

# SUPREME COURT OF QUEENSLAND

CITATION: *Goldsmith & Anor v Resolution Life Australasia Limited*  
[2024] QCA 48

PARTIES: **ANDREW DAVID GOLDSMITH**  
**JANNE ELIZABETH TIPPETT**  
(appellants/respondents)  
v  
**RESOLUTION LIFE AUSTRALASIA LIMITED**  
ACN 079 300 379  
(respondent/applicant)

FILE NO/S: Appeal No 3379 of 2023  
Appeal No 3320 of 2024  
SC No 7538 of 2022  
SC No 3268 of 2018

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Civil

ORIGINATING COURT: Supreme Court at Brisbane – [2023] QSC 15 (Crowley J);  
[2024] QSC 17 (Wilson J)

DELIVERED ON: 3 April 2024

DELIVERED AT: Brisbane

HEARING DATE: 27 March 2024

JUDGE: Morrison JA

ORDERS: **1. Appeal CA 3379 of 2023 be heard together with appeal CA 3320 of 2024.**  
**2. That the Registrar determine a timetable to finalise the steps necessary to give effect to order number 1.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JOINDER OF CAUSES OF ACTION AND OF PARTIES – PARTIES – GENERALLY – where the applicant applies for two appeals to be heard together or heard sequentially by the same court – where the court will have to traverse areas of evidence and factual findings that are common to both appeals – where there is a risk that the court’s findings will be inconsistent about the same facts – whether the two appeals should be heard together

COUNSEL: The appellants/respondents appeared on their own behalf  
D E F Chesterman KC for the respondent/applicant

SOLICITORS: The appellants/respondents appeared on their own behalf  
Norton Rose Fulbright Australia for the respondent/applicant

- [1] **MORRISON JA:** The respondent to these two appeals applies to have them heard together or heard sequentially by the same court. The appellants resist that course on the basis that it is unnecessary and will be unduly burdensome upon them.
- [2] Some short history of this otherwise prolonged litigation is necessary.
- [3] The appellants commenced litigation in the District Court in 2016. They sought compensatory damages for loss of profits due to business disruption in respect of their newsagency business in a shopping centre. The trial was heard in May 2020 and both the claim and counterclaim were dismissed.<sup>1</sup> In the trial the appellants contended that relevant limitation period under s 10 of the *Limitation of Actions Act 1974* (Qld) was 12 years.
- [4] In the course of the reasons, the trial judge held it was 12 years.
- [5] An appeal from that decision was heard by the Court of Appeal.<sup>2</sup> This court held that the trial judge's conclusion on the limitation point was in error. An application for special leave to appeal to the High Court was dismissed.
- [6] The first Supreme Court proceedings were commenced in March 2018. The underpinning of that claim involved the same general factual basis as had been alleged in the District Court proceedings. However, the legal basis of the claim was different.
- [7] Although the claim was brought in March 2018, the appellants did not take any steps to serve it on the respondent until nearly four years later. Meanwhile, the appellants obtained various renewals of the claim by orders of the Registrar. Eventually a contested renewal was heard by Daubney J in September 2021. Unlike the position taken in the trial, the appellants contested the renewal on the basis that a six-year limitation period applied. Daubney J renewed the claim.
- [8] An application was brought to set aside the order of Daubney J. It was heard by Wilson J in May 2022. On 30 May 2022 Wilson J set aside the renewal and dismissed the proceedings.<sup>3</sup> No appeal was brought from those orders. Instead, on 28 June 2022 the appellants commenced proceedings in BS7538 of 2022.<sup>4</sup> The claim was indistinguishable from the previous claim dismissed by Wilson J.
- [9] The respondent applied to have the first Supreme Court proceedings stayed on the basis that it was an abuse of process. Part of the contentions was it disclosed no reasonable cause of action because the relevant limitation period had expired. In essence the respondent contended that the first Supreme Court proceedings urged a claim that was, in all material respects, the same as the claimed dismissed by Wilson J on 30 May 2022. It was also urged that in the proceedings before Wilson J the appellants had accepted that the relevant limitation period had expired.

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<sup>1</sup> *Goldsmith v AMP Life Ltd* [2020] QDC 140.

<sup>2</sup> *Goldsmith v AMP Life Ltd* (2021) 7 QR 113; [2021] QCA 20.

<sup>3</sup> *Goldsmith v AMP Life Pty Ltd* (Supreme Court of Queensland, Wilson J, 30 May 2022).

<sup>4</sup> Those proceedings are the subject of the appeal in CA3379 of 2023.

- [10] That application was heard by Crowley J in October 2022, with judgment delivered on 17 February 2023.<sup>5</sup> Crowley J made an order permanently staying the first Supreme Court proceedings.
- [11] In the course of the reasons given by Crowley J, his Honour had to examine whether the Court of Appeal had determined the limitation point in a way binding on the new proceedings. His Honour concluded that it did not. In the course of dealing with the question of whether the first Supreme Court proceedings were an abuse of process, his Honour had to examine the factors emerging from the proceedings before Wilson J, including what was decided by Wilson J, and what position was taken by the appellants in relation to the limitation point before Daubney J and Wilson J, and more recently before Crowley J. Specifically, Crowley J had to considered whether the appellants were attempting to proceed on a basis that was “clearly contrary to the position they previously adopted with respect to the limitation period”.<sup>6</sup>
- [12] For that purpose his Honour examined the submissions before Wilson J and the position taken on the limitation point. His Honour stayed the proceedings on the basis that they were an attempt to litigate the same claim that had already been dismissed by Wilson J, and to do so was unfair.<sup>7</sup>
- [13] The second Supreme Court proceedings were issued in terms which are, in all material respects, indistinguishable from those dealt with by Crowley J.
- [14] In those new proceedings the appellants brought an application to reinstate the orders of Daubney J made in September 2021, or for identical orders to be made in their place. In other words, the appellants sought to reinstate the claim which had been already dismissed.
- [15] That application was dismissed by Wilson J on 23 February 2024.<sup>8</sup> The appellants bring appeal CA 3320/24, challenging that decision by Wilson J.
- [16] Wilson J identified the issues in the application as including whether:
- (a) the reasons given by Crowley J constituted a new fact in relation to the applicable limitation period; and
  - (b) whether the appellants were taken by surprise in the hearing before her Honour in May 2022.<sup>9</sup>
- [17] Wilson J reviewed the history of the litigation in more detail than I have outlined above. In doing so her Honour had to review the basis of the decision of Crowley J.<sup>10</sup>
- [18] Further, Wilson J had to review aspects of the original hearing before her Honour, and the submissions made by the appellants on the limitation point.<sup>11</sup>

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<sup>5</sup> *Goldsmith & Anor v AMP Lift Ltd* [2023] QSC 15.

<sup>6</sup> Reasons of Crowley J, at [105].

<sup>7</sup> Reasons of Crowley J, at [121]-[124].

<sup>8</sup> *Goldsmith & Tippet v Resolution Life Australasia Ltd* [2024] QSC 17.

<sup>9</sup> Reasons of Wilson J at [4].

<sup>10</sup> Reasons of Wilson J at [50]-[56].

<sup>11</sup> Reasons of Wilson J at [74]-[77].

- [19] Because one of the issues before Wilson J was whether a new fact had arisen because of what Crowley J found, it was necessary for her Honour to examine the position taken by the appellants in the proceedings before Crowley J.<sup>12</sup>
- [20] Wilson J held that no new fact had arisen in respect of the limitation period by reason of the findings of Crowley J. Wilson J then dealt with a separate point raised by the appellants. It was that the matter should be reopened in the inherent jurisdiction of the court, because of the respondent's misleading conduct in relation to the application to set aside Daubney J's order. Part of that misleading was as to the duration and expiry of the limitation period. In order to resolve that dispute Wilson J had to examine the competing positions taken in the original hearing by her Honour in May 2022. Central to that was the question of the positions taken by the parties in respect of the limitation period.
- [21] Ultimately Wilson J determined that there was no misleading conduct that had the consequence of preventing the appellants being heard on the relevant matters. Her Honour dismissed the application.

### **Consideration**

- [22] The above review is sufficient to demonstrate that the two appeals will almost inevitably involve this court considering the same background facts and procedural history, and competing contentions on the limitation point taken at various times. Further, it is almost inevitable that this court will be required to examine what was said and the positions taken with respect to the limitation point (among others) before Daubney J, Wilson J (on both occasions) and Crowley J. In my view, it does not matter that the basis of the appeal is said to be different in each case. The legal point might be different, but inevitably this court will have to traverse areas of evidence and factual findings that are common to both appeals.
- [23] That raises several material considerations. First, unless the one court hears both appeals, there is a risk of inconsistent findings about the same facts. That risk is all the greater if the appellants take an inconsistent position in one appeal when compared to the other.
- [24] Secondly, there is a risk, in my view, that if the same court does not hear both appeals, but only that against the decision of Wilson J in CA 3320/24, that the findings sought could amount to an indirect attack on the orders of Crowley J because it would impact upon the factual substratum for those orders.
- [25] Thirdly, the appeal from the decision of Crowley J has been stayed by consent since September 2023, awaiting the decision on the application brought most recently before Wilson J. That application has been resolved, and there is no good reason why the appeal from Crowley J should not now be dealt with. Of course the decision of Wilson J has been appealed, but that, in my view, makes it all the more imperative that the two appeals be heard together, by the same court.
- [26] The appellants' contention is that they should not be put to the trouble and expense of having to address both appeals. Mr Goldsmith suggests that the appeal CA 3320 of 2024 be allowed to proceed first, on the basis that if the appellants are successful in that appeal, then the other appeal is likely to be rendered moot. That contention has only superficial attraction. The effect suggested will only occur if the result is

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<sup>12</sup> Reasons of Wilson J at [82]-[94].

one way in the appeal. If the appellants do not succeed, that leaves the appeal against the decision of Crowley J still on foot and unresolved.

[27] The appellants have already filed an outline of submissions in CA 3320 of 2024. Because of the stay, nothing has happened in the other appeal. There is sense in the approach proposed by the respondent, namely that the appellants produce the outline in CA 3379 of 2023, then leaving the respondents to do a combined outline answering both appeals.

[28] For the reasons I have expressed above, the appeals should be heard together. I make the following orders:

1. Appeal CA 3379 of 2023 be heard together with appeal CA 3320 of 2024.
2. That the Registrar determine a timetable to finalise the steps necessary to give effect to order number 1.