Brumby & Ors v Kaltukatjara Community Council Aboriginal Corporation & Ors [2018] NTSC 16

PARTIES:	DANIEL BRUMBY
	AND
	ANDREW BRUMBY
	AND
	DANIEL BRUMBY (AS LITIGATION GUARDIAN AND TRUSTEE FOR BRUCE AND LARISSA BRUMBY)
	AND
	ALEC BRUMBY
	AND
	KEVIN BRUMBY
	AND
	KEVIN BRUMBY (AS LITIGATION GUARDIAN AND TRUSTEE FOR MAX AND KENRICK BRUMBY)
	AND
	TRUDY BRUMBY
	AND
	HAZEL PEIPEI (AS LITIGATION GUARDIAN AND TRUSTEE FOR ROSALIND AND NIGEL BRUMBY)
	v
	KALTUKATJARA COMMUNITY COUNCIL ABORIGINAL CORPORATION ICN 200
	AND

	COMMONWEALTH OF AUSTRALIA
	AND
	QBE INSURANCE (AUSTRALIA) LIMITED ACN 003 191 035
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	4 of 2010 (2102435)
DELIVERED:	13 March 2018
HEARING DATES:	11 October 2017 and 31 January 2018
JUDGMENT OF:	LUPPINO AsJ

CATCHWORDS:

Practice and Procedure - Setting aside an order dismissing proceedings for want of prosecution - Discretionary nature of the relief - Test is the interests of justice - Factors relevant to the test - Balance of prejudice - Principles to be applied.

Statutory Interpretation - Principle that a statute must be read as a whole - Interpretation of a continuing provision of a statute by reference to the legislative history - General principles of statutory interpretation.

Local Government - Restructuring orders to create shires - Reference to constituent councils in restructuring orders - Meaning of constituent councils.

Compensation (Fatal Injuries) Act ss 4, 7, 8, 13, 14.
Interpretation Act s 24(2).
Law Reform (Miscellaneous Provisions) Act s 27.
Limitation Act ss 17, 36(1), 44, 49.
Local Government Act ss 28A, 106, 114C, 261, 262
Local Government Grants Commission Act s 12, 19.
Supreme Court Rules, rr 9.06, 20.01, 20.03(1), 24.06, 36.01(4), 36.03(a).

Patsalidies & Anor v Magoulias & Anor (1984) NTR 1.
Gameson v McKechnie [1999] NTSC 59.
Norbis v Norbis (1986) 161 CLR 513.
Bird v Northern Territory of Australia [1992] NTSC 53.
TSC Nominees Pty Ltd v Canham Commercial Interiors Pty Ltd & Ors [2017] VSC 86.
Kostokanellis v Allen [1974] VR 596.
Brakatselos v ABL Nominees Pty Ltd [2012] VSCA 231.
Deputy Commissioner of Taxation v Hua Wang Bank Berhad (No 2) [2010] FCA 1296.
White v Northern Territory (1989) 97 FLR 122.
Noja v Civil And Civic Pty Ltd and Ors (1990) 26 FCR 95.
Jorgensen v Slater & Gordon Pty Ltd [2008] VSCA 110.
Batistatos v Roads & Traffic Authority of New South Wales (2006) 226 CLR 256.
Bendt v Green & Ors Unreported, Supreme Court of New South Wales, Enderby J, 7 April 1983.
Palmer & Ors v Riverstone Meat Co Pty Ltd & Anor 1988 Australian Torts Reports 80-223.
Wallis v Lyco Industries [2002] NSWSC 1215.
Palmer v MacDonnell Shire Council [2011] NTCA 2.

Pearce, DC and Geddes RS, *Statutory Interpretation In Australia*, 7th Ed.

REPRESENTATION:

Counsel:

Plaintiffs:	Mr Alderman
First Defendant:	Mr McIntyre
Second Defendant:	Not represented
Third Defendant:	Mr Liveris

Solicitors:

Plaintiffs:	Povey Stirk
First Defendant:	Ruth Morley Legal Services
Second Defendant:	Not represented
Third Defendant:	John McBride

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Brumby & Ors v Kaltukatjara Community Council Aboriginal Corporation & Ors [2018] NTSC 16

No. 4 of 2010 (21020435)

BETWEEN:

Daniel Brumby
First Plaintiff

AND

Andrew Brumby
Second Plaintiff

AND

Daniel Brumby (as litigation guardian and trustee for Bruce and Larissa Brumby)
Third Plaintiff

AND

Alec Brumby
Fourth Plaintiff

AND

Kevin Brumby
Fifth Plaintiff

AND

Kevin Brumby (as litigation guardian and trustee for Max and Kenrick Brumby)
Sixth Plaintiff

AND

Trudy Brumby

Seventh Plaintiff

AND

Hazel Peipei (as litigation guardian and trustee for Rosalind and Nigel Brumby)
Eighth Plaintiff

AND

Kaltukatjara Community Council Aboriginal Corporation ICN 200
First Defendant

AND

Commonwealth of Australia
Second Defendant

AND

QBE Insurance (Australia) Limited ACN 003 191 035
Third Defendant

CORAM: LUPPINO AsJ

REASONS

(Delivered 13 March 2018)

[1] Dulcie Brumby (the "Deceased") was a resident of the Aged Care Centre (the "Facility") at Docker River Community. The Facility was operated by the First Defendant, Kalukatjara Community Council Aboriginal Corporation ("KCC"). The Facility only provided supervision between the hours of 6 am and 6 pm. June is a cold time of the year in the centre of Australia and it was usual for there to be open fire pits at the Facility at that time to enable the residents to keep warm.

[2] The Deceased was a 72-year-old person who had a history of dementia. On 14 June 2007 Mark Swindell was at the Facility and he saw the Deceased engulfed in flames. He smothered the flames but not in time to avoid the Deceased being severely burnt. The Deceased died on 15 June 2007 at Alice Springs Hospital as a result of the severe burns she sustained.

[3] Although the Coroner did not hold an inquest into the death, the Deputy Coroner prepared a report. The Deputy Coroner found that there was a small fire pit just outside the room of the Deceased and two other fires in the grounds of the Facility, although the proximity of the fires to each other was not the subject of comment. The Deputy Coroner reported that the Deceased caught alight from contact with one of the fires.

[4] Neil Bell filed the Writ in these proceedings in the Alice Springs Registry of the Court on 4 June 2010. The named Plaintiffs are the adult children and adult grandchildren of the Deceased and three of the infant grandchildren of Deceased. The named Defendants were KCC, the Commonwealth of Australia (the "Commonwealth") and QBE Insurance (Australia) Ltd ("QBE").

[5] The Statement of Claim endorsed on the Writ is clearly intended to be a claim pursuant to the *Compensation (Fatal Injuries) Act* ("the *CFI Act*"). The *CFI Act* has specific procedural requirement including that only one claim may be made, that the claim is to be made by the personal representative of the Deceased (or by a claimant on a representative basis),

and that the claim is to be made in respect of all persons entitled to claim.[1] However, the proceedings purported to name all of the claimants as parties. Apparently there are a number of potential infant claimants who have been omitted as parties.

[6] Some six weeks after the Writ was issued Mr Bell sought to pass the matter to Central Australian Aboriginal Legal Aid Service ("CAALAS"). It was not until some four months later that Mr Bell corresponded with the Court and informally sought leave to cease acting. He was told to file a Notice of Ceasing to Act as required by Rule 20.03(1) of the *Supreme Court Rules* (the "*SCR*") but he did not do so.

[7] The matter was apparently transferred to CAALAS and was assigned to Mr Sinoch, a solicitor employed by CAALAS. There is no direct evidence from Mr Sinoch. He left the employ of CAALAS before 2013. There is evidence of a discussion between Mr McCarthy, another solicitor employed by CAALAS, and Mr Sinoch on 4 December 2013. That goes part way to explaining the lack of activity on Mr Sinoch's part. As best I can determine from the available evidence, it appears that Mr Sinoch formed the view that KCC no longer existed and therefore the Plaintiffs' claim could not proceed. It seems that Mr Sinoch formed that view on the basis that KCC was dissolved as part of the creation of the McDonnell Shire Council pursuant to the *Local Government Act* (the "*LGA*"). Mr Sinoch also seems to have been of the view that KCC's assets, but not its liabilities, were transferred to MSC.

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1 Section 8(1) and 8(2).

[8] Although determination of the status of KCC vis a vis MSC is not straightforward, Mr Sinoch's view appears to be in error. The relevant provision of the *LGA* is section 262(1)(c). The section was introduced by the amendments to the *LGA* which commenced on 1 July 2008 and has remained in force since. Section 262(1) is reproduced for reference, namely:

> 262 Constitution of new councils
>
> (1) On the date of transition:
>
> (a) a body corporate constituted as a prospective council by a restructuring order under the former Act becomes a shire council; and
>
> (b) the area for which the body corporate was constituted becomes (as it existed immediately before the date of transition) the council's shire; and
>
> (c) the councils (*constituent councils*) for local government areas subsumed into the shire are dissolved and all their property, rights, liabilities and obligations (including contractual rights, liabilities and obligations) become property rights, liabilities and obligations of the shire council.

[9] The date of transition is defined in section 261 as 1 July 2008. If KCC was subsumed into the MSC pursuant to section 262(1)(c) then the effect of that section is that KCC was "*dissolved*" on 1 July 2008 and that, as at that date, all the "*property, rights, liabilities and obligations*" of KCC became "*property, rights, liabilities and obligations*" of MSC.

[10] The conclusion arrived at by Mr Sinoch regarding the status of KCC was incorrect for the reasons that follow. Although he was correct that the assets did not transfer to MSC, he was in error in concluding that KCC was

dissolved and, in any case that only the assets, and not the liabilities, transferred to MSC.

[11] Mr Sinoch advised Daniel Brumby, the First Plaintiff that the action was not maintainable due to the dissolution of KCC. The First Plaintiff's version conflicts with that evidence. The First Plaintiff says Mr Sinoch told him that the file was to be closed because "*there were too many drunk people*" and that he should consult another lawyer. Closure of the file is inconsistent with advice to consult another lawyer and the advice generally is not consistent with the view that the claim was not maintainable for the technical legal issues that Mr Sinoch considered. I doubt whether Mr Sinoch explained the technicalities of the legal position to the First Plaintiff. It is clear that the First Plaintiff is an unsophisticated man of limited education although it appears he can understand English well enough. Had Mr Sinoch attempted to explain the legal niceties to the First Plaintiff then I doubt that the First Plaintiff could have understood the concepts on which the legal position was based.

[12] The different versions of the discussion between the First Plaintiff and Mr Sinoch are irreconcilable. Mr Alderman, counsel for the Plaintiffs submitted that I should therefore infer that the First Plaintiff did not understand what Mr Sinoch told him. I do not consider that the very specific differences in the versions leave room to infer a poor understanding and I am not prepared to draw such an inference.

[13] Thereafter, although it is not clear when, the First Plaintiff saw Mr McCarthy and he claims that as a result, he thought that CAALAS was continuing to work on the claim. He says that he did not know the claim had been struck out. It appears that the First Plaintiff spoke to Mr McCarthy in June 2013[2] so this is likely the occasion which the First Plaintiff is referring to. It is conceivable that he was not then told of the dismissal of the proceedings.[3]

[14] The affidavit of Alison Phillis made 6 June 2017 lists the steps and enquiries made by Mr McCarthy from June 2013 which apparently took him three years to complete.[4] Those enquiries were firstly, an unsuccessful search for the CAALAS file as that had apparently been lost. Secondly, discussions with Mr Bell but I cannot see how that would have been either difficult or time consuming. Thirdly, enquiries of Mr Sinoch but again that could not have much time, something which is confirmed from the content and brevity of the file note of Mr McCarthy's discussions with Mr Sinoch. Fourthly, seeking counsel's opinion and lastly, inspecting the Court file. The last step occurred twice, on 22 November 2013 and 24 June 2014. Why two inspections were necessary is puzzling as at both of those dates, apart from some items of correspondence, the Court file consisted of only three documents. The first was the Writ, the second was an inconsequential affidavit in support of a fee waiver application and the third was the order dismissing the proceedings.

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2 Affidavit of Alison Phillis made 6 June 2017 at para 6.
3 See para 14 which shows that CAALAS first searched the Court file in November 2013.
4 See para 22 below.

[15] As to counsel's opinion, that was sought over one year later on 19 August 2014. It appears that the formal opinion was provided on 12 December 2014. However there is other evidence which refers to counsel providing advice as early as 19 August 2014.[5] There was no explanation of that. It is likely that the advice on 19 August 2014 was preliminary advice only as it is apparently given on the same date as the opinion was sought.

[16] The order for the dismissal of the proceedings was made on 13 December 2011 and came about due to the inactivity on the Plaintiffs' part and the failure of anyone to take responsibility for the proceedings. Mr Bell had not filed a Notice of Ceasing to Act, had left Alice Springs, and the Court had no contact details for him. CAALAS had not filed a Notice of Acting despite apparently working on the matter for some time. There was no evidence of service of the proceedings. Enquiries over a period of time had been made by the Registrar, including enquiries of CAALAS, in an attempt to ascertain what was happening with the matter but those enquiries proved fruitless. By the time that the proceedings were dismissed the validity of the Writ had expired by nearly 6 months.

[17] Notwithstanding that CAALAS was aware, by 22 November 2013, that the proceedings had been dismissed for want of prosecution, CAALAS did not take any immediate action to set aside that order.[6] The evidence is that "thereafter", although not specifying when, CAALAS conducted further investigations. Those further investigations resulted firstly in confirmation

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5 Affidavit of Alison Phillis made 6 June 2017, Annexure G.

6 That application was not made until 7 June 2017.

of the apparent continued existence of KCC. This could not have occupied much time or skill and effort. KCC is an Aboriginal Corporation and a search of the records of the Registrar of Aboriginal Corporations would have readily revealed the ongoing existence of KCC.[7]

[18] Secondly, CAALAS obtained an advice on damages but when this occurred is uncertain. That uncertainty casts doubt on the relevance of this in relation to explaining the delay. The relevance to the delay occasioned due to seeking advice on quantum was not explained in any case. The claim as pleaded at that time was in respect only of the claim for solatium, costs and interest. Such assessments are relatively straightforward and I would not ordinarily expect that obtaining an advice on assessment of damages for solatium would have taken much time.

[19] Thirdly, CAALAS obtained a copy of Mr Bell's file. That contradicts other evidence that Mr Bell was transferring the matter to CAALAS not long after the proceedings were commenced. That suggests that Mr Bell provided his file to CAALAS at about that time. That contradiction was also not explained.

[20] Fourthly, CAALAS obtained copies of statements and other information collected by the Coroner. The Deputy Coroner's report is dated 26 April 2008 and therefore that material was readily available. It should have required relatively little time to obtain that material. Similarly, with respect the last enquiry, namely the obtaining of the report by the Commonwealth of

[7] As the search annexed to the affidavit of Alison Phillis made 8 December 2017 at Annexure D reveals.

its investigation into the death. In any case, the need for that report and its relevance was not explained.

[21] The evidence before me includes a list of the documents that CAALAS obtained as a result of those enquiries. The documents referred to, apart from some more contemporaneous correspondence and file notes made in the course of the enquiries, are documents in existence well before the time when the proceedings were commenced. Although the list appears extensive in terms of the number of documents, that is deceptive if it is suggested that those documents came from a large number of sources. The bulk appears to come from the Coroner's office, from Mr Bell and from one or two Government Departments. In each case, I expect that multiple documents which were obtained from the same source would have been obtained contemporaneously.

[22] Mr McCarthy apparently left CAALAS on 29 July 2016 having transferred the matter to the Plaintiffs' current lawyers, Povey Stirk, on 1 June 2016.[8] Despite the delays to that time, further delays meant that the current application was not filed until just over 12 months later, namely on 7 June 2017.

[23] The long delay on the part of the Plaintiffs in making the current application is obvious. Noting that CAALAS was aware of the order dismissing the proceedings as early as 22 November 2013, the current application was made more than three and a half years later and that was nearly five and a

8 Affidavit of Alison Phillis made 6 June 2017 at para 13.

half years after the order dismissing the proceedings. Notwithstanding the Plaintiffs' submission that the delay was beneficial overall as the subsequent enquiries meant that the Court was now better placed to assess the question of prejudice, I do not consider that the delay was reasonable or justified on the evidence before me.

[24] However what is clear on the evidence, and I find, is that any delay cannot be attributed to the Plaintiffs personally but was due to the various solicitors who worked on the matter at different times. Although Mr McIntyre, counsel for KCC, attempted to blame the First Plaintiff for the overall delay, in this instance the lack of sophistication of the First Plaintiff works in the Plaintiffs' favour as I do not expect the First Plaintiff to have done any more than he did in the circumstances.

[25] That is the background to the current application. The orders sought are firstly, that the order for dismissal be set aside, secondly, for an extension of the period of validity of the Writ for service purposes and, thirdly, for leave to amend the Statement of Claim.

[26] If I were prepared to set aside the order for dismissal of the proceedings then the order to extend the validity of the Writ, if required,[9] would consequentially be made. It would be futile not to make that order if the proceedings were reinstated. Likewise, to the extent that leave is required to

[9] Per rule 5.12(1) of the *SCR* the validity is for service purposes only. KCC and QBE have entered unconditional appearances which means they are no longer able to dispute valid service.

amend the Statement of Claim,[10] it would be appropriate to grant leave especially having regard to the inadequacies of the current version.

[27] Both KCC and QBE have entered an unconditional Appearance and both were represented on the application. The Commonwealth was not served with the application. The Plaintiffs have indicated an intention to seek to have the Commonwealth removed as a party if the proceedings are reinstated. The lack of any allegations against QBE in the proposed Amended Statement of Claim suggests that the Plaintiffs will also necessarily seek removal of QBE.

[28] I deal first with the law in respect of setting aside an order dismissing proceedings for want of prosecution. The power to make that order, in addition to the inherent jurisdiction of the Court,[11] is provided for in the Rule 24.06 of the *SCR* which provides as follows:-

> **24.06 Setting aside judgment**
>
> The Court may set aside or vary:
>
> (a) an order that a proceeding be dismissed for want of prosecution; or
>
> (b) a judgment entered or given on the failure of a party to do an act or take a step which under this Chapter the party is required to do or take or to comply with an order that he do such an act or take such a step.

[29] Whether an order dismissing a claim for want of prosecution is set aside is a matter of discretion. As with all judicial discretions it must be exercised

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10 The Plaintiffs could utilise the right to amend pursuant to Rule 36.03(a) of the *Supreme Court Rules.*

11 *Patsalidies & Anor v Magoulias & Anor* (1984) NTR 1 and *Gameson v McKechnie* [1999] NTSC 59.

properly having regard to all relevant factors and disregarding any irrelevant or extraneous factors. Guidelines developed from authorities do not restrict the discretion and only provide guidance to promote consistency and to diminish the risk of arbitrary decisions.[12]

[30] The primary consideration is what the justice of the case requires (*Bird v Northern Territory of Australia*[13] ("*Bird*") and *TSC Nominees Pty Ltd v Canham Commercial Interiors Pty Ltd & Ors*[14] ("*TSC Nominees*")). In assessing this, the Court will have regard to:-

(a) what caused the dismissal (*Kostokanellis v Allen*[15] ("*Kostokanellis*");

(b) whether the dismissal resulted from a contumelious or intentional action or whether it was simply an error (*Brakatselos v ABL Nominees Pty Ltd*[16] ("*Brakatselos*") and *Deputy Commissioner of Taxation v Hua Wang Bank Berhad (No 2)*[17];

(c) the extent that the client should bear the consequences of any error or negligence by his solicitors (*Kostokanellis*, *Bird* and *White v Northern Territory*[18] ("*White*")); this is countered to some extent by authorities to the effect that any possible claim against the

12 *Norbis v Norbis* (1986) 161 CLR 513.
13 [1992] NTSC 53.
14 [2017] VSC 86.
15 [1974] VR 596.
16 [2012] VSCA 231.
17 [2010] FCA 1296.
18 (1989) 97 FLR 122.

solicitors can be taken into account (*Bird, White* and *Noja v Civil And Civic Pty Ltd and Ors*[19] ("*Noja*"));

(d) the explanation for the delay (*TSC Nominees* and *Jorgensen v Slater & Gordon Pty Ltd*[20] and *Braketselos*);

(e) whether the defendant(s) are able to have a fair trial in all the circumstances (*Batistatos v Roads & Traffic Authority of New South Wales*[21] ("*Batistatos*")) and *Patsalidies & Anor v Magoulias & Anor*[22];

(f) the prejudice to the defendant and the extent to which the ability of the defendant to have a fair trial has been materially affected (*Batistatos, Bird, TSC Nominees*); this involves a comparison of the prejudice to the plaintiffs in the event that the proceedings are not reinstated with the likely prejudice suffered by the defendants if the proceedings are set aside.

[31] The issues are complicated by two matters, both of which relate to prejudice but in respect of different parties. The first relates to the prejudice to the Plaintiffs and arises from the procedural requirements of the *CFI Act*. The applicable provisions of the *CFI Act* are now set out:-

7 Liability in respect of the death of a person

(1) Where the death of a person is caused by a wrongful act, neglect or default and the act, neglect or default is such that it would, if death had

19 (1990) 26 FCR 95.
20 [2008] VSCA 110.
21 (2006) 226 CLR 256.
22 (1984) NTR 1.

not ensued, have entitled the person injured to maintain an action and recover damages in respect of the injury, the person who would have been liable, if the death had not ensued, is liable to an action for damages despite the death of the person injured and irrespective of whether the death of that person was caused by circumstances that amount in law to an offence.

(2) Omitted.

8 One action for the benefit of members of deceased person's family

(1) Not more than one action may be brought against any one person in respect of a death.

(2) Subject to section 13, any such action must be brought by and in the name of the personal representative of the deceased person for the benefit of those members of the deceased person's family who sustained damage because of his or her death.

13 Alternative action where personal representative is not appointed or does not bring action

(1) Where an action has not been commenced by and in the name of the personal representative of a deceased person within 6 months after the death of the deceased person, any one or more of the persons for whose benefit an action may be brought may bring such an action.

(2) An action brought by a person other than the personal representative of the deceased person must be for the benefit of the same persons and subject to the same provisions and procedures, mutatis mutandis, as if it were brought by the personal representative of the deceased person on behalf of those persons.

14 Special endorsement on writ of summons

The writ of summons or other process by which an action is commenced must, in addition to any other endorsements required or permitted to be made, be endorsed with a statement specifying the names of each of the persons for whose benefit the action is brought and the relationship of each of those persons to the deceased person.

[32] At common law no cause of action existed in respect of the death of a person. Section 7 of the *CFI Act* establishes a statutory cause of action. This basically provides that where death is caused by a wrongful act of another person and that other person would have been liable had death not occurred, liability exists notwithstanding the death.

[33] The procedural complication arises due to the combination of the various requirements in the *CFI Act* specifically that only one action may be brought[23] and secondly, that the action is to be bought on a representative basis for all claimants.[24]

[34] The possible effect of these procedural requirements on the question of prejudice arises because, if the proceedings can be recommenced afresh, the Plaintiffs cannot suffer prejudice. The possibility of re-commencing, divorced of limitation issues and considerations of abuse of process for the moment, arises due to the omission as parties of potential infant claimants. Section 17 of the *Limitation Act* sets the limitation period in respect of a claim under the *CFI Act* at three years from the date of the relevant death but section 36(1) of that Act suspends the commencement of a limitation period for the period of time that a claimant is under a disability, and that includes infancy.

[35] What follows from this is the possibility that new proceedings could be commenced in the names of the infant grandchildren of the Deceased who have been omitted from the current proceedings and then, by operation of sections 8 and 13 of the *CFI Act*, all other potential claimants, including the current Plaintiffs, could then be included by the endorsement process provided for in section 14.

[36] This argument was dealt with in *Noja*, a case which dealt with the equivalent of the *CFI Act* in the Australian Capital Territory. Relevantly the provisions

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23 Section 8(1).
24 Section 8(2) and 13.

of the legislation in the Australian Capital Territory were *para materia* to the *CFI Act*. In that case a widow sought an extension of time to bring an action under the Australian Capital Territory legislation for her benefit and that of her infant child. Although the limitation period had expired in the case of the widow, it had not expired in the case of the infant child by reason of the counterpart of section 36(1) of the *Limitation Act* in the Australian Capital Territory legislation.

[37] It was argued that as only one action could be brought pursuant to the legislation, and as there was an infant claimant in respect of whom the limitation period was suspended during infancy, that suspension operated in respect of all claimants and therefore an extension was not required.

[38] The argument relied on two authorities,[25] however in *Noja* the Full Court of the Federal Court rejected that argument and said that each of the persons entitled to claim has a separate cause of action. An extension of a limitation period during a period of disability only applies to persons under a disability and that has no operation with respect to a claimant who is not under a disability. The Court said:

> The right which the legislation confers upon a particular individual who is a member of the class [*meaning potential claimants*] will be lost if, in the action brought under the legislation whether by the personal representative of the deceased or a member of the prescribed class, that person is not named as one of the persons on whose behalf and for whose benefit the action is brought.[26]

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25 *Bendt v Green & Ors* Unreported, Supreme Court of New South Wales, Enderby J, 7 April 1983 and *Palmer & Ors v Riverstone Meat Co Pty Ltd & Anor* 1988 Australian Torts Reports 80-223.

26 (1990) 26 FCR 95 at p 108.

[39] That is arguably detrimental to the infant grandchildren of the Deceased who were not named as Plaintiffs in the current proceedings. However *Wallis v Lyco Industries*[27] affords some comfort given section 49 of the *Limitation Act*. In that case although joinder of an omitted claimant as a party would not have been allowed, nonetheless the inclusion of that claimant by amendment to the Statement of Claim was permitted on the basis that the claimant was not seeking to "maintain" (in the sense used in section 17 of the *Limitation Act*) an action based on the cause of action but was merely seeking to be named as a beneficiary in a pending proceeding.

[40] That establishes that the Plaintiffs could not recommence proceedings if the order for dismissal is not set aside hence the prejudice they will suffer in that event is obvious. Also, as the current claim is a claim under the *CFI Act*, as the currently unnamed infant grandchildren could not bring separate proceedings then, in addition to the prejudice which all of the current Plaintiffs will suffer if the proceedings are not reinstated, there is obvious prejudice to the infant claimants who have been omitted from the current action.

[41] The second complication relates to the possible prejudice to KCC and arises from the status of KCC by reason of section 262(1)(c) of the *LGA*. If that section applies to KCC the effect is that all liabilities and assets of KCC transferred to the MSC on 1 July 2008. Counsel for KCC submitted that that the section applied to KCC. The prejudice claimed by KCC was based on that submission and was firstly, that the capacity of KCC to meet any

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27 [2002] NSWSC 1215.

judgment has been severely affected by the transfer of the assets and liabilities of KCC to the MSC. Secondly, that it was futile to reinstate the proceedings as they were then liable to be struck out due to the dissolution of KCC.

[42] The creation of the shire council model was effected by a process commencing with a re-structuring order made pursuant to section 28A of the *LGA*. That section was introduced in the amendments to the *LGA* commencing 11 September 2007 and was repealed with effect from 1 July 2008. The relevant parts of that section provided as follows:-

> **28A. Orders by Minister**
>
> (1) The Minister may make any order (a "re-structuring order") the Minister considers necessary or desirable to facilitate re-structuring of the system of local government in the Territory.
>
> (2) A re-structuring order may (for example) do any one or more of the following:
>
> (a) abolish a council;
>
> (b) create a new council;
>
> (c) establish a body corporate as the prospective council for a proposed municipality or shire;
>
> (d) amalgamate 2 or more councils into a single council or divide a council into 2 or more councils;
>
> (e) convert a municipal council into a community government council or a community government council into a municipal council;
>
> (f) amalgamate, or divide council areas or make any other alteration to the boundaries of a council area;
>
> (g)-(q) Omitted.

[43] MSC is one of the new super shires established under the *LGA*. Pursuant to section 28A(1) of the *LGA*, on 17 October 2017, RE-STRUCTURING

ORDER NO. 1.4 ("RO 1.4") was made. That had the effect of establishing MSC as a body corporate and as a prospective shire council effective from 17 October 2007.

[44] RO 1.4 became operative from the "*the date of transition*"[28] and *inter alia* it provides:-

> 1. A body corporate is established as the prospective shire council for the area specified in Compiled Plan CP 5198 (the "proposed shire").
>
> 2. The name "McDonnell Shire Council" is assigned to the body corporate.
>
> 3. The councils (the "constituent councils") for the local government areas that will form part of the proposed shire are specified in the Schedule.

[45] RO 1.4 does not name KCC in the Schedule referred to in paragraph 3 and therefore it is arguable that whatever status KCC had at the time the MSC was established, section 262(1) does not apply to KCC by reason of that omission except to the extent that the area in respect of which KCC previously provided local government type services forms part of the MSC shire area. If that is correct then KCC has a continuing existence. If section 262(1)(c) does not apply to KCC then, irrespective of whether MSC now manages the Facility, it was run by KCC at the time of the death of the Deceased and the "*property, rights, liabilities and obligations*" of KCC have not been altered.

[46] The application of section 262(1)(c) to KCC is at odds with KCC's incorporation as an Aboriginal Corporation[29] under Commonwealth law and

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[28] As defined in section 114C of that Act which fixes the date by Gazetted notice specifically, Gazette number S31. The date is 17 October 2007.

with the evidence which shows that KCC performed local government type functions. However KCC had been declared to be a "*local governing body*" pursuant to section 19 of the *Local Government Grants Commission Act.*[30] That declaration rendered KCC eligible for funding by the Northern Territory Government for local government purposes.[31] That status commenced as at 26 July 2000[32] and was revoked effective 30 June 2008.[33] KCC's status under the *Local Government Grants Commission Act* may reconcile its status as the body which governed the Docker River Community notwithstanding that it was not one of the "*constituent councils*" referred to in section 262(1)(c) of the *LGA* and paragraph 3 of RO 1.4. In that event KCC would have an ongoing status separate and distinct from whatever local government functions that it had previously performed.

[47] KCC's opposition to the Plaintiffs' application is somewhat anomalous. It argues prejudice on the basis that it no longer has assets to meet any liability by reason of it being subsumed into the MSC by operation of section 262(1)(c) of the *LGA*. However if it was subsumed into the MSC on that basis then its liabilities at that time were also transferred and that would include the liability in respect of the Plaintiffs' claim. Indeed if section 262(1)(c) of the *LGA* applies to it, KCC no longer exits. If all that is correct in reality there is no prejudice to KCC and MSC would have to be substituted as a defendant in lieu of KCC.[34] Although in that event there is

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29 Affidavit of Alison Phillis made 8 December 2017, Annexure D.
30 Exhibit D3 – 1.
31 Section 12.
32 Gazette G31 9 August 2000.
33 Gazette G23 11 June 2008.
34 Pursuant to *SCR* rule 9.06 or, if applicable, r 36.01(4).

some strength to the argument of KCC that it would be futile to reinstate the proceedings, that futility must be measured against the possibility of the substitution of MSC for KCC.

[48] It is clear therefore that whether section 262(1)(c) of the *LGA* applies to KCC is critical to the claim of prejudice by KCC. For the reasons that follow I am satisfied that the section does not apply to KCC

[49] RO 1.4, which established MSC as a body corporate, specified that the area of the "*prospective shire council*" was that indicated in the specified Compiled Plan. The area of the proposed shire, per paragraph 1 of RO 1.4, includes the Docker River Community. Paragraph 3 of RO 1.4 then names, by reference to a Schedule, 11 existing entities which are allocated the collective name of "*constituent councils*".

[50] Section 262(1)(a) of the *LGA* refers back to the "*body corporate*" constituted as a "*prospective council by a restructuring order under the former act*". Clearly, that includes RO 1.4. The effect of that is that from the date of transition[35] MSC became a shire council under the *LGA* and the area of the shire is the same area for which it was established as a prospective shire council, again including the Docker River Community. Clearly therefore the Docker River Community now forms part of the shire area of MSC and that is irrespective of whether or not section 262(1)(c) applies to KCC.

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35 This is a different date of transition to that referred to in the re-structuring order as the date of transition for section 262 is defined in section 261 as being 1 July 2008

[51] Section 262(1)(c) of the *LGA* is the key section. That provides that "*the councils (constituent councils)…*" for the local government areas subsumed into the shire "*are dissolved and all their property, rights, liabilities and obligations …. become property, rights, liabilities and obligations of the shire council*".

[52] There is no specific definition of "*constituent councils*" in the *LGA*. Therefore there are two arguable interpretations as to the meaning of "*constituent councils*" for the purposes of section 262(1)(c). The first interpretation is that any council that operated as local government body in the area subsumed into the new shire is one of the "*constituent councils*". This is the interpretation advanced by KCC. This derives from the wording in subsection 262(1)(c) as that can be read such that any of the entities for the areas subsumed into the new shire, which includes the Docker River Community, are "*constituent councils*". On that interpretation the inclusion of a Community in the area of a new shire council is independent of whether or not the body which previously provided local government type functions in that Community is named in the Schedule to RO 1.4.

[53] The contrary argument is that the "*constituent councils*" are only those "*councils*" which are actually listed in the Schedule to RO 1.4. Therefore as KCC is not listed, section 262(1)(c) does not apply to KCC, notwithstanding the Community in respect of which it previously performed local government type functions forms part of the shire area of the new shire council.

[54] In my view and on my reading of section 262(1)(c) of the *LGA*, the status of KCC depends on whether it is one of the "*councils*" which are "*constituent councils*" referred to in that section. The term "*council*" was defined in section 3 of the *LGA* as it stood up to the commencement of the amendments creating the super shires which came into force on 1 July 2008, i.e., at the time that RO 1.4 was made. Although the definition and related definitions were omitted from the *LGA* as it stood from 1 July 2008,[36] that does not prevent reference to those definitions based on the principle of statutory interpretation that a continuing provision of a statute may be interpreted by reference to its legislative history.[37] That the plural form of that term is used in section 262(1)(c) is of no consequence given section 24(2) of the *Interpretation Act*. In the *LGA* as it stood before 1 July 2008, the term "*council*" was defined as "*…a municipal council or, as the case may be, a community government council*". A "*community government council*" in turn is defined in the same section to mean "*…the community government council for a community government area elected or appointed in accordance with Part 5*".

[55] As I read those provisions, only a "*council*" can be a "*community council*" and therefore before KCC can be subject to section 262(1)(c) of the *LGA* it must at least be a "*council*" within the meaning of the *LGA*. It is clear from the *LGA* that it was not a "*municipal council*" and therefore it can only be a "*council*" if it was a "*community government council*". It is an easy

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36 Compare the definition of "*council*" and "*local government council*" in section 7(b) of the *LGA*.

37 See generally Pearce, DC and Geddes RS, *Statutory Interpretation In Australia*, 7th Ed at paras 3.32, 3.41, 4.2

assumption to make that KCC was a "*community government council*" given that it performed some local government type functions but that is reconciled by its status under the *Local Government Grants Commission Act*.

[56] The process under Part 5 of for establishing a "*community government council*" concludes with Ministerial action, specifically verification by publication of a notice in the Gazette stipulating the matters referred to in section 106(1) of the *LGA*. Absent such a declaration a body cannot be a "*community government council*" for the purposes of the *LGA*.

[57] My research in respect of notices made pursuant to section 106(1) of the *LGA* reveals that there are no such Gazette notices relating to KCC. Therefore KCC was not a "*community government council*" and therefore it was not a "*council*" within the meaning of that term in section 262(1)(c) of the *LGA*. It follows that KCC cannot be a "*constituent council*" for the purposes of that section. Therefore KCC was neither dissolved by operation of section 262(1)(c) of the *LGA*, nor were its assets and liabilities transferred to MSC.

[58] That interpretation fits in well with the existence of a Shire Agreement entered into between KCC and MSC, on 31 October 2008, shortly after the formation of MSC.[38] That agreement transfers various assets of KCC to MSC, something which clearly would not be required if section 262(1)(c) of the *LGA* applied to KCC. The recitals to that agreement are all consistent

[38] Affidavit of Rob Burdon made 7 September 2017 at para 11 and Annexure C.

with KCC's local government functions having been performed as part of its status under the *Local Government Grants Commission Act,* the takeover of various assets by MSC and the continuing existence and operation of KCC in the Docker River Community.

[59] The Shire Agreement however does not contain any provisions with respect to the Facility. Further, although the Shire Agreement demonstrates an intention for MSC to take over some liabilities of KCC, no actual assignment of any liabilities is provided for. Mention is made only of a process to determine liabilities. Specifically KCC's potential liability in respect of the current claim is not provided for. That agreement therefore does not support the evidence of QBE that as at 1 July 2008 MSC took over the management of the Facility.[39] There may well be other evidence which supports that assertion but it is not evident from the agreement.

[60] Irrespective of whether there is other evidence, the absence of reference to the Facility in the Shire Agreement does not change the legal position of KCC vis a vis the Plaintiffs' claims on that account alone. If there was a contractual transfer of liability then KCC would remain liable to the Plaintiffs, albeit KCC may then have a right of indemnity against MSC as an assignee.

[61] The Court of Appeal discussed the process of establishment of the new shire councils, and specifically in respect of MSC, in *Palmer v MacDonnell Shire*

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[39] Affidavit of Samantha Kim Hocking made 6 September 2017 at para 4; see also Exhibit D3 – 1.

Council.[40] That concerned Amoonguna Community Inc, a body specifically named in the Schedule to RO 1.4. The Court of Appeal noted that initially that body had been given status as a community government council (although it is not entirely clear whether this refers to its status under the *LGA* or under the *Local Government Grants Commission Act*[41]). Reference was also made to the shire area of MSC being the result of an amalgamation of 11 local government areas which at that time were each separately administered by community government councils.[42] The Court of Appeal concluded that those councils were the "*constituent councils*".[43]

[62] The Court of Appeal then went on to say that as of 1 July 2008 those councils, (referring presumably to the councils which operated in the same 11 local government areas), were dissolved and their assets and their liabilities transferred to MSC.[44] If that is authority for the proposition that only the 11 bodies named in the Schedule to RO 1.4 were subsumed into the new shire council then that could mean that the Docker River Community is not part of the shire areas for the MSC given the omission of KCC from the Schedule. However that clearly is not the case. Hence although on that authority KCC was not dissolved and its assets and liabilities were not transferred to MSC because it was not one of the named 11 local government areas, I do not read that case as being determinative of the status of KCC for current purposes. The Court of Appeal did not consider the unique position

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40 [2011] NTCA 2.

41 Annexure A to the affidavit of Ruth Morley made 30 January 2018 is the Gazette notice which revokes the declaration of Amoonguna Community Inc as a "*local governing body*" under the *Local Government Grants Commission Act.*

42 There are 11 councils listed in the Schedule to RO 1.4.

43 [2011] NTCA 2 at para 9.

44 [2011] NTCA 2 at para 11.

of KCC specifically. I think the Court of Appeal only dealt with the formation of MSC by way of background, with regard only to the status of Amoonguna Community Inc, and without actual consideration of KCC's peculiar status. Therefore I do not read that decision as a binding finding that KCC is, or is not, one of the "*constituent councils*" in respect of RO 1.4.

[63] The approach I have taken to the determination of KCC's status was not the subject of submissions and in case there is any flaw in my finding or in case my search for Gazette notices as aforesaid proves inadequate, I also deal with the approach which was argued. That was also based on principles of statutory interpretation.

[64] In my view the same result is arrived at. As Mr Alderman argued, the reference to "*restructuring order*" in section 262(1)(a) of the *LGA* is clearly a reference, in the case MSC, to RO 1.4, and with that I agree. In turn he argued that, absent a contrary definition in the *LGA*, the reference to "*constituent councils*" in section 262(1)(c) therefore must mean the "*constituent councils*" referred to in RO 1.4 namely, those listed in the Schedule to RO 1.4. As KCC is not named in that Schedule, therefore KCC was not a constituent council and it was neither dissolved nor were its assets and liabilities transferred to MSC.

[65] I agree. Reference to RO 1.4 as an aid to interpretation is a legitimate use of that instrument. It is not an extrinsic instrument as it is specifically referred to in section 262(1)(a) of the *LGA*. Therefore, applying the well settled

principle of statutory interpretation that an Act is to be read as a whole, regard can be had to the restructuring order for the purposes of the interpretation of the section. Although section 28A, the provision pursuant to which RO 1.4 was made, has since been repealed, that does not prevent reference to it for interpretation purposes based again on the principle of statutory interpretation that a continuing provision of a statute may be interpreted by reference to its legislative history.

[66] Therefore in my view on either basis, KCC has had a continuing existence since the formation of the MSC and has kept it assets and liabilities, other than assets and liabilities which it has voluntarily disposed of, for example by the Shire Agreement. Therefore, contrary to KCC's submission, there is no futility in granting the Plaintiffs' application.

[67] KCC also submits that it will suffer evidentiary, financial and legal prejudice. In respect of the evidentiary prejudice, that is based on the possibility that the quality of the evidence may be adversely affected by the passage of time, that there will likely be recall problems for witnesses due to the passage of time, the possibility that witnesses will now not be able to be located and other usual and similar arguments routinely made in such instances. Although KCC has levelled criticism at the Plaintiffs for shortcomings in their evidence on the application, here it is itself subject to a similar criticism. KCC has not provided any evidence of attempts to contact relevant persons nor has it led evidence of any other enquiries it says that it would need to make. To that extent KCC simply makes a bare allegation of prejudice. The absence of such evidence means that I should

disregard the bare claim of prejudice, consistent with the approach in *Patsalidies & Anor v Magoulias & Anor*.[45]

[68] To highlight this, as an example, a key witnesses is Mark Swindell. His role in the events of the night in question is very significant. In his case in particular, but also in the case of other witnesses, there is no evidence of any attempt by KCC to locate him such that the related claim of prejudice might be corroborated. Instead KCC merely asserts the likelihood of prejudice by reason of not being able to locate witnesses. In the case of Mr Swindell, the Plaintiffs' solicitors have made enquiries and have ascertained his current whereabouts which sees him working and residing in Yulara. This highlights the importance of evidence of actual prejudice as opposed to a mere assertion of possible prejudice.

[69] In any case I do not think that KCC's submission has sufficient regard to the numerous contemporaneous statements and other documents that are available. Mostly these derive from the Coronial investigation. Such investigations are always very thorough. Those materials include details of events observed by the various witnesses and the physical characteristics at the Facility. I accept that historical documents of this nature may not be a complete substitute for contemporaneous investigations but their existence is a factor which I can have regard to. I do not accept that the evidentiary prejudice to the Defendants is as severe as was submitted on their behalf. Similarly with respect to KCC's submission that it will suffer prejudice by

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45 (1984) NTR 1.

lapse of time and memory defects. There are many sources by which witnesses could refresh their memory. Bearing in mind the extent of documentary evidence that is available I am satisfied that the Defendants can have a fair trial. I also take into account that the Plaintiffs will be subject to the same level of disadvantage as the Defendants and possibly to a greater extent by reason that the Plaintiffs have the burden of proof.

[70] KCC also raises possible legal prejudice in that it will encounter time limitation issues in any action it will take to enforce its insurance policy. To put this into context, the claim by KCC on its policy was made on 2 February 2010, before the Writ was issued. After a preliminary indication of likely refusal of indemnity by QBE by letter dated 26 March 2010, indemnity was finally refused by letter dated 8 September 2010. Indemnity was refused on a number of grounds including that the incident was not covered by the policy and the application of specific exclusions under the policy. The lack of action by KCC in respect of QBE's denial of indemnity, something which could have been actioned in the 14 months prior to the dismissal of the proceedings, is a relevant factor. Why nothing was done in that period, or since, was not satisfactorily explained and that is curious given that a claim on the policy had been made before the Writ had been filed.

[71] At paragraph 12 of the affidavit of Marlene Abbott made 6 October 2017, she alleges that the dismissal of the proceedings was the reason that no action was taken by KCC to enforce its insurance policy with QBE. However that assertion is not supported by the actual timing of events as set

out above as the dismissal of the proceedings occurred well after the refusal of indemnity. I do not accept that evidence. The Plaintiffs argued that all this indicates that KCC does not intend to challenge QBE's decision to refuse indemnity and therefore there can be no prejudice. I think there is some force to this argument. Curiously, if KCC does not challenge QBE's refusal of indemnity that that negates the claims of prejudice by QBE.

[72] KCC's submissions in relation to this ground of prejudice were little more than another bare claim of prejudice. That bare claim was made in KCC's written submissions. It was not specifically addressed by counsel for KCC in the course of argument. I repeat and rely on my earlier comments concerning bare unsupported claims of prejudice.

[73] There is also evidence to suggest that KCC considered that its brokers were responsible for the inadequate cover.[46] The claim of legal prejudice can apply equally to limitation issues in respect of any potential claim that KCC might have against its broker for failing to arrange sufficient cover. I think that similar considerations apply to that. In any event, KCC's submissions overlook the possibility of an extension of time being granted pursuant to section 44 of the *Limitation Act*.

[74] KCC's claim to financial prejudice is also not a strong claim. The claim of financial prejudice is again little more than a bare claim of the possibility of prejudice and unsupported by any actual evidence.[47] Although the written submissions presented for KCC submitted that KCC had managed its affairs

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46 Affidavit of Rob Burdon made 7 September 2017 at para 9.

47 For example, see the bare claim of prejudice contained in the affidavit of Marlene Abbott made 6 October 2017 at paras 7 and 8.

for many years based on the claim having been dismissed, that is also is a bare claim as there was no supporting evidence. The only evidence relied on in the course of argument was evidence reflecting various financial statements prepared in respect of KCC in contemporary times compared to financial statements up to the time of formation of MSC. I am not satisfied that that advances the position much at all.

[75] I accept that the situation would have been different if there was actual evidence that KCC had organised its affairs on the basis of the proceedings being at an end and that there was now some demonstrated detriment if the proceedings were reinstated. However there is no evidence that KCC has done anything differently since the dismissal of the proceedings or, at the least from when it became aware of the dismissal of the proceedings.

[76] In relation to QBE, the Plaintiffs concede that QBE should not have been named as a Defendant and the proposed Amended Statement of Claim does not contain any allegations against QBE. Notwithstanding that, I still consider QBE's submissions as there remains a possibility that it could be joined as a Third Party by KCC notwithstanding that in that event the case between KCC and QBE would only concern the policy of insurance. Alternatively, circumstances could arise whereby the Plaintiffs could seek to join it again as a Defendant pursuant to section 27 of the *Law Reform (Miscellaneous Provisions) Act*, although again that would only relate to the policy of insurance.

[77] QBE opposes the Plaintiffs' application and its submissions are largely based on evidentiary prejudice. As in the case of KCC, QBE has not led any evidence of actual prejudice. It also merely raises the possibility of prejudice. The same considerations, including the same conclusion, therefore apply as with respect to the argument made by KCC.

[78] There are additional considerations in the case of QBE. The evidence reveals that a claim was made under KCC's policy of insurance on 2 February 2010, which is nearly four years after the event. QBE denied liability after investigation and advice. The denial of liability turns on the nature of the cover and the interpretation of the policy including the application of exclusions. I think it is unlikely that there will be any change in the position of QBE vis a vis the current claim. If that remains QBE's focus in respect of the matter generally then it is difficult to see how there can be any prejudice to QBE. However, I accept that QBE would, in conjunction with a defence on that basis, also have an interest in the Plaintiffs' claims against KCC. To that limited extent, it remains relevant to the balancing exercise.

[79] I am required to determine the interests of justice in deciding whether or not to grant the primary relief sought. This takes into account various factors including the relative prejudice to the Plaintiffs if the relief sought is not granted, weighed against the prejudice to the Defendants if it is. The prejudice to the Plaintiffs is obvious. There are as many as six Plaintiffs in respect of whom the limitation period has not yet expired. Although the position might be seen differently in respect of the infant Plaintiffs named in

the proceedings, the infant claimants generally and specifically those not named in the proceedings, will be severely prejudiced as they cannot bring separate proceedings. The infant claimants not currently named in the current proceedings arguably can join in the current proceedings by way of amendment to the Statement of Claim. Likewise in respect of all other claimants, refusal of the relief sought will result in severe prejudice in that they will lose the benefit of what appears to be, at least prima facie, a good case.

[80] I also have regard to the availability to the Plaintiffs of a potential action for professional negligence against the various solicitors who worked on the claim. That will be complicated by the number of persons or entities involved. One of those entities, CAALAS, has now been disbanded. Mr Bell seems to be in retirement and living out of the jurisdiction and very little else is in evidence concerning his position. The claim against the solicitors for professional negligence is far from certain of succeeding and this is relevant to the balancing exercise.

[81] All things considered, I am satisfied that the balance of prejudice favours the Plaintiffs.

[82] For these reasons, in summary, I am satisfied that the solicitors acting for the Plaintiffs at various times were responsible for the delay in seeking to set aside the order for dismissal. I am also satisfied that the Defendants can still have a fair trial and the balance of prejudice is in favour of the Plaintiffs. I am prepared to set aside the order dismissing the proceedings

for want of prosecution and I will give leave to the Plaintiffs to amend their Statement of Claim. I will also extend the validity of the Writ for service purposes if that is required. I will also hear from the parties in relation to any consequential procedural orders such as removal of unnecessary parties.

[83] I will also hear the parties as to costs.