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Case Note

Persuasive evidence of prejudice - a must when resisting an extension of time application to issue proceedings

***Bull v Ararat Abattoirs Pty Ltd & Ors* [2023] VCC 1903**

The Victorian County Court recently dismissed an application made by an injured worker to issue proceedings out of time.

In the eyes of the Court, the combination of an 18 year delay following the accrual of the cause of action, and 'clear prejudice' to the defendants, were enough to warrant the dismissal. While the Court described the delay as 'extreme', the significance of the potential prejudice to the defendants, caused by the death of one of their witnesses, likely carried more weight in the decision.

Background

Mr Bull (**'the worker'**), aged 59 at the time of the decision, was employed as a slaughterman at an abattoir in Ararat (VIC) between 1994 and 2001. The worker alleged that he suffered various shoulder injuries throughout this period as a result of the 'repetitive, awkward and heavy' nature of his duties. The worker sought to bring proceedings against his employer and two other entities that he alleged had roles in the operation of the abattoir. The three defendants shared a common directorship.

The chronology of events following the alleged injury is summarised as follows:

- The worker reported his injury to his employer in September 2001
- Between September 2001, and when he ceased work completely in 2004, the worker underwent various treatments to his shoulders including surgery, while also completing periods of light duties at the abattoir
- The worker appears to have first consulted solicitors in 2002 regarding his potential rights. The Victorian WorkCover Authority (VWA) subsequently placed the worker on "weekly payments" in 2003
- In March 2005, the VWA determined that the worker's level of whole person impairment was insufficient to entitle him to an impairment benefit payment. During the same timeframe, the VWA obtained surveillance footage of the worker that showed him undertaking a certain level of activity
- In November 2005, the VWA ceased the worker's weekly payments with reference to expert medical reports, which commented on the video surveillance

- By 2010, the worker reported worsening shoulder pain, which had been present for nine years and unchanged following three surgeries
- Matters then rested for almost another decade until mid-2018 when the worker consulted his current lawyers
- After moving at what the Court described as a 'leisurely pace', the worker's lawyers lodged a serious injury application against the employer in 2019, later issuing proceedings against the employer in 2021 and then adding the two further entities as defendants in late August 2022.

The legal issues

The question for the Court was whether the worker should be allowed to bring his claim for damages against the defendants after the expiry of the six year limitation period under the *Limitations of Actions Act 1958* (**'the Act'**).

There is a list of factors in the Act that the Court 'shall consider' when determining whether a plaintiff may bring a claim 'out of time'. Such factors include the length and reasons for the delay, and the extent of any prejudice the defendants are likely to suffer.

The Decision

The Court commenced with the reasons for the delay, or indeed the lack thereof. The worker conceded he had an imperfect memory regarding the advice of his former lawyers between 2002 and 2007, and the decision to not pursue a common law claim while within time. The Court found that the worker did likely receive advice on his rights during that period but, given the combination of low impairment assessments by medical experts and damaging video surveillance, the advice was likely to the effect that it was not worth pursuing a common law claim.

The Court then moved to the likely prejudice suffered by the defendants. During the period in which the worker was employed at the abattoir, the sole director of the business was a very 'hands on' director, who effectively occupied the role of general manager in the day to day running of the operations of the business. The director passed away in 2022, after the proceedings against the employer had been commenced but prior to the other defendants being joined, while other less relevant witnesses had retired.

During the course of the hearing, counsel for the worker placed great emphasis on the fact that the employer's lawyers had not made any attempts to obtain a proof of evidence from the director while he was still alive, particularly between 2020 and his death in 2022. While this was noted by the Court, the same could be said for the 'leisurely pace' at which the worker's lawyers progressed the case.

Ultimately, the Court found that the director was a 'crucial witness' for the defendants, who could likely provide specific instructions regarding the system of work and training provided. Paired with the 'extreme delay', the Court decided that the worker's application must be dismissed.

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This decision provides an interesting analysis of the competing considerations when dealing with applications to bring a claim out of time. As insurers will be well aware, a significant delay on its own is often not enough for a defendant to resist such an application. Defendants should be careful to elicit persuasive evidence of prejudice, such as the death of a crucial witness or loss of key documents, whenever possible.

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