SUPREME COURT OF QUEENSLAND

CITATION:	*Kalecinski v Mercy Community* [2024] QSC 49
PARTIES:	**WOJCIECH HENRYK KALECINSKI** (Plaintiff/Respondent) **v** **MERCY COMMUNITY FORMERLY MERCY HEALTH AND AGED CARE CENTRAL QUEENSLAND** (Applicant/Defendant)
FILE NO/S:	1310/23
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	28 March 2024
DELIVERED AT:	Rockhampton
HEARING DATE:	13 March 2024
JUDGE:	Crow J
ORDER:	**1. The plaintiffs claim is set aside**
CATCHWORDS:	WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – DETERMINATION OF CLAIMS – APPEALS – RIGHT OF APPEAL AND RIGHT TO REVIEW – where the plaintiff had a rejected statutory claim by WorkCover Queensland – were the plaintiff unsuccessfully appealed the rejected statutory claim by WorkCover Queensland to the Workers' Compensation Regulator within the statutory time limit – where the plaintiff did not appeal the decision of Workers' Compensation Regulator to the Queensland Industrial relations Commission within the 20 business days advised by the Regulator – where approximately 3 years later, the plaintiff files a statement of claim in the Supreme Court – where the defendant seeks orders by the Court striking out the statement of claim and setting aside any subsequent claim for damages arising from the subject injury – whether the plaintiffs title to sue can be cured. *Limitation of Actions Act* 1974 (Qld), s 11, s 30, s 31 *Uniform Civil Procedure Rules* 1999 (Qld), r 16, r 375 *Workers' Compensation and Rehabilitation Act* 2003 (Qld), s 237 *Phipps v Australian Leisure and Hospitality Group Ltd & Anor* [2007] QCA 130, followed

Van Der Berg v Key Solutions & Anor [2020] QSC 262, followed

COUNSEL: SP Sapsford for the applicant
The respondent appeared in person

SOLICITORS: McInnes Wilson for the applicant

[1] Mr Kalecinski was employed by the respondent as a maintenance assistant from 6 February 2017 to 23 August 2019. Mr Kalecinski alleges that he suffered an injury to his back lifting a heavy tent in the course of his employment at his employer's premises in Rockhampton on 18 May 2018.

[2] Mr Kalecinski lodged an application for statutory WorkCover benefits on 20 July 2018, in which he alleged he reported the injury to his employer by one of its supervisors on 21 May 2018. In addition to lodging his application, WorkCover received a medical certificate from Dr Adikarige dated 19 July 2018 stating that Mr Kalecinski suffered from "canalstenosis at L4/5 with right foot drop due to lifting tents at work weighing 200kg."

[3] Mr Kalecinski supported his application with a statement to WorkCover. WorkCover obtained statements from the respondent's supervisors who agreed that they spoke to Mr Kalecinski on 21 May 2018. Both supervisors denied that Mr Kalencinski said his back was sore from lifting a tent.

[4] By its decision dated 22 August 2018, WorkCover rejected the statutory claim and provided Mr Kalecinski with detailed reasons. As required by regulations, the statement of reasons included advice that Mr Kalecinski had the right to apply for review of his decision to the Workers' Compensation Regulator. Mr Kalecinski sought a review of WorkCover's decision by the Workers' Compensation Regulator on 19 November 2018.

[5] By its written decision of 8 January 2019 the Regulator confirmed WorkCover's decision to reject Mr Kalecinski's statutory claim. In undertaking the review, the Regulator had reference to various materials including submissions lodged by Splatt Lawyers on behalf of Mr Kalecinski.

[6] The review decision of 8 January 2019 was addressed to Splatt Lwyers who acted on behalf of Mr Kalecinski. As is required by regulation, the Regulator's review decision advised each party of its right to appeal the Regulator's decision to the Queensland Industrial Relations Commission (QIRC) within 20 business days from receipt of the Regulator's decision.

[7] In his outline of argument, Mr Kalecinski said that he did not appeal the Regulator's decision, as his lawyers, Splatt Lawyers, advised him they would require "substantial funds" to pursue such an appeal and Mr Kalecinski did not have those funds.

[8] Mr Kalecinski had an MRI on 24 May 2022 and on 25 May 2022, Dr Anthanasiov advised him that the damaged nerve within his right leg had failed to regenerate, and so he had a permanent right foot drop. Dr Anthanasiov then referred Mr Kalecinski to a neurologist, Dr Green. On 26 October 2022, Dr Green confirmed damage to the nerve causing the pain and right foot drop was permanent. Mr Kalecinski then sought further advice from Grant & Simpson Solicitors in light of the reports received from Dr Anthansiov and Dr Green. Mr Kalecinski was told by Grant & Simpson Lawyers that his time to appeal had expired.

[9] The report of Dr Anthansiov, spinal surgeon, dated 25 May 2022 records:

> "…He had an L4/S1 decompression posterior instrumented fusion. At the time of the surgery, quite a large haematoma was found compressing his L4, L5 and S1 nerve roots on the right side. Wojciech's pain has improved, but his neurological function has never recovered. He has difficulty accepting that it will not get any better than what it is, but I have explained that again to his [sic] today."

[10] Dr Green, neurologist, in his report of 26 October 2022 stated his opinion that Mr Kalecinski has a permanent disability involving his right foot, most likely from the injury to his nerve roots. Dr Green suggested that a disability pension was entirely appropriate.

[11] On 7 December 2023, Mr Kalecinski filed a claim in the Supreme Court for

> "1. Pursuant *Workers' Compensation and Rehabilitation Act* 2003 Pt II Div. 1. 109(5), the applicant seeks compensation for lost wages and future income in the sum of $750,000 (seven hundred and fifty thousand dollars).

> 2. Further the applicant seeks $1,200,000 (one million two hundred thousand dollars) for psychical [sic] and secondary psychiatric injury due to chronic pain."

[12] Mr Kalecinski's statement of claim has eight paragraphs alleging the respondent failed to examine and assess prescribed manual handling tasks, failed to provide appropriate lifting apparatus, did not adhere to the *Workplace Health and Safety Act* 2011, failed to provide appropriate rehabilitation and acted contrary to unfair dismissal regulations as outlined in the *Fair Work Act*.

[13] The statement of claim then contains paragraphs 6, 7, and 8 as follows:

> 6. Affidavit of Wojciech Henryk Kalecinski, 5 December 2023.
>
> 7. Statutory Declaration of Wojciech Kalecinski dated 10 August 2018.
>
> 8. Affidavit of Tomasz Skrzypczynski dated 5 December 2023.

[14] By application filed 17 January 2024, the defendant sought orders under r 16 of the *Uniform Civil Procedure Rules* 1999 striking out the claim and statement of claim. In response, Mr Kalecinski has filed an amended claim and statement of claim. The amendments to the claim make it clear that Mr Kalecinski wishes to bring an action against his employer for negligence as a result of the injury sustained to his lumbar spine whilst performing lifting in the course of his employment on 18 May 2018. The amendments, however, to the statement of claim do not plead the material facts necessary to constitute the cause of action in negligence and in particular, there is no allegation of duty of care nor breach of duty of care.

[15] Ordinarily, leave would be granted to amend the statement of claim to cure the deficiency so that Mr Kalecinski can bring his case against his employer for personal injuries sustained in the course of his employment on 18 May 2018.

[16] The defendant opposes such leave being granted and further seeks orders that not only the statement of claim be struck out, but that the claim itself be set aside. The defendant submits that it is legally impossible for Mr Kalecinski to succeed in a claim for damages against the defendant due to failure to comply with numerous requirements under the *Workers' Compensation and Rehabilitation Act* 2003 (WCRA) and also because the cause of action is now time barred pursuant to s 11 of the *Limitations of Actions Act* 1974 (LAA).

[17] In respect of the latter issue, Mr Kalecinski argues that although his cause of action is time barred, he should succeed in an application to extend the time period under s 31 of the *Limitations of Actions Act* as he has new medical evidence that was not part of the original claim.

[18] The medical evidence referred to in the applicant's submissions are the reports and advice of Drs Anthansiov and Green. These reports were received on 25 May 2022 and 26 October 2022 which is prior to 12 months from the date of filing the claim on 7 December 2023. Assuming in Mr Kalecinski's favour, that the new medical evidence is a material fact of a decisive nature, then Mr Kalecinski cannot succeed in an extension approach as the new evidence was received more than 12 months prior to him commencing his cause of action.[1]

[19] Although Mr Kalecinski is self-represented, there is not the slightest hint that any other material fact (as defined in s 30(1)(a) of the LAA) could exist. Mr Kalecinski's submissions and affidavit show that he had knowledge of the fact of negligence (s30(1)(a)(i)), the identity of the person against whom the right of action lies (s30(1)(a)(ii)) causation, (s30(1)(a)(iii))and the extent to which his personal injury was caused by the respondents negligence (s30(1)(a)(v)). As the time limitation defence is an unsurmountable barrier to Mr Kalecinski's success, then, in my view, it would be inappropriate to grant Mr Kalecinski leave to amend his claim and statement of claim.

[20] A further difficulty for Mr Kalecinski is his failure to comply with the provisions of the *Workers' Compensation and Rehabilitation Act* 2003. Mr Kalecinski's response is that: "As WorkCover and the Regulator rejected his claim, he was not responsible to comply with any sections of the WCRA"[2].

[21] Section 237(1) and (5) of the *Workers' Compensation and Rehabilitation Act* 2003 provide:

> "237 **General limitation on persons entitled to seek damages**
>
> (1) The following are the only persons entitled to seek damages for an injury sustained by a worker—
>
> (a) the worker, if the worker—

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1 *Limitations of Acts Act* 1974 (Qld), s 31(2).

2 Paragraph 31 of respondent's outline of argument.

(i) has received a notice of assessment from the insurer for the injury; or

(ii) has not received a notice of assessment for the injury, but—

(A) has received a notice of assessment for any injury resulting from the same event (the *assessed injury*); and

(B) for the assessed injury, the worker has a DPI of 20% or more or, under section 239, has elected to seek damages; or

(iii) has a terminal condition;

(b) a dependant of the deceased worker, if the injury results in the worker's death and—

(i) compensation for the worker's death has been paid to, or for the benefit of, the dependant under chapter 3, part 11; or

(ii) a certificate has been issued by the insurer to the dependant under section 132B.

[…]

(5) To remove any doubt, it is declared that subsection (1) abolishes any entitlement of a person not mentioned in the subsection to seek damages for an injury sustained by a worker."

[22] It is plain by s 237(5) that a person who is not mentioned in s 237 does not have a claim in damages for an injury sustained by a worker and that any such right has been abolished. Mr Kalecinski has not received a notice of assessment of injury and is not entitled to receive such as notice of assessment of injury as his claim has been rejected. It is plain, therefore, that Mr Kalecinski is incapable of bringing a cause of action against his employer. It is not necessary to consider in detail numerous other sections of the WCRA which Mr Kalecinski has not complied with. In *Van Der Berg v Key Solutions & Anor*[3], I have summarised these provisions concluding that:

"[50] It is unnecessary to speculate whether, had the applicant appealed within time to the QIRC, or at all to the Industrial Court, that he would have succeeded. What is plain is that the WCRA is comprehensive in its provisions to deal with the rights of an injured worker to compensation and statute has as "intersecting web of

[3] [2020] QSC 262.

> reviews and appeals" concerning the granting of rights or privileges which are dependent entirely upon statute such that the general rule referred to by Walsh J in *Forster v Jododex* is engaged. It is important that the special procedures laid down by the WCRA should be allowed to take their course and ought not to be displaced by the making of declaratory orders concerning the respective rights of parties under the statute, unless, as Walsh J said in *Forster v Jododex* there is a "special reason for intervention"."
>
> (Footnotes omitted.)

[23] Mr Kalecinski cannot comply with any provisions of the WCRA pertaining to a common law claim unless he first succeeds in having his WorkCover statutory claim accepted. Section 550(a) of the WCRA required Mr Kalecinski to make his appeal from the review decision within 20 business days of receipt of the review decision. That would require the appeal to the QIRC to be made prior to 6 February 2019.

[24] Pursuant to s 550(3) of the WCRA, a person who wishes to appeal the decision of a regulator may ask the respondent to allow further time to appeal, however, given that more than five years have elapsed since the conclusion of the appeal time period, and the reason for failure to appeal is that Mr Kalecinski could not pay his lawyers fees, it is inconceivable that such a belated extension could be provided.

[25] In these circumstances, the relevant principles are set out by Keane JA:[4]

> "[21] On the respondents' application to strike out the appellant's action, the question was not whether the court had jurisdiction to entertain the action: it plainly had jurisdiction: the decision of the High Court in *Berowra Holdings* authoritatively establishes that proposition: if a breach of statutory prohibition on the commencement of an action does not deprive the court of jurisdiction, then, *a fortiori*, provisions such as s 237 and s 250 of the Act which are not in terms concerned with the jurisdiction of the court cannot have that result. Nor was the question whether the appellant was, at that time, able to demonstrate an enforceable liability in the respondent to pay her

[4] *Phipps v Australian Leisure and Hospitality Group Ltd & Anor* [2007] QCA 130 at 12-14.

damages by way of recompense for her injury of 14 July 2003. Rather, the question was whether the appellant's action should be summarily terminated because a notice of assessment had not issued, bearing in mind the prospect of the imminent issue of a notice of assessment. In my respectful opinion, the learned primary judge erred in failing to appreciate that he had a discretion to exercise in this regard.

[22] At this point one must turn to consider the nature of the discretion to be exercised in such a case. The reasons of the High Court in *Berowra Holdings* did not explicitly identify the source and nature of the discretion held to exist in that case. The respondent in the present case argued that the relevant discretion has its origin in "the inherent authority of the Supreme Court … to stop the abuse of its process when employed for groundless claims". That submission may be accepted for the purpose of the argument which the respondent seeks to make here. The respondent then submits that the appellant's action must fail because the appellant has no "title" to seek damages from the respondent. Further, the respondent argues that the appellant was not merely not entitled to pursue her claim against the respondent – by action or otherwise – but nothing she did after commencing her action "or could now do, can circumvent that defence, so as to, in effect, 'feed' that title". I pause to note that, no doubt, the respondents' reference to "feeding the title" is drawn from the language of the reasons in *Austral Pacific Group Ltd (In liq) v Airservices Australia*. Accordingly, so it was submitted by the respondent, the learned primary judge had no alternative but to dismiss the appellant's action as an abuse of process in that it was an action which was bound to fail.

[23] But, in this case, the appellant's "title" to pursue her claim can, given time, be "perfected", so far as the infirmities which flow from non-compliance with s 237(1) and s 250 are concerned, by the issuing of a notice of assessment. On the evidence, a notice of assessment will issue; apparently within a relatively short time. The situation is one

in which there is a real prospect that the appellant will be able to cure the defect in her title to sue the respondents even though, on the facts as they exist at the moment, the respondent is under no enforceable liability to the appellant.

[24] At this point, in conformity with the instruction in *Berowra Holdings*, reference to the "procedural structure for the conduct of litigation in the court" is necessary. Within the Queensland court structure, it is now well-established that an action which is susceptible of being struck out as an abuse of process is not necessarily a nullity.

[25] Prior to 27 September 1975, when O 32 r 1(6) was added to the *Supreme Court Rules*, an action commenced before the facts necessary for a complete cause of action had occurred was liable to be struck out, and the deficiency could not be cured by amendment to add reference to the facts that occurred after it had been commenced. That situation changed with the addition of an express power of amendment in such a case. Rule 375(2) of the *Uniform Civil Procedure Rules 1999* (Qld) ("UCPR") continues the effect of O 32 r 1(6). Rule 375 provides relevantly:

> "(1) At any stage of a proceeding, the court may allow or direct a party to amend a claim, anything written on a claim, a pleading, an application or any other document in a proceeding in the way and on the conditions the court considers appropriate.
>
> (2) The court may give leave to make an amendment even if the effect of the amendment would be to include a cause of action arising after the proceeding was started."

[26] The effect of r 375(2) is, by necessary implication, to ensure that an action, commenced before all the facts necessary to give rise to a "title" to sue have occurred, is not a "nullity": the action may be irregularly commenced and susceptible of being struck out as an

abuse of process, but it has sufficient existence in the eyes of the law to be capable of being made regular by amendment.

[27] As I have said, there is, in this case, good reason to believe that the facts will change so as to "feed" the appellant's title to recover damages from the respondent. The question is whether, in the light of the prospects of a change in the facts which bear upon the appellant's entitlement to recover damages from the respondent, a court should refuse to exercise the discretion to terminate the action because, on the facts as they presently stand, it cannot succeed.

[28] The learned primary judge erred in failing to appreciate that there was a discretion to be exercised. It, therefore, falls to this Court to exercise the discretion. In the exercise of this discretion, the principal consideration relating to the noncompliance of the action with s 237(1) and s 250 of the Act is whether the infirmity in the appellant's title to sue is likely to be cured. It was, therefore, material that:

(a) there was a real likelihood, amounting to a virtual certainty, that the notice of assessment will issue;

(b) the notice of assessment is likely to issue soon, or at least sufficiently soon for there to be no suggestion by the respondent that any delay is likely to prejudice the respondent in its ability to have a fair trial;

(c) on the evidence, the notice of assessment soon to issue is likely to show that the appellant has suffered a substantial injury. That circumstance tends to confirm that a loss of the opportunity to establish an entitlement to damages "on the merits" will be a substantial prejudice to the appellant;

(d) if the action is struck out, any new action by the appellant will be defeated by the *Limitation of Actions Act 1974* (Qld), and so the appellant would suffer prejudice in the form of a loss of the opportunity to have her claim determined on the merits. It may be noted that

> the appellant's proceedings were not commenced out of time: so far as the present proceedings are concerned, she does not need an extension of time in order to defeat a defence under the *Limitation of Actions Act*."

(Footnotes omitted.)

[26] In the present case "the infirmity" in the plaintiffs "title to sue" cannot be cured and even if it could, his claim is out of time and he cannot succeed in a s 31 of the LAA extension application.

[27] As Mr Kalecinski has no prospect of succeeding in a claim for damages against his employer, his claim ought to be set aside.