that he would phone … back".[14] Eventually, the appellant went to his federal member, Mr Bob Katter, for assistance. A few days later he received a letter from Mr Pinder advising that Colin Patino would be taking over his file and the conduct of the claim. The appellant had no complaints about Mr Patino's availability and saw him on two or three occasions.

[30] On 1 August 2002 Mr Patino wrote to MacDonnells that he now had conduct of the matter and was awaiting the appellant's instructions. He sought information about the deficiencies in the notice of claim. Mr Patino wrote to the appellant confirming instructions to discontinue the industrial magistrate's appeal and further matters relating to assessment. Mr Patino continued to seek advice from MacDonnells about the notice of claim. At the end of August Mr Patino wrote to the appellant advising him that he should contact WorkCover direct to arrange for a medical examination. The appellant conferred with Mr Harrison of counsel in the offices of Pinder Gandini on 12 September, who subsequently gave general advices relating to

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14 Affidavit of John William Boettcher, para 10, AR 230.

evidence and the second incident, and settled the notice of claim for damages. Mr Patino sought updated payment details from WorkCover and Centrelink. He sought a list of out-of-pocket expenses from the appellant, which were supplied. On 10 October 2002 Mr Patino made an application to the Registrar for the renewal of the claim. He wrote several times to WorkCover requesting details of the medical examination for the appellant. Eventually the appellant was notified that he was to be examined by Dr Crilly on 26 November 2002 in Cairns.

[31] Mr Cooper notes that he was retained by the appellant with respect to another court matter on 25 November 2002. In mid-December WorkCover enclosed a notice of assessment and other documents for the appellant, care of Pinder Gandini. Mr Patino sought Dr Crilly's report on several occasions from WorkCover, which was finally provided in January 2003. On 23 January 2003 Mr Patino asked the appellant to contact him, which he did on 3 February and arrangements were made for a meeting on 7 February 2003. Mr Patino sought an authority for Pinder Gandini to obtain details of the appellant's income for the three years pre-accident, apparently unaware that those taxation returns had previously been supplied. In response to correspondence from MacDonnells, Mr Patino advised that the notice of claim would not be served until all the documentary material was available because WorkCover had adopted "a pedantic approach" to compliance with s 280. The appellant signed an authority authorising Pinder Gandini to discuss his claim so as to allow payment of his fees to Mr Cooper to come out of any settlement monies. An application was made to the Australian Tax Office for the appellant's tax returns from 30 June 1994 to 30 June 2002.

[32] MacDonnells reminded Pinder Gandini that they still had not received the notice of claim, to which Mr Patino responded that he still awaited the income tax returns from the Australian Tax Office. The tax returns were received on 10 April 2003. MacDonnells again sought advice on 27 May 2003 as to when the notice of claim for damages would be delivered. Mr Patino sought responses from the appellant about the tax documents which, it might be noted, had already been provided.

[33] On 24 June 2003 MacDonnells advised Pinder Gandini that WorkCover required delivery of the notice of claim within 28 days, failing which they expected to be instructed to apply to strike out the claim and statement of claim for want of prosecution. No response was received. Reminder letters were sent on 25 July and 6 August, to which no response was received. On 13 August 2003 Mr Pinder met with Ms McLaughlin of MacDonnells, explaining that he had "some difficulty" getting instructions and was arranging for the appellant to confer with Mr Harrison of counsel at the end of the month and expected that they would be able to provide a notice of claim for damages by 12 September 2003. An extension was granted. On 20 August 2003 Mr Pinder advised the appellant that MacDonnells were pressing for delivery of the notice of claim for damages and that he had a final extension until 12 September 2003. Mr Pinder apparently thought it necessary in order to finalise the notice of claim, notwithstanding earlier conferences with Mr Webb and Mr Harrison of counsel, to obtain further instructions and to confer with counsel. The appellant conferred with Mr Harrison of counsel on 30 August 2003 and again on 2 September 2003. Counsel confirmed that he had settled relevant passages of the notice of claim for damages. Notwithstanding, on 18 September 2003, MacDonnells wrote to Pinder Gandini noting that there had been no notice of claim for damages.

*(ii) November 2003 – July 2008*

[34] Mr Cooper notes in his affidavit that the court matter that he was handling for the appellant was finalised on 7 November 2003. His fees of $18,616.25 were to be deducted from any settlement in respect of the appellant's claim. There were fees of $7,992.75 owed to the Tasmanian solicitors.

[35] On 3 November 2003 the appellant left a message with Pinder Gandini that he was to have an operation on his right knee on 13 November at Cairns Base Hospital. On 5 November Mr Pinder wrote to the Health Insurance Commission seeking past benefits and information. A claims history was sent under cover of letter dated 12 November 2003, relating to services between October 1993 and November 2003. Mr Pinder sent this material to the appellant on 13 January 2004, requesting him to complete and return it prior to 10 February 2004.

[36] Mr Cooper wrote to Pinder Gandini on 13 May 2004 requesting advice about the current status of the appellant's claim, to which no response was received. On 28 July 2004 the appellant rang Pinder Gandini complaining that he had heard nothing from Mr Pinder since February 2004 and understood that WorkCover had six months to get back to him with an offer. The appellant was anxious and left a message for Mr Pinder to telephone him. Mr Cooper notes that there is nothing on the file to suggest that Mr Pinder telephoned the appellant.

[37] Mr Cooper wrote on 17 August 2004, 7 November 2004 and 7 December 2004 seeking advice as to the status of the appellant's claim but no response was received. A file note indicates that the appellant telephoned Mr Pinder on 19 January 2005, notifying a change of address and left a telephone number. Mr Cooper himself wrote again on 7 June 2005 seeking advices as to the current status of the appellant's claim, to which he received no response.

[38] The appellant deposes that during the winter of 2005 he experienced a lot of pain in his knees and saw Dr Flynn. A note on the Pinder Gandini file indicates that the appellant telephoned Mr Pinder on 24 June 2005 and informed him that Dr Flynn had advised a left knee reconstruction. Mr Cooper again wrote to Pinder Gandini on 25 July 2005 requesting advice as to the current status of the appellant's claim, to which there was no response.

[39] On 8 August 2005 the appellant met Mr Pinder at his office and was told that two lawyers from Murphy Schmidt would take over his file and manage it from Brisbane. Mr Pinder wrote to MacDonnells advising of this change.

[40] In the meantime Mr Cooper had relocated to Brisbane in January 2004 but visited Far North Queensland for a few days every month to review client matters. On 26 August 2005 the appellant met Mr Cooper to discuss his outstanding fees and asked him to take over the conduct of his personal injury claim. The appellant deposes that he asked Mr Cooper to do so because Mr Cooper was pressing for his account to be paid, he was embarrassed that it remained unpaid, and that if Mr Cooper was handling the claim, he would not be pressing him for payment of his fees.

[41] Mr Cooper received the appellant's file in early September 2005. Mr Pinder telephoned Mr Cooper on 25 October enquiring about progress of the matter and

Mr Cooper undertook to protect Mr Pinder for his fees. On reviewing the file Mr Cooper found that Pinder Gandini had never taken a statement from the appellant. He did so on 23 November 2005. Mr Pinder contacted Mr Cooper by phone and letter several times about his outstanding fees.

[42] Mr Cooper telephoned the appellant on 18 September 2006. The appellant deposes that his residence at Innisfail had lost its roof in Cyclone Larry. The post-cyclone period was very difficult for him, his now wife and their children. One of her children was deaf. His cochlear ear implant suffered water damage in the cyclone and was only repaired about two months later. Another child had cerebral palsy and required significant care and assistance. The appellant and his wife had a child in April 2007, after which she developed post-natal depression and they both received counselling. They had another child in November 2008 and again his wife developed post-natal depression and needed care.

[43] When Mr Cooper contacted the appellant in September 2006 the appellant told him of his personal difficulties, that his "knees were no good" and that he was on the waiting list for a left knee reconstruction. Mr Cooper met with the appellant at the end of March 2007 to obtain up to date instructions. A year later he had another meeting and prepared a draft notice of claim for damages which was sent for signing at the end of June 2008. In July 2008 Mr Cooper finalised his notice of claim for damages.

*(iii) August 2008 – September 2009*

[44] It was not until 12 August 2008 that Mr Cooper wrote to WorkCover advising that he was acting on behalf of the appellant in lieu of Pinder Gandini. He enclosed the notice of claim for damages, reports from the Tasmanian medical practitioners, and PAYG summaries and tax returns for the period 1994 to 2008. A copy of that letter was sent to the respondent.

[45] Shortly afterwards MacDonnells advised Mr Cooper that they acted for WorkCover and required details of service on the employer. MacDonnells reserved "their client's rights in relation to the Plaintiff's delay in delivering the Notice of Claim for Damages".[15] On 17 September 2008 MacDonnells advised that WorkCover was not satisfied that the notice of claim for damages was compliant and identified the areas of non-compliance. Mr Cooper arranged to see the appellant on 25 and 26 September 2008. Mr Cooper sought documents from the Tasmanian insurers and WorkCover. During October, Mr Cooper received various documents from Tasmania and the Australian Tax Office and on 6 November 2008 MacDonnells advised that WorkCover was satisfied that the appellant had complied with the requirements of s 280 of the Act and his notice of claim for damages was deemed compliant as of 1 October 2008.

[46] On 12 November 2008 MacDonnells wrote to Mr Cooper setting out WorkCover's notice pursuant to s 285(4)[16] of the *WorkCover Queensland Act*. Liability was denied because the claim and statement of claim filed on 12 October 2000 was "stale for service". WorkCover required the appellant to apply for leave to renew the claim pursuant to r 24 of the *UCPR* and WorkCover would oppose any application and would cross-apply to strike out for want of prosecution.

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15 AR 55.

16 Written notice attempting to resolve claim.

[47] The writer continued:[17]

> "2. WorkCover fully reserves its position in relation to the prejudice suffered by WorkCover and the employer as a result of the excessive delay in the Claimant prosecuting his claim.
>
> 3. WorkCover has made reasonable enquiry and remains uncertain of the truth or otherwise of the Claimant's allegations.
>
> 4. Further, and in the alternative, the employer implemented and maintained a safe system of work."

[48] MacDonnells wrote that the compulsory conference could take place in Cairns between 15 and 17 December 2008. Mr Cooper proposed 16 December 2008, however, on 2 December 2008 MacDonnells advised that the solicitor who had day-to-day conduct of the matter (Ms McLaughlin) was on maternity leave and a compulsory conference could not be held until late January or early February 2009.

[49] Mr Cooper notified the appellant of these developments and sought further up to date medical information. He received some material from the Australian Tax Office in January 2009 and sent that material to MacDonnells. Updated material, including earlier material from Innisfail, was provided by MacDonnells. WorkCover had signed a certificate of readiness for the conference pursuant to s 293A(6) of the *WorkCover Queensland Act*.

[50] The compulsory conference was held on 16 February 2009 in Cairns. The parties were unable to resolve the claim and exchanged compulsory offers. Counsel who appeared on behalf of the appellant at the conference advised that the appellant would need leave to proceed on an application to renew the claim.

[51] On 6 May 2009 MacDonnells wrote to Mr Cooper advising that the appellant had failed to serve WorkCover with the claim and statement of claim within the requisite 60 day period following the compulsory conference pursuant to s 306(3)(a) of the *WorkCover Queensland Act* and enquired whether the employer had been served. Mr Cooper made no reply to that letter. On 10 June 2009 MacDonnells enquired if the appellant intended to pursue his claim given his failure to serve the claim and statement of claim. Mr Cooper wrote to MacDonnells a few days later.

**Application to renew**

[52] On 28 September 2009 MacDonnells were served with the appellant's application dated 20 August 2009 for renewal of the claim and leave to proceed. The respondent cross-applied for dismissal of the proceedings for want of prosecution or dismissal pursuant to s 291 of the *WorkCover Queensland Act*. The applications were heard in the Supreme Court at Cairns on 16 October 2009 and judgment was delivered on 9 March 2010, dismissing the application to renew the notice of claim and the proceedings with costs.

**Reasons of the primary judge**

[53] The primary judge noted that the claim was filed two days prior to the expiration of the limitation period and without the pre-commencement procedures required under

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[17] AR 216. No prejudice was ever actually identified relating to the investigation of the incidents in which the appellant sustained his injury.

the *WorkCover Queensland Act* having been completed. He noted that the notice of assessment was issued on 18 December 2002 "after a number of delays occasioned by applications for reopening of the Claim and appeal against WorkCover's refusal to reopen".[18] He concluded that any delay associated with this period could not tell against the appellant. While the primary Judge noted that the progress of the claim was set out in "extensive detail" in the affidavit of Mr Cooper, he thought it was not necessary to refer "to every detail of the interaction between the plaintiff and his successive solicitors which appears to be the root cause of the delay".[19]

[54] His Honour noted that "the defendants" did not complain of delay between the date of the injury and mid-2003 because during this time the statutory requirements were being attended to. His Honour observed that it was reasonable to allow a period for enquiries to be undertaken and for the appellant to confer with counsel. His Honour noted that the next step after conferring with counsel in August 2003 ought to have been "the service of the writ [sic] before it became stale on 12 October 2003".[20] But any activity on the court proceedings was stayed pending the conclusion of the pre-court proceedings. His Honour noted some contact and preparation in November 2005 but that the appellant's next contact with his solicitors was on 18 September 2006 when he gave details of his new address and employment. His Honour noted that the appellant's house was destroyed by Cyclone Larry in March 2006 and observed:[21]

> "There was no doubt considerable disruption in his life for some time as a consequence of this. Following the meeting in September 2006, the next meeting was in March 2007. By this time, the effects of that disruption should have passed sufficiently to allow the claim to proceed with due celerity. In fact, it did not do so as the next action was not taken until 14 months later on 23 May 2008."

The primary Judge noted that apart from one contact from each of the appellant's former and present solicitors, there was no communication between the appellant's advisors and the "defendant's" solicitors between 25 November 2003 and 18 August 2008.

[55] His Honour referenced r 5 of the *UCPR* and the observations by Williams J (as his Honour then was) in *Muirhead v The Uniting Church in Australia Property Trust (Q)*:[22]

> "[29] The general principle is that it is for the applicant to establish some good reason why the case should be excepted from the general rule that the court will not exercise its discretion in favour of renewal. (*Jones v Jebras & Hill* (1968) Qd R 13, *Licul v Corney* (1976) 58 ALJR 439, and *Van Leer Australia Pty Ltd v Palace Shipping KK* (1979) 180 CLR 337). One of the more recent relevant statements is that of McHugh J in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 553:

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18 *Crompton v Buchanan & Ors* [2010] QSC 61 at [4].
19 Ibid at [5].
20 Ibid at [6]
21 Ibid at [9].
22 [1999] QCA 513.

> "…I do not see any warrant for treating provisions that provide for an extension of time for commencing an action as having a standing equal to or greater than those provisions that enact limitation periods. A limitation provision is the general rule; an extension provision is the exception to it. The extension provision is a legislative recognition that general conceptions of what justice requires in particular categories of cases may sometimes be overridden by the facts of an individual case." (See also Dawson J at 554)".

[56] His Honour noted that there was no complaint of specific prejudice made by the defendant but was persuaded that there was general prejudice of the kind referred to in *Brisbane South Regional Health Authority v Taylor*.[23] His Honour noted the hardship to the appellant if the claim were not renewed but concluded that there was "no proper explanation" for the delay during the two identified periods.[24] Counsel had referred his Honour to *Smith & Anor v Harvey-Sutton & Ors*[25] where a delay of sixteen years did not disentitle the plaintiff to continue his claim. His Honour distinguished *Harvey-Sutton* on the basis that it was ready for trial when the defendant brought an application to strike out. The delay there was described as "inordinate and inexcusable" and the plaintiff himself had been dilatory in responding to his solicitors.

[57] The primary Judge observed:[26]

> "The most telling factor in the exercise of my discretion, is that the action has only begun and has not moved to the second step in 12 years."

In the following paragraph he described the "glacial-like pace" in the pre-commencement procedures and concluded:[27]

> "In the end result I take the view that a delay of 12 years between the commencement of the action and the very next step cannot be condoned."

**Discussion**

[58] The appellant accepts that it was for him to persuade the primary Judge that he ought to exercise his discretion in favour of renewal.[28] Keane JA observed in *The IMB Group P/L (in liq) v ACCC*[29] of r 24(2) that it must be read and the discretion exercised in a context which includes r 5. It is not suggested that this observation does not apply equally to r 24(4). His Honour also referred to Pincus JA's summary of Stephen J's analysis in *Van Leer Australia Pty Ltd v Palace Shipping KK*,[30] in the *Muirhead v The Uniting Church in Australia Property Trust (Q)*:[31]

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23 (1996) 186 CLR 541 at 551.
24 *Crompton v Buchanan & Ors* [2010] QSC 61 at [23].
25 [1998] QCA 232.
26 *Crompton v Buchanan & Ors* [2010] QSC 61 at [25].
27 Ibid at [26].
28 *Muirhead v The Uniting Church in Australia Property Trust (Q)* [1999] QCA 513.
29 [2007] 1 Qd R 148 at 152-3.
30 (1980-1981) 180 CLR 337 at 343-6; (1981) 55 ALJR 243.
31 [1999] QCA 513 at [4].

> "(1) There is a tendency to relax rigid time limits where that is legally possible and where it can be done without prejudice or injustice to other parties.
>
> (2) The discretion may be exercised although the statutory limitation period has expired.
>
> (3) Matters to be considered include the length of delay, the reasons for it, the conduct of the parties and the hardship or prejudice caused to the plaintiff by refusing renewal or to the defendant by granting it.
>
> (4) There is a wide and unfettered discretion and there is "no better reason for granting relief than to see that justice is done"."

[59] It is accepted that the loss of the ability to pursue an apparently worthwhile claim alone does not constitute a sufficiently good reason. That is a feature present in every case where recourse has to be had to r 24.[32] If the notice of claim is not renewed and other enabling orders made, the appellant will be deprived of his cause of action. It was submitted before the primary Judge and acknowledged by him in his reasons that the appellant would not be without a remedy as there were good grounds for supposing that he would be protected by claims against his solicitors.[33] That he may be forced to commence such litigation to vindicate his claim was not recognised by his Honour as serious prejudice. At best, the appellant will be able to litigate the loss of chance.[34] That prejudice needed to be balance against any prejudice which the respondent might experience. His Honour was correct to identify general prejudice which infects all stale causes. However, what his Honour did not note was that WorkCover has from the time of the appellant's initial injury been fully engaged. There was an investigation of the incident on the farm immediately following the report to WorkCover which necessarily involved the employer. The hospital records have all been produced and the medical reports of the alleged aggravation in Tasmania were supplied immediately. Investigations were, it would appear, thorough and complete at the time. The affidavits suggest that medical witnesses are available and even Mr Turner in Tasmania, although retired, would still, conceivably, be available to be cross-examined on his report.

[60] The contention that there is a want of explanation for the delays during the two identified periods must be considered in light of the whole of the relationship between the appellant and his solicitors. Furthermore, in the absence of prejudice of the kind which would prevent a fair trial being had, unexplained delay is less relevant.[35] The appellant was a young man of 21 and a labourer when he sustained the injury. When he allegedly aggravated the left knee injury in Tasmania in 1999

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32 *The IMB Group Pty Ltd (in liq) v Australian Competition and Consumer Commission* [2007] 1 Qd R 148 at 156.

33 *Crompton v Buchanan & Ors* [2010] QSC 61 at [23].

34 *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638; *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 333 at 355; *Harwood v Gayler & Cleland* [1996] QCA 461 at 8 and 10 per Macrossan CJ.

35 *Dempsey v Dorber* [1990] 1 Qd R 418; *Smith & Anor v Harvey-Sutton & Ors* [1998] QCA 232; *Quinlan v Rothwell* [2002] 1 Qd R 647; [2001] QCA 176. The observations in *Batistatos v Road and Traffic Authority of NSW* (2006) 226 CLR 256; [2006] HCA 27 that in order to safeguard the administration of justice where the lapse of time was so serious that a fair trial is not possible, proceedings will be stayed, revolves around the requirement for a fair trial.

he notified WorkCover promptly and, on its rejection of his claim, he attended immediately upon solicitors who were prompt and regular in protecting his interests. He had the great misfortune to be put in contact with solicitors in Queensland who failed to protect his interests. The sorry saga reveals, for example, that on three occasions the same income tax notices of assessment and returns were sought and provided. The appellant was constant in his attempt to have some response from Pescott Reaston. He was fobbed off or ignored regularly. He was driven to contacting his parliamentary representative. That might have been a wake up call to the solicitor but after initial contact, enthusiasm waned. Those solicitors handed over the appellant's file to a firm in Brisbane, notwithstanding that the appellant resided in Far North Queensland. The respondent criticises the appellant for not again seeking assistance from his federal member of parliament. When the appellant requested Mr Cooper to take over the conduct of the file after the failure of the Brisbane solicitors to advance his interests, this was because the appellant saw that Mr Cooper had a real financial interest in bringing the personal injuries claim to a successful conclusion. However, as the chronology reveals, that did little to advance matters.

[61] Against the background of the inaction by the solicitors, notwithstanding the reasonable persistence of the appellant to engage their interest in his claim, the appellant's cessation of pressure for a period to deal with his personal circumstances does not seem to warrant censure to the extent of losing his claim altogether. The final period of delay between the compulsory conference in February 2009 and the filing of the application to renew the notice of claim in August 2009 is a matter for which the solicitor must be held responsible.

[62] I am of the view that the primary Judge misconceived the history of the matter by suggesting that there had been no movement "to the second step in 12 years" against the background of the purpose of the provisions in the *WorkCover Queensland Act*. Furthermore, his Honour suggested that had the matter been ready to proceed to trial, he may have exercised his discretion differently. He has made no reference to the state of readiness which must necessarily have been achieved for the compulsory conference.

[63] A purpose of the pre-court procedures leading to the compulsory conference are to have the proceedings at the date of the compulsory conference in as good a position as they would be immediately prior to a trial so that all information "is on the table". Part 6 relating to the settlement of claims provides for the parties to sign a certificate of readiness which provides that all investigative material required for the conference has been obtained, including witness statements from persons other than expert witnesses, that medical and other expert reports have been obtained, and each party has complied fully with the party's obligation to give the other party material that is relevant and required to be given for the claim. A financial statement must be given to the opposite party containing details of the legal costs payable and the estimate of the party's likely legal costs and damages if the claim proceeds to a trial. If the claim is not settled at a conference each party must make a written final offer at the conference which will impact upon the costs of the trial. Accordingly, with the exception of updated medical reports and adjusting financial statements, the matter must be regarded as ready to proceed to trial. These were matters not adverted to by the primary Judge. The failure to do so, together with a failure to acknowledge the appellant's attempts to get his several Queensland solicitors to advance his claim over many years, and the early engagement of WorkCover in the

investigation including medical investigations, has minimised any prejudice to the respondent, and has meant that his Honour's discretion miscarried.

[64] For the reasons discussed above, I have concluded that a fair trial may be had. The respondent referred to *AON Risk Services Aust Ltd v ANU*.[36] No other litigants have been prejudiced. No trial has been adjourned. There is, of course, a degree of vexation associated with the necessity to dust off this matter but that is to be contrasted with the serious loss to the appellant.

[65] The claim is thoroughly stale. There is power to renew it for any period in excess of the one year stipulated in r 24(2) by virtue of r 367.[37] Renewal from the last renewal should be made and for one year from 12 October 2009. By s 306(3)(a) of the *WorkCover Queensland Act*, the claim must be served within 60 days after the date of the compulsory conference. By s 306(3)(b) the court may extend the time for doing so. Time should be extended for 28 days after the delivery of judgment in this appeal.

[66] These are the orders I would make:

1. Allow the appeal.

2. Set aside the orders made below.

3. Renew the claim for the period from 12 October 2003 until 12 October 2009 and for one year from 12 October 2009.

4. Extend the time within which the respondent employer must be served with the claim and statement of claim pursuant to s 306(3)(b) of the *WorkCover Queensland Act* 1996 (Qld) to 28 days after judgment is delivered in this appeal.

5. The respondent pay the appellant's costs of and incidental to the appeal to be assessed.

[67] **MULLINS J:** I agree with White JA.

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36 (2009) 239 CLR 175 at 213-214; [2009] HCA 27 at [98], [100].

37 *Gillies v Dibbetts* [2001] 1 Qd R 596 per Wilson J at 602.