PARTIES:	COMMERCIAL UNION ASSURANCE LIMITED
	v
	WHITE, Richard
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEALS FROM THE SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 8 of 1997 (9315534)
DELIVERED:	21 November 1997
HEARING DATES:	6 and 7 October 1997
JUDGMENT OF:	Gallop ACJ, Mildren & Bailey JJ.

CATCHWORDS:

Practice and Procedure – Leave to join second defendant – Whether an order made during interlocutory proceedings is a final order – Whether leave to appeal required as per s53 Supreme Court Act 1979 (N.T.) – Whether a final order giving rise to an appeal as of right – Order granting leave to respondent to join present appellant as a second defendant held to be a final order as it was a "final determination" of the issue whether leave should be granted to the plaintiff to join the second defendant.

Law Reform (Miscellaneous Provisions) Act 1956 (N.T.) – ss 24, 26, 27, 28 and 29

Andjelkovic v AFG Insurance Ltd (1980) 31 ACTR 17, at p24 – Referred
Ceric v CF Heath Underwriting and Insurance (Australia) Pty Ltd (1994) 99 NTR 1 at 8 – Referred
Oswald v Bailey (1987) 11 NSWLR 715 at 717–718, 725, 734 and 736 – Followed

Insurance – Workers compensation Insurance – Application to join an insurer under the Law Reform (Miscellaneous Provisions) Act 1956 – Appeal against grant of leave to join insurer as second defendant – onus on plaintiff/applicant to show arguable case – plaintiff had established an "arguable case".

Workmens Compensation Act 1949 (N.T.) – s18 (as inserted by ordinance No. 1 of 1970).

AFG Insurance Ltd v Andjelkovic (1981) 54 FLR 398 at p400 – Followed

Workers Compensation Insurance – Relevant consideration on grant of leave to join second defendant – Prejudice by reason of delay – Application for leave brought three years after institution of proceedings against first defendant – Such delay not unreasonable –Proceedings against insurer necessary as alleged alternative employer had been wound up – Primary Judge was correct in granting leave to join insurer as second defendant to the proceedings.

Corporations Law 1989 (Cth) – s471B, 571(1)
Law Reform (Miscellaneous Provisions) Act 1956 (N.T.) – s27(2) and (3)
Limitation Act (N.T.) 1981, s44
Workmans Compensation Act 1971–74 (SA)
Workmens Compensation Ordinance 1949 (N.T.)

Brisbane South Regional Health Authority v Taylor (1996) 139 ALR 1 at pp6, 8 and 11 – Considered
Grimson v Aviation & General (Underwriting) Agents Pty Ltd (1991–1992) 25 NSWLR 422 at 425. – Referred
New South Wales Medical Defence Union Ltd v Crawford (1993) 31 NSWLR 469, at 490, 504 and 531 – Followed
Civil & Civic Pty Ltd v R. W. Bass Pty Ltd (1996) 14 ACLC 1,015 – Referred to
Re P J Staunton Pty Ltd (1993) 11 ACLC 219 – Referred to
Re Steelmaster Pty Ltd (in liquidation) *Kenney v McCann* (1992) 10 ACLC 176– Referred to

REPRESENTATION:

Counsel:

Appellant:	Mr I Quick QC
Respondent:	Mr J Waters

Solicitors:

Appellant:	Hunt & Hunt
Respondent:	Cridlands

Judgment category classification:	C
Judgment ID Number:	GAL001
Number of pages:	29

gal0001

COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. AP 8 of 1997
(9315534)

BETWEEN:

COMMERCIAL UNION ASSURANCE LIMITED
Appellant

AND:

RICHARD WHITE
Respondent

CORAM: GALLOP ACJ, MILDREN & BAILEY JJ.

REASONS FOR JUDGMENT

(Delivered 21 November 1997)

GALLOP ACJ & BAILEY J

By writ of summons issued on 12 August 1993 the plaintiff (the present respondent) instituted proceedings against Pink Batts Insulation Pty Ltd, formally known as Divic Pty Ltd, formally known as Dimet Corrosion Pty Ltd, formally known as Dimet Corrosion Prevention Pty Ltd, for damages for personal injury sustained in the course of his employment by that defendant.

By summons filed on 22 October 1996 the plaintiff applied for leave to join Commercial Union Assurance Company of Australia Ltd (the present appellant) as a second defendant in the proceedings. The summons came on for hearing before Thomas J. who, on 13 March 1997, made the order sought by the plaintiff giving leave to join the present appellant as a second defendant in the proceedings. The appellant filed alternative applications against that order. The first application is for leave to appeal against the order, if leave is required pursuant to s53 of the *Supreme Court Act* 1979 (NT), as the order made was not a final order, but interlocutory only. As an alternative, the appellant lodged a notice of appeal on the basis that the order was a final order giving rise to an appeal as of right. In our view, the order giving leave to the respondent to join the present appellant as a second defendant in the proceedings was a final order, and accordingly the appropriate process is by way of appeal as of right. We have come to that conclusion by reason of the fact that the order made is a final determination of the issue of whether leave should be granted to the plaintiff to join the second defendant or not. If leave had been refused, that would have been a final determination of the plaintiff's right to join the second defendant. The order made was that leave be granted and that determines that question once and for all subject to the resolution of this appeal. We note that in the earlier case in this Court of *Ceric v CE Heath Underwriting and Insurance (Australia) Pty Ltd* (1994) 99 NTR 1, which likewise was an appeal from an order granting leave to a plaintiff to institute proceedings against an insurance company, the matter proceeded by way of appeal and not by way of application for leave to appeal.

The application for leave to join the present appellant was brought pursuant to Part VIII of the *Law Reform (Miscellaneous Provisions) Act* 1956 (NT). The relevant provisions are as follows:

> "26. AMOUNT OF LIABILITY TO BE CHARGE (sic) ON INSURANCE MONEYS PAYABLE AGAINST THAT LIABILITY
>
> (1) If a person (in this Part referred to as "the insured") has, whether before or after the commencement of this Ordinance, entered into a contract of insurance by which he is indemnified against liability to pay any damages or compensation, the amount of his liability is, on the happening of the event giving rise to the claim for damages or compensation, and notwithstanding that the amount of the liability may not then have been determined, a charge on all insurance moneys that are or may become payable in respect of that liability.
>
> (2) If, on the happening of the event giving rise to the claim for damages or compensation, the insured (being a corporation) is being wound up, or if any subsequent winding-up of the insured (being a corporation) is deemed to have commenced not later than the happening of that event, the provisions of subsection (1) apply notwithstanding the winding-up.
>
> (3) Every charge created by this section has priority over all other charges affecting the insurance moneys, and where the same insurance moneys are subject to 2 or more charges by virtue of this section those charges have priority between themselves in the order of the dates of the events out of which the liability arose, or, if the charges arise out of events happening on the same date, they rank equally between themselves.
>
> 27. ENFORCEMENT OF CHARGE
>
> (1) Subject to subsection (2), a charge created by this Part is enforceable by way of an action against the insurer in the same way and in the same court as if the action were an action to recover damages or compensation from the insured.
>
> (2) In respect of any such action and of the judgment given in any such action the parties have, to the extent of the charge, the same rights and liabilities, and the court has the same powers, as if the action were against the insured.

(3) Except where the provisions of subsection (2) of section 26 apply, no such action shall be commenced in any court except with the leave of that court, and leave shall not be granted where the court is satisfied that the insurer is entitled under the terms of the contract of insurance to disclaim liability, and that any proceedings, including arbitration proceedings, necessary to establish that the insurer is so entitled to disclaim have been taken.

(4) Such an action may be brought although judgment has been already recovered against the insured for damages or compensation in respect of the same matter.

28. PROTECTION OF INSURER

(1) Notwithstanding anything in this Part, a payment made by an insurer under the contract of insurance without actual notice of the existence of a charge under this Part is, to the extent of that payment, a valid discharge to the insurer.

(2) An insurer is not liable under this Part for any greater sum than that fixed by the contract of insurance between himself and the insured.

29. CERTAIN OTHER PROVISIONS NOT AFFECTED

Nothing in this Part affects the operation of any of the provisions of the Workmen's Compensation Ordinance or Part V of the Motor Vehicles Ordinance."

At the hearing before Thomas J., the respondent produced a proposed further amended Statement of Claim, the substance of the amendments being to add an allegation of employment by an alternative employer, and a consequential prayer for relief in respect of alternative employers. So far as the present appellant is concerned, the prayer for relief claimed by the plaintiff is set out in para 22B of the proposed further amended Statement of Claim which reads:

"AND THE PLAINTIFF CLAIMS

A. ...

B. As against the Second Defendant:-

(i) A declaration that if Dimet Contracting Pty Ltd had not been dissolved, it would have been liable to pay the plaintiff damages, interest and costs as a result of its breach of contract and or in the alternative its breach of duty of care;

(ii) A declaration that the Second Defendant is obliged to indemnify Dimet Contracting Ltd (notwithstanding that Dimet Contracting Pty Ltd has been dissolved) against any liability that Dimet Contracting Pty Ltd would have had, if it had not been dissolved, to pay damages to the plaintiff;

(iii) An order in favour of the plaintiff enforcing the charge against insurance moneys held by the second defendant in respect of the declared liability of Dimet Contracting Pty Ltd to pay damages to the plaintiff;

(iv) Damages, interest and costs payable to the plaintiff by the second defendant."

On the hearing of the application by the plaintiff to join the present appellant, another application was heard contemporaneously, namely, an application by the (first) defendant for summary judgment against the plaintiff on the basis that the plaintiff had proceeded against the wrong defendant. Her Honour disposed of the second application first, and declined to enter judgment against the plaintiff on the material produced in evidence. Her Honour then proceeded to consider the application to join the present appellant. She considered all the evidence produced on the hearing of both applications and, in the exercise of her discretion, granted the application for

leave to join the present appellant as a second defendant in the proceedings. In the course of coming to that conclusion she made certain findings of fact. She found that the plaintiff was employed in the Northern Territory between 1972 and 1974. He was engaged principally in sand blasting, painting ships and other steel work. In 1986 he was diagnosed with lung problems, the consensus of medical opinion being that he was suffering a form of silicosis. On 24 December 1974, the plaintiff's home in Darwin was severely damaged in Cyclone Tracy and any documents he had relating to his employment with "Dimet" were destroyed. He first consulted a solicitor in relation to his lung disease on 13 November 1991. At that time he was not able to recall the correct name of his employer during the period 1971 to 1974. Her Honour accepted the evidence of the plaintiff set out in his affidavit sworn 7 June 1995 concerning his efforts to identify his employer during the relevant years. These proceedings were finally instituted against the first defendant on 12 August 1993. The present appellant knew nothing of the proceedings until the issue of the interlocutory summons on 22 October 1996.

Her Honour's approach to the exercise of her discretion to grant leave to the plaintiff to join the appellant as a second defendant was first to resort to the principles set out in *AFG Insurances Ltd v Andjelkovic* (1981) 54 FLR 398 at 400 and *Oswald v Bailey* (1987) 11 NSWLR 715 to which we shall return. The evidence upon which her Honour made the order sought was reviewed by her in the following terms:

"On the evidence of Mr Richard Bonython, Dimet Contracting Pty Ltd operated in the Northern Territory and during this period employed Commercial Union Assurance Company Pty Ltd exclusively as their insurers.

In the document titled "Summary of Commercial Union Claims", which is attached to the affidavit of David Sydney Farquhar sworn 25 September 1996, there are numerous claims against Commercial Union from Dimet Corrosion Pty Ltd, Dimet Contracting Pty Ltd, Dimet (S.A.) Pty Ltd and Dimet (W.A.) Pty Ltd. Claims were made by a number of different Dimet entities, all to Commercial Union most of them relating to the workers compensation jurisdiction. On p7 of this summary Mr Farquhar has summarised a claim by Mr Morris Wilson. The insured is stated to be Dimet Contracting Pty Ltd. The worker sustained aggravation to his eyes and it is noted that he received an invoice from Darwin Hospital providing a medical certificate dated 30 September 1974. The accident occurred whilst the worker was sandblasting, he reported it to T. Jones. The name of the insured was given as Dimet Contracting of PO Box 3779 Darwin, at Dimet at 13 Mile. The summary then states "C.U. only paid $1.35 on this claim being invoiced from hospital for medical certificate."

The following entry on this page of the summary relates to a claim made by Mr Jim Taccori and states as follows:

"Jim Taccori

Insured: Dimet Contracting Pty Ltd.
Date of incident **25.9.74**
Place: Stokes Hill Wharf, Darwin.
Worker was a sandblaster who sustained a dislocated knee and bruised ribs.
Accident was at Stokes Hill Wharf with the witness noted as Bruce Henders?
The report of the injury is by the employer in the name of Dimet Contracting.
The medical certificate from Darwin Hospital dated 1/10/74 renders an account for $1.35 to Dimet Const. of PO Box 3779, Darwin.
Further invoice of $1.25 to Dimet Contracting Pty Ltd of 3 Marjorie Street, Berrimah for ambulance.
Note in this claim the worker had been employed for 2 months only and gave a Darwin address."

The inference from this information is that Dimet Contracting Pty Ltd was insured for the claims.

On p14 there is a summary of a claim made by T. Jones:

"T. Jones

Insured: Dimet Corrosion Pty Ltd
Date: 11.5.74
Place: Accident occurred at 12 Mile, Stuart Highway.

Subpoena to produce documents is in name of Dimet Contracting Pty Ltd.

Letter from Von Doussa, McGregor and Co. Barristers & Solicitors refers to Dimet contracting Pty Ltd as employer and also mentions treatment of Jones at Royal Darwin Hospital.

- Dimet Contracting Pty Ltd and Dimet Construction are used regularly in correspondence, although Dimet Corrosion is noted as the insured.

- Dimet Corrosion Control letterhead appears with Darwin branch phone number listed.

- Writ made out to Dimet contracting Pty Ltd.

- Commercial Union Australia Group memo dated 19 December 1974 mentions 'Darwin office of Dimet'."

There is no indication this claim was rejected by Commercial Union. I agree with the submission made by Mr Waters that the proper inference to be drawn is that all these claims were properly lodged and admitted at least so far as the liability of Commercial Union to the Dimet Company was concerned. I also agree with Mr Waters' submission that there is an inference to be drawn that there was an arrangement whereby Commercial Union would meet claims by whichever Dimet entity made those claims.

It is not in dispute that on 7 June 1976 Dimet Contracting Pty Ltd resolved to be wound up. On 24 January 1985, Dimet Contracting Pty Ltd was dissolved after the liquidator had repaid surplus assets to the first defendant.

There is evidence that Commercial Union accepted claims from a number of the Dimet entities during the relevant period including Dimet Contracting Pty Ltd. There is evidence of claims made by Messrs Morris Wilson and Jim Taccori naming Dimet Contracting Pty Ltd as the insured.

The nominated insured in respect of the claim by Mr T Jones is Dimet Corrosion Pty Ltd.

Exhibit I in these proceedings is a copy of a consent judgment in suit number 444 of 1974 dated 17 May 1976. The parties are Trevor Norman Jones, plaintiff, and Dimet Contracting Pty Ltd, defendant.

The terms of the consent judgment are as follows:

"1. That the defendant pay to the plaintiff the sum of TWENTY SEVEN THOUSAND DOLLARS ($27,000.00) inclusive of the costs in this action.

2. That none of the sums received by the plaintiff under the Workmen's Compensation Ordinance 1949 (as amended) shall be deducted from the amount of the judgment herein."

This is the Mr T Jones referred to in the summary of Commercial Union Claim files annexed to the affidavit of Mr Farquhar sworn 25 September 1996.

The matters deposed to in the affidavits of Trevor Sinclair sworn 8 November 1996, Frank Strazdins sworn 11 November 1996, Roy Joseph William Bottrell and Dennis Stephen Cross sworn 11 November 1996, Dominic Donato sworn 4 November 1996 and Denis James sworn 11 November 1996, do not completely refute the plaintiff's submission that Commercial Union accepted claims from Dimet Contracting Pty Ltd during the relevant period."

"In the affidavit of Helen Camp sworn 4 November 1996, Ms Camp has annexed a document annexure "A" which is a list of "Claims for Dimet - Claims Finalised and Outstanding". On p6 of the annexure a claim has been identified by counsel for the plaintiff as being a claim made by Mr White whom it is conceded is the plaintiff in these proceedings. The claim is against Dimet Corrosion Pty Ltd. The branch code is "A" which designates the branch from which the policy was issued in South Australia. In the affidavit of Mr James sworn 11 November 1996, he states that all claims were paid under the South Australian policy. Counsel for the plaintiff argues that one can draw no particular significance from the internal policy classification arrangement that Commercial Union has adopted in this case. Mr Bonython in his evidence had stated that nobody in Whyalla apart from the technical assistants were employed by Dimet Corrosion."

She then considered the submissions put by Senior Counsel for the present appellant, which were in essence the same submissions as were put on the hearing of this appeal, and came to the conclusion that the plaintiff had demonstrated at least an arguable case. As Dimet Contracting Pty Ltd had been dissolved, the appropriate course was for the plaintiff to join the present appellant as a (second) defendant in the proceedings. She made the order sought accordingly. It is apparent from her Honour's reasons that she attached considerable weight to the evidence of the appellant having indemnified Dimet enterprises in respect of workers compensation claims during the relevant period, and accordingly found an arguable case for joining the appellant as the insurer of the relevant employer at the time when the plaintiff's cause of action arose against that employer.

Appellant's submissions on appeal

The first submission on behalf of the appellant was that in imposing upon the plaintiff the onus of establishing only an arguable case for leave to join the appellant, her Honour misunderstood the relevant passage of the judgment of the Full Court of the Federal Court in *AFG Insurances Ltd v Andjelkovic* (1981) 54 FLR 398 at 400. Her Honour cited the following passage:

> "Counsel for the respondent argued that the respondent was entitled to leave pursuant to s.26(3) of the Ordinance if she could show a prima facie case of liability which he equated to a seriously arguable case, but he

> conceded that, if the incident took place outside the terms of the policy, the respondent was not entitled to leave. For the purpose of the appeal he said that the only real issue was 'Was there an arguable case?'.
>
> Section 26 (3) commands the court not to grant leave in certain circumstances. It is not easy to decide precisely what is embraced in the words which describe the circumstances where the court is not to grant leave. In our opinion the court has a general power to grant leave in all cases which do not fall within the provision that it shall not grant leave and in which it is made to appear by evidence available in the application that there is an arguable case of liability against the insured, being a liability against which the insured is indemnified by a contract of insurance in force at the time of the happening of the event said to give rise to the claim. We accept the relevant test proposed by the respondent which is really the test formulated by the primary judge, namely, has the respondent presented a case which is at least arguable?" (my underlining).

There is some force in this submission because the Federal Court is there referring to an arguable case of liability against the insured, not against the insurer. However, there are other dicta to the effect that the onus is on the applicant for leave to establish only an arguable case. In the trial of *Andjelkovic v AFG Insurances Ltd* at first instance (reported at (1980) 31 ACTR 17), Blackburn CJ. said at p24:

> "I may sum up my decision as follows: The main purpose of the provision requiring leave to commence the statutory action is to prevent the substitution of a statutory claim for a claim against the insured where the latter is available and will apparently be effective. Leave may also be refused where the applicant's claim is unarguable, ie where the applicant's contention, that the statutory conditions for the vesting in him of a right of action have been fulfilled, could not possibly succeed. But if on such an issue there is an argument in the applicant's favour which could be seriously put, then in my opinion, on the proper construction of the Ordinance, leave should be granted and the issue should be determined in the action in any available way."

The statutory conditions referred to by Blackburn CJ. include, of course, a contract of insurance by which a person (the employer) is indemnified against any liability to pay any damages or compensation.

In a similar case dealing with the exercise of a similar discretion in New South Wales, *Oswald v Bailey* (1987) 11 NSWLR 715 at 734 Priestley JA. said:

> "The applicants before Yeldham J thus had to show an arguable case on four matters. The first was whether there were arguable cases of liability against Dr Bailey. The argument both before Yeldham J and in this Court proceeded on the basis that the applicants had such arguable cases. The next two matters were whether, at the time when Dr Bailey's liability (if any) to the applicants arose, (i) he was indemnified by contracts of insurance with the MDU against such liability and (ii) the amount of any such liability then became a charge "on all insurance moneys ... payable in respect of that liability" within the meaning of those words in s6(1) of the LR(MP) Act."
>
> And at 736:
>
> "The last matter on which the applicants had to show an arguable case was that the contracts of insurance still remained on foot after the substitution on 4 November 1982 of new articles (which are set out in the reasons of Kirby P at 720D), for the old articles. In regard to this question, Yeldham J, although he had held that contracts of insurance were on foot between Dr Bailey and the MDU until 4 November 1982, also held (at 4 of his reasons of 5 May 1986, referring to, inter alia, at 16 of his reasons of 17 December 1985) that upon the alteration of the articles on that date those contracts no longer existed. Thus, no insurance moneys could become payable under s6(1) of the LR(MP) Act and there was no point in granting leave to the applicants to proceed against the MDU."

In our view, the last matter addressed by Priestley JA. in the above passage is of particular relevance in the present case.

Further guidance as to the correct approach to the exercise of the discretion to grant leave is to be found in the judgment of Kirby P. in the same case at pp717–718. It reads:

> "The very uniqueness of this statutory provision speaks against a narrow construction of it. So too does the beneficial object which lies behind it. The insured may disappear, die or, if a company, be wound up. Such events could, in the past, stultify the claimant's prospects of practical recovery. Out of recognition of the modern reality of insurance, the need to protect those with claims for damages or compensation, and the ready ability, normally, to trace insurers entering into contracts of insurance, provision has been made for a direct action against the insurer. The claimant must bring himself within the terms of s6 of the Act. But if the claimant does, the benefit is secured of a charge on all insurance moneys that are or may become payable in respect of the insured's liability."

If a narrow construction of the statutory provisions is to be avoided and recognition given to the beneficial object which lies behind the provisions, it is reasonable to impose an onus of establishing no more than an arguable case. We consider that her Honour made no error in requiring the plaintiff to prove only an arguable case. We would reject the first submission made on behalf of the appellant.

The next submission was that even if the onus was on the plaintiff to establish only an arguable case, no arguable case had been made out. In support of this submission Senior Counsel for the appellant relied upon the

evidence of Denis James, the Liability Claims Controller for the appellant in Adelaide, set out in his affidavit sworn 11 November 1996. He deposed that he had read through all the claims files referred to in his affidavit that were retrieved and photocopied, and only three of the claims related to a claim from the Northern Territory. He went on to say that all claims were paid under the South Australian policy of insurance. Those three claims were the three claims upon which the plaintiff relied to establish that there must have been a policy indemnifying the plaintiff's employer against any liability at common law to the plaintiff. As we understand the argument, it is that, because those claims were paid under the South Australian policy, the plaintiff had not even made out an arguable case of the existence of a policy which would indemnify the employer from liability to pay damages to the plaintiff. In answer to that submission, counsel for the plaintiff relied upon the indemnity which was extended by the appellant in relation to the workers Jones, Wilson and Taccori and to the terms of the consent judgment in favour of the worker Jones in settlement of his common law action in the Northern Territory, to which reference was made in her Honour's reasons for judgment. It is significant that there was a waiver by the defendant in that action of its right to recover payments made to or on behalf of the worker by way of workers compensation under the Northern Territory legislation.

There was also evidence from Richard Martin Bonython, a Director of Dimet Contracting Pty Ltd and Dimet Corrosion Prevention Pty Ltd between

1970 and 1975. In his affidavit sworn 30 July 1996 he deposed that Dimet Contracting Pty Ltd was based in South Australia, but operated from time to time elsewhere, including Darwin. The operation in Darwin was permanent for several years. He said in his oral evidence that, so far as the Darwin operation was concerned, he had no doubt that proper insurance would have been taken out. He said that the Directors of Dimet were quite aware that insurance was required and he had no doubt that the appropriate insurance was put in place, but he did not recall specifically that it was done. He referred to Dimet operating not only in Darwin, but also in Queensland and New South Wales. Thus the submission on behalf of the plaintiff was that it was likely that the appellant would have obeyed the law in the Northern Territory which contained a compulsory requirement for workers compensation insurance by an approved insurer with common law cover (see s18 of the *Workman's Compensation Act* inserted by Ordinance No. 1 of 1970). Accordingly, it was likely, so the submission went, that the appellant would have issued the appropriate policy to cover the plaintiff's employer for workers compensation benefits as well as common law damages.

It is clear from the reasons for judgment that her Honour did attach weight to the payment of claims by the appellant in respect of Dimet employees over the relevant years. Having done so, it was not an inappropriate inference to find that there was an arguable case that at the

relevant time there was a policy in force, issued by the appellant, indemnifying the plaintiff's employer from common law liability to the plaintiff.

The last submission on behalf of the appellant was that leave to join the appellant should have been refused on the grounds of prejudice to the appellant by reason of the delay between when the cause of action arose and the application to join was made. The assertion is that there was prejudice to the appellant in respect of the issue of whether there was a relevant contract of insurance in operation at the relevant time and on questions affecting the appellant's right to disclaim, such as absence of full disclosure. Furthermore, it was submitted that the delay created prejudice for the appellant in defending the plaintiff's allegation of negligence. There is real substance in these submissions.

The appellant does not argue that the plaintiff's right to apply for leave is barred by a limitation period. For limitation purposes the right or cause of action does not begin to run until such leave is granted (*NSW Medical Defence Union Ltd v Crawford* (1993) 31 NSWLR 469).

The scope of the discretion to grant leave was referred to by Kirby P. in *Grimson v Aviation & General (Underwriting) Agents Pty Ltd* (1991–1992) 25 NSWLR 422 at 425:

"**A protective proviso affording a broad discretion:**

In my view the purpose of this phrase is to achieve the statutory assimilation of the action against the insurer to the action which would have existed against the insured at the time the cause of action arose. To prevent injustice to an insurer by a gross delay in the enforcement of the action based on the statutory charge which certainly arose at that time, the bringing of an action by the plaintiff against the insurer is controlled by the proviso which Parliament has enacted affording a gateway through which the plaintiff must pass to commence the action on the "charge". This is a gateway at which the relevant court must consider whether or not it will grant leave to the party to commence the action.

One circumstance only where leave is not to be granted is specified by the section. This is where the insurer is entitled to disclaim liability under the contract of insurance with the insured. No party to this appeal suggested that such was the *only* circumstance in which leave might be denied. The gateway of leave provides the court, considering the application, an appropriate discretion to decide whether the action should or should not be commenced. As with any statutory discretion, it is to be exercised for the purposes of which it is afforded, namely, here, to evaluate the appropriateness or otherwise of allowing the procedure, exceptional to our legal system, of an action against the insurer in the circumstances of the case.

The difficulty which suggests that the construction urged by the respondents should be rejected is presented by the simple fact that such construction seriously undermines the achievement, in potentially numerous cases, of the reformatory object of the section. Clearly, the section contemplates the supervening winding up of an insured corporation or the death or disappearance of an individual who was insured before the plaintiff has recovered. Such events are the very circumstances which attract the application of the section and demonstrate its utility. But if the construction urged by the respondents and accepted by Newman J is correct, no relief would be available under the section to a plaintiff who commenced proceedings within time, discovered the need for resort to the section outside the limitation period otherwise protecting the insured, and thus, at the gateway of leave, faces the impenetrable barrier of a limitation defence invoked by the insurer.

In our view, this is why, as a proviso to control the assimilation of rights and liabilities provided under s6(4) of the Act, Parliament has afforded the gateway of general discretion to grant or refuse leave. It enlivens a

discretion protective of insurers where the particular circumstances of the case warrant refusal of the application."

The construction by Newman J. referred to in the above passage was that on an application for leave the insurer was entitled to raise a limitation defence if the claimant against it was out of time and even if that claimant had proceedings against the insured which were not statute-barred. Kirby P. was in dissent on this in *Grimson.* When the point arose again for consideration in *NSW Medical Defence Union Ltd v Crawford* (supra) *Grimson* was disapproved by majority (Kirby P. and Shellen JA.).

Kirby P. said (at p490) that, until leave is given, the cause of action is not complete, the claimant may not prosecute it in the courts and time does not run against the claimant. Mahoney JA. was of the same opinion (at p504) and likewise Shellen JA. (at p531).

It is thus clear principle that time does not begin to run until leave is granted. Nevertheless, the appellant is entitled to raise prejudice by reason of delay, because it is a factor to be taken into account in the exercise of the discretion to grant leave.

The delay factor was adverted to in *Ceric v C.E. Heath Underwriting and Insurance (Australia) Pty Ltd* (1994) 99 NTR 1 at 8:

> "We recognise, as did Mahoney JA, that this construction of the legislation leads to the result that there is no restriction on a plaintiff seeking leave at any time and that, accordingly, he may by his own act prevent time running against himself. But, by delaying making an application for leave, a plaintiff exposes himself to the risk that leave will not be granted if his delay is shown to be unreasonable."

The impact of prejudice by delay in a different context was adverted to in *Brisbane South Regional Health Authority v Taylor* (1996) 139 ALR 1 by Toohey and Gummow JJ at p6:

> "Whether prejudice to the prospective defendant is likely to thwart a fair trial is to be answered by reference to the situation at the time of the application, *Akermanis v Melbourne and Metropolitan Tramways Board* [1959] VR 114 at 116-17; *Posner v Roberts* [1986] WAR 1 at 6. It is no sufficient answer to a claim of prejudice to say that, in any event, the defendant might have suffered some prejudice if the applicant had not begun proceedings until just before the limitation period had expired."

and more forcefully by McHugh J at p8:

> "The discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. For nearly 400 years, the policy of the law has been to fix definite time limits (usually six but often three years) for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that "[w]here there is delay the whole quality of justice deteriorates" *R v Lawrence* [1982] AC 510 at 517 per Lord Halisham of St Marylebone LC. Sometimes the deterioration in quality is palpable, as in the case where a crucial witness is dead or an important document has been destroyed. But sometimes, perhaps more often than we realise, the deterioration in quality is not recognisable even by the parties. Prejudice may exist without the parties or anybody else realising that it exists. As the United States Supreme Court pointed out in *Barker v Wingo* (1972) 407 US 514 at 532, "what has been forgotten can rarely be shown". So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody

> now "knowing" that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A verdict may appear well based on the evidence given in the proceedings but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose".

Relying on those dicta, the appellant contended that a fair trial of the insurance issue is not attainable and the liability of the alleged alternative employer (Dimet Contracting Pty Ltd) to the appellant cannot be litigated; accordingly leave should be refused.

Even though the dicta of McHugh J. above are forceful, even compelling in their context of application to extend time to bring statute-barred claims, they are of less relevance in the exercise of a discretion to grant leave to join an insurer under the *Law Reform (Miscellaneous Provisions) Act*.

We are not persuaded that the appellant's arguments against the grant of leave should prevail. The liability of the appellant to the plaintiff will only arise as a practical reality if the plaintiff succeeds in establishing the existence of a relevant contract of insurance between the alleged alternative employer (Dimet Contracting Pty Ltd) and the appellant. The plaintiff might well fail in that respect.

Secondly, the plaintiff's case on liability against the alleged alternative employer is fully set out in his affidavit sworn 7 June 1995. The appellant has the advantage of full disclosure of the plaintiff's case. In other words, the element of surprise by reason of delay is reduced, if not minimised, by the evidence of the plaintiff already furnished.

Thirdly, the application for leave was brought three years after the institution of proceedings against the (first) defendant. Such a delay is not obviously unreasonable. Proceedings against the appellant are necessary and appropriate because the alleged alternative employer has been wound up. As Kirby P. said in *Oswald v Bailey* (supra) at p725:

> "The obligation to secure leave has the purpose of reserving proceedings against insurers to cases where such proceedings are necessary or appropriate."

In our opinion, the primary judge was right in granting leave. We would dismiss the appeal, with costs.

MILDREN J

The facts relevant to this appeal are set out in the joint judgment of Gallop ACJ and Bailey J and need not be repeated.

I do not think it is appropriate to decide whether or not this is an appeal from an interlocutory order. The issues raised by the appellant are sufficient to warrant the granting of leave, if necessary. Neither counsel sought to debate this question, and in those circumstances, this issue has not been adequately explored.

I agree with Gallop ACJ and Bailey J, for the reasons which they give, that the respondent only had to show an arguable case that Dimet Contracting Pty Ltd, was the respondent's employer, that Dimet Contracting Pty Ltd was in breach of its duty of care to the respondent, and that the appellant was in breach of its duty of care to the respondent, and that the appellant was the insurer of Dimet Contracting Pty Ltd. I also agree with their Honour's conclusion, for the reasons they give, that Thomas J did not err in finding that an arguable case had been made out.

I also agree with Gallop ACJ and Bailey J that the respondent's action against the appellant is not statute barred, that the requirement for the obtaining of leave in s27(3) of the Act confers a general discretion upon the court (except where the court is satisfied that the insurer is entitled under the terms of the contract of insurance to disclaim liability), and that, in a case

such as this, the appellant is entitled to raise prejudice by reason of the delay in seeking leave.

The right of action conferred by the Act is a simpler method of achieving that which can be achieved by other methods. In this case, Dimet Contracting Pty Ltd was dissolved following a voluntary winding up. The respondent could apply to the court pursuant to s571(1) of the *Corporations Law* to have the dissolution declared void, and for leave to sue the company pursuant to s471B of the *Corporations Law*: see, for example, *Civil & Civicl Pty Ltd v RW Bass Pty Ltd* (1996) 14 ACLC 1,015; *Re Steelmaster Pty Ltd (in Liquidation); Kenny v McCann* (1992) 10 ACLC 176. If that approach were to have been adopted, the Court would have considered whether there was any prejudice to the company's insurer by reason of the delay: see the cases already referred to and *Re P.J. Staunton Pty Ltd* (1993) 11 ACLC 219. There is no reason why the same principles ought not apply to an application under s27(3) of the *Law Reform (Miscellaneous Provisions) Act*.

In so far as the action against the appellant requires the respondent to prove liability on the part of Dimet Contracting Pty Ltd, I agree with Gallop ACJ and Bailey J that there is no prejudice to the appellant because of the delay between the time when the cause of action against Dimet Contracting Pty Ltd arose, and the time when the respondent's application to join the appellant was brought.

It is my view that prejudice on this ground could arise on the facts of this case only if the action against Dimet Contracting Pty Ltd was statute barred, since in all other respects, the position of the appellant and of Dimet Contracting Pty Ltd, had it not been dissolved, is the same, neither having been previously aware of the respondent's claim. Although it was not suggested by counsel for the appellant that this was the case, paragraph 22 of the Further Amended Statement of Claim seeks an extension of time pursuant to s44 of the *Limitation Act*. As s27(2) of the *Law Reform (Miscellaneous Provisions) Act* confers the same rights and liabilities upon the parties and confers upon the court the same powers, as if the action were against the insured, it would be open to the appellant to plead the relevant statute of limitations applicable to the cause of action which could have been brought against Dimet Contracting Pty Ltd, and it would be open to the Court to entertain an application for an extension of time by the respondent in respect thereof under s44 of the *Limitation Act*. As the exercise of discretion to grant an extension of time will require the court to consider the question of possible prejudice to Dimet, in whose shoes the appellant stands, if an extension of time is granted, it cannot be said that there would be any prejudice to the insurer by the mere granting of leave under s27(3). There is no suggestion that the granting of leave, even if this had the effect that the action against the appellant related back to the date of the issue of the writ, would in any way affect the appellant's right to raise the limitation issue. If I am wrong in this view, and Thomas J was required to consider the question on a broader basis, I consider that no real prejudice has been shown. In particular, there was no evidence before her Honour that any witnesses are no longer available, or that

there is any issue as to the facts incapable of being fairly tried. If in fact the action against Dimet Contracting Pty Ltd was not statute barred, which seems unlikely, it is difficult to see what basis there is for concluding that the appellant would be prejudiced: see the observations of McHugh J in *Brisbane South Regional Health Authority and Taylor* (1996) 139 ALR 1 at 11.

However, in my opinion Thomas J did not properly consider the question of any prejudice arising to the appellant relating to the separate issue of whether or not the appellant was the insurer of Dimet Contracting Pty Ltd, notwithstanding that this was urged upon her Honour by counsel for the appellant. Her Honour's reasons for rejecting the appellant's argument were as follows:

> "I do not agree that I should exercise a discretion to refuse the plaintiff's application because of prejudice to CU brought about by the delay in making such a claim. The reasons for the delay are explained by Mr White in his affidavit sworn 7 June 1995 and are essentially attributable to the slow onset of Mr White's physical condition which gives rise to the claim. It is a delay which affects both the plaintiff and the defendant in this claim in the preparation of their case."

It is true that the respondent had good reasons for the delay, and that this was relevant to the question, recognised by Gallop ACJ and Morling J in *Ceric v C.E. Heath Underwriting and Insurance (Australia) Pty Ltd* (1994) 122 FLR 123 at 130, that unreasonable delay caused by an applicant sitting on his rights, may result in leave being refused. Even then, some prejudice would have to be shown, such as, the insurer having changed its position to its detriment, in the meantime. But her Honour did not deal with the nub of the

appellant's submission, which was, that a fair trial of the issue of whether or not the appellant was the insurer of Dimet Constructions Pty Ltd, cannot now be had because of the lapse of time between 1974 when the alleged breach of duty occurred, and 1996 when the application to join the appellant was made. In this respect I consider that it was clearly relevant to consider that question. Her Honour did not do so, and in my opinion, she therefore fell into error, and it is therefore open to this Court to form its own opinion on that question.

The evidence relied upon by the respondent to establish an arguable case that the appellant was the insurer of Dimet Contracting Pty Ltd depends upon inferences to be derived from scanty material. Although, as Gallop ACJ and Bailey J point out, the respondent may well ultimately fail to prove that the appellant was the insurer, in my respectful opinion that is not to the point because the respondent may also succeed on the same material. There was uncontested evidence before her Honour that the respondent could not find from the discovered documents a policy document covering the common law liability of Dimet Contracting Pty Ltd in respect of employer's liability arising in the Northern Territory; that the appellant's records kept in the Northern Territory relating to this period were destroyed at some time between 1989-1991; that the appellant's underwriting records in relation to proposals of insurance and policies issued to the Dimet group of companies held in the appellant's offices in Victoria, New South Wales, Western Australia and Tasmania have been destroyed; and that the three claims involving Messrs. Jones, Wilson, and Taccori related to policies issued by the South Australian office. Exhibit A to the affidavit of Helen Camp shows that the claim in

respect of J. Taccori, who was employed by Dimet Contracting Pty Ltd, was dealt with under policy number 1910272 issued by the appellant's Adelaide office. That policy number is the same policy in respect of which the insured, in respect of other claims, is listed as "Dimet Corrosion Pty Ltd," "Dimet", and "Dimet SA P/L." Exhibit A also lists a claim by M Wilson in respect of a loss on 25 September 1974 in respect of policy number 1910272 where the insured is stated to be Dimet Contracting. Exhibit A also lists a claim by T Jones. The date of loss given is 11 May 1974. This is the same date as that referred to in Mr Farquhar's summary. The insured is listed as Dimet Corrosion Pty Ltd. The policy number is 1910272. There are a number of other claims listed in Exhibit A, where the insured is Dimet Contracting Pty Ltd and the policy number given is 1910272. The inference is that the appellant was the insurer under policy number 1910272 and that both Dimet Contracting Pty Ltd and Dimet Corrosion Pty Ltd (as well as other Dimet companies) were insured under that policy. Exhibit 'A' also indicates that claims were made in respect of policy number 1910272 in respect of "dates of loss" between 1969 and 1974, the last date in the "date of loss" column being 25 September 1974. (This is in fact the date for the J. Taccori and M Wilson claims). Exhibit A also indicates that claims under policy number 1910272 were made by Dimet Contracting Pty Ltd in 1972, and 1973 the earliest being on 21 March 1972 in respect of a person named "I Pride". The inference is that policy number 1910272 was in force, in respect of Dimet Contracting Pty Ltd, at least between 21 March 1971 and 25 September 1974. The period of the respondent's employment is alleged to have been between May 1971 and August 1974. The evidence gives rise to the inference, as Mr Quick Q.C.

acknowledged, that the appellant indemnified Dimet Contracting Pty Ltd under policy number 1910272 in respect of a common law claim by an employee of Dimet Contracting Pty Ltd against his employer in respect of a breach of duty arising in the Northern Territory in 1974. Indeed Mr Quick Q.C. conceded that the appellant paid the common law damages payable to Mr Jones pursuant to the terms of the consent judgment. He sought to explain this by the possibility that the insurer thought it was liable under the policy as it extended cover in respect of claims by employees transferred from South Australia by Dimet Contracting Pty Ltd to the Northern Territory.

There are a number of difficulties with this explanation. Mr Quick Q.C. relied upon s11(1)(a) of the *Workman's Compensation Act*, 1971-74 (SA); but that section, if it applied to Dimet Contracting Pty Ltd's workers, merely entitled them to claim workmen's compensation under the South Australian Act, or alternatively to claim Workmen's Compensation under the *Northern Territory Workers Compensation Ordinance*. Unlike the Northern Territory Ordinance, the South Australian Act did not provide for compulsory common law insurance by employers, and said nothing about the insurer's common law liability.

Mr Quick Q.C. stressed that the insurer was prejudiced because it could not be shown what were the terms of the policy under which is was said to be liable. He submitted that it may well be that the payments made to Taccori, Wilson and Jones were erroneously made, or alternatively explicable on the basis that, as South Australian workers transferred to the Northern Territory,

the insurer was liable to indemnify Dimet Contracting Pty Ltd, whereas any claim in respect of the respondent, who was not a transferred worker, was not covered by the terms of the policy. The foundation for this argument was the inability of the respondent to produce a policy document. The evidence shows that the relevant policy is policy number 1910272. The appellant's affidavits do not disclose that the appellant is unable to say what the terms of that policy were. Rather, Mr Quick Q.C.'s submission was that the respondent was unable to produce a copy of it, and that the lapse of time now made a fair trial as to the terms of that policy impossible. As Mr Waters, counsel for the respondent submitted, it was up to the appellant to show, it being best placed to do so, that the appellant could not prove the terms of policy number 1910272. The appellant's affidavits do not address that issue at all; yet, if the terms of that policy were not now known to it, one would have expected it to say so. The facts established before Thomas J, in my opinion, placed an evidentiary burden upon the appellant in respect of this issue, and the absence of this evidence leads to the inference that no such difficulty exists. In all the circumstances I am satisfied that there is no prejudice to the appellant in granting leave.

I would dismiss the appeal with costs.
