HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

BEROWRA HOLDINGS PTY LTD APPELLANT

AND

RODNEY JOHN GORDON RESPONDENT

Berowra Holdings Pty Ltd v Gordon
[2006] HCA 32
15 June 2006
S473/2005

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

B W Walker SC with P L Perry for the appellant (instructed by Lyons Barnett Kennedy)

J E Sexton SC with P A Regattieri for the respondent (instructed by Peacocke Dickens & Price)

CATCHWORDS

Berowra Holdings Pty Ltd v Gordon

Workers' Compensation − Plaintiff did not comply with s 151C of the *Workers Compensation Act* 1987 (NSW) − Defendant did not take any point as to non-compliance until after it had made an offer of compromise pursuant to Pt 19A of the District Court Rules − Plaintiff accepted defendant's offer of compromise after the point as to non-compliance had been raised – Whether proceedings commenced by the plaintiff invalid or a nullity because of non-compliance with s 151C − Whether procedural steps taken by the parties under the District Court Rules invalid or nullities because of non-compliance with s 151C − Whether defendant entitled to an order that its offer of compromise be withdrawn − Whether the concept of waiver relevant.

Statutory construction − Where statute imposed a restriction upon the commencement of court proceedings but made no provision for consequences of non-compliance − Construction of s 151C of *Workers Compensation Act* 1987 (NSW).

Workers Compensation Act 1987 (NSW), Pt 5, s 151C.

1 GLEESON CJ, GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. Part 5 (ss 149-151AC) of the *Workers Compensation Act* 1987 (NSW) ("the 1987 Act") is headed "Common law remedies". Section 151 provides that "except to the extent that this Act otherwise expressly provides", it "does not affect any liability in respect of an injury to a worker that exists independently of this Act". However, s 151C stipulates a six months delay before the commencement of court proceedings against an employer for damages.

2 The grounds of appeal for this appeal from the New South Wales Court of Appeal[1] show that it turns upon an issue of construction of Pt 5 of the 1987 Act. This may be shortly stated: does the prohibition apparently imposed by s 151C deny legal effect both to proceedings for common law damages commenced in contravention of that prohibition and to all steps later taken by the parties under the relevant Rules of Court with respect to such proceedings?

3 The appellant ("the employer") submits that the Court of Appeal erred and that, on its proper construction, s 151C(1) does have this result. Therefore, it is said, an action commenced by the respondent ("the worker") in the District Court, together with the employer's own offer of compromise made under the District Court Rules ("the Rules"), were null and void.

4 The question of the construction of s 151C falls to be resolved in the light of two significant facts about which there was no controversy. First, the worker did commence an action in the District Court without complying with s 151C. Secondly, the employer did not take any point (in pleadings or otherwise) regarding failure to comply until the day before the matter was listed for hearing in the District Court some 18 months later. That day fell at a time when the employer's offer of compromise pursuant to Pt 19A of the Rules remained open. The employer contends that the second fact is irrelevant and that the first fact constitutes a complete answer to the case.

5 The submissions by the employer should not be accepted. We turn to explain why this is so.

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1 *Gordon v Berowra Holdings Pty Ltd* (2005) 62 NSWLR 427; see also *Gordon v Berowra Holdings Pty Ltd [No 2]* [2005] NSWCA 123.

Section 151C

6 On 23 November 2001, when the worker filed his statement of claim, s 151C provided:

> "(1) A person to whom compensation is payable under this Act is not entitled to commence court proceedings for damages in respect of the injury concerned against the employer liable to pay that compensation until 6 months have elapsed since notice of the injury was given to the employer.
>
> (2) Despite subsection (1), the person is entitled to commence court proceedings against the employer if either of the following occurs:
>
> (a) the employer denies all liability in respect of the injury,
>
> (b) the employer admits partial liability in respect of the injury but the person is dissatisfied with the extent to which liability is admitted."

7 Section 151C(1), to which the arguments in this appeal are directed, has remained in its original form[2].

8 The word "damages" in s 151C is defined by s 149 of the 1987 Act to include "any form of monetary compensation" and "any amount paid under a

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2 As a result of changes made by the *Workers Compensation Legislation Further Amendment Act* 2001 (NSW), Sched 1, Item 1.1[4], which Schedule commenced on 27 November 2001, s 151C(2)(a) was amended and s 151C(3) was added. These sub-sections now read:

> "(2) Despite subsection (1), the person is entitled to commence court proceedings against the employer if either of the following occurs:
>
> (a) the employer *wholly denies liability* in respect of the injury,
>
> (b) the employer admits partial liability in respect of the injury but the person is dissatisfied with the extent to which liability is admitted.
>
> (3) *This section does not limit or otherwise affect the operation of Part 6 of Chapter 7 of the [Workplace Injury Management and Workers Compensation Act 1998 (NSW)]*." (emphasis added)

compromise or settlement of a claim for damages (whether or not legal proceedings have been instituted)". There are also a number of exclusions which are not presently relevant. There is no definition of "court" or "proceedings".

9 On its face, s 151C(1) creates an imperfect obligation; the statute does not make express provision for the consequences of failure to comply with s 151C(1), so giving rise to the dispute in this appeal.

"Nullity" and invalidity

10 Some attention should be given at the outset to the result which the employer submits must attend the non-compliance by the worker with s 151C. It was said that such proceedings are "invalid" or a "nullity". In *Minister for Immigration and Multicultural Affairs v Bhardwaj*[3], three members of this Court pointed out in the context of administrative decisions that such expressions are statements of conclusion which are not necessarily helpful in resolving the rights of parties. Dangers are equally present in the context of proceedings in, and acts and orders of, courts.

11 In particular, the introduction into s 151C of concepts of "nullity" and "invaldity" is misleading because they tend to obscure the distinction between superior courts of record of general jurisdiction and courts of limited jurisdiction. That distinction has been the subject of comment in this Court[4], although due regard is to be had to the constitutional context. In the case of the superior courts, acts in excess of jurisdiction cannot be characterised as invalid until quashed or set aside on appeal, whereas that is not necessarily true of the latter. Thus, in the majority judgment of Gaudron, Gummow and Callinan JJ in *Pelechowski v Registrar, Court of Appeal (NSW)*[5], it was decided that, because

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3 (2002) 209 CLR 597 at 613 [46] per Gaudron and Gummow JJ, 643 [144]-[145] per Hayne J

4 *Cameron v Cole* (1944) 68 CLR 571 at 590-591 per Rich J, 598-599 per McTiernan J, 607 per Williams J; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 184 [49] per Gaudron J, 235-236 [216] per Gummow J, 249 [257] per Kirby J, 274-275 [328] per Hayne and Callinan JJ. See also the comments of Lord Millett, delivering the judgment of the Privy Council, in *Strachan v The Gleaner Co Ltd* [2005] 1 WLR 3204 at 3211-3213.

5 (1999) 198 CLR 435 at 445 [27].

an order made by an inferior court (in that case the New South Wales District Court) without power to do so was a "nullity", it could not found a proceeding for contempt. This situation was contrasted to that arising where an order was made within power but improperly, in which case, until set aside by a superior court, the order had to be obeyed[6].

12 That difference between courts of general jurisdiction and of limited jurisdiction is important because s 151C(1) refers generally to "court proceedings", a term which is not susceptible of confinement to proceedings in any particular court and, as will be discussed below, jurisdiction in workers' claims are cognisable in a range of courts. In construing s 151C, this Court should not prefer a construction which would result in s 151C having differential application depending upon the court in which proceedings were commenced.

13 There also is a very real difficulty in characterising proceedings as "invalid". The institution of an action or other proceeding is the exercise by the litigant of the freedom to invoke the jurisdiction of the judicial arm of government to determine a dispute. That step engages the procedural law appurtenant to the relevant court, which in modern times is found primarily in the Rules.

14 Professor Jolowicz describes procedural law as creating choices or a sequence of choices in the sense that each procedural step taken by a litigant requires the other party or the court to take some action, so affecting the path which the proceedings take towards ultimate disposition[7]. This is the case even where a procedural rule is expressed in mandatory form; if the party to whom it is addressed chooses to disregard it, the normal outcome is that a choice accrues to the other party either to do nothing or to seek an appropriate order from the court.

15 In the adversarial system of justice, choice rests primarily with the parties and it is generally the case that the court's power of decision or order is exercised upon the application of a party. Generally there is in law no restriction upon a person's right to start an action and to carry it to the point at which a choice is cast upon the defendant to make some response in order to avoid judgment in

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6 (1999) 198 CLR 435 at 445-446 [28].

7 *On Civil Procedure*, (2000) at 68, 78.

default. Once the procedural law has been engaged, all parties to the litigation are subject to it.

16 None of the above denies the possibility of a defendant denying the plaintiff's right to invoke the jurisdiction of the court, for example where the plaintiff's right is conditional upon there being an action cognisable within that jurisdiction. However, the material point is that that denial must be made within the structure of the relevantly engaged procedural law, and not outside it. Accordingly, the defendant may challenge at an interlocutory level the strength of the plaintiff's alleged case by seeking to have a plaintiff's action struck out for failure to disclose a reasonable cause of action, or dismissed as incompetent. Alternatively, the defendant may have recourse to judicial review by a superior court, challenging the right of an inferior court to adjudicate the plaintiff's claim and seeking orders to prevent the inferior court continuing to hear the claim. However, the invocation of jurisdiction ordinarily enlivens the authority of the court in question at least in the first instance to decide whether it has jurisdiction[8].

Statutory scheme regulating common law rights

17 As already remarked, s 151C is contained in Pt 5 of the 1987 Act. Part 5 was introduced in its present form by the *Workers Compensation (Benefits) Amendment Act* 1989 (NSW)[9] which commenced on 1 February 1990 ("the 1989 Act"). Part 5 provides for what is loosely described as the restoration of a right to modified common law damages. This usage derives from the circumstance that, when first enacted, s 149 of the 1987 Act provided that a worker was "not entitled to recover damages, otherwise than under this Act" from the employer where workers' compensation was payable. Those words were repealed by the 1989 Act. This also introduced s 151 which "restored" the common law. The gist of s 151 is stated in the first paragraph of these reasons.

18 The restoration effected by Pt 5 did not involve altering the common law source of the worker's cause of action against the employer by transforming that right into one with a statutory foundation. The right of the worker to sue the employer for damages in any court of competent jurisdiction remains a right sourced at common law, albeit with its enjoyment regulated by Pt 5.

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8 *Re Macks; Ex parte Saint* (2000) 204 CLR 158.

9 Sched 1(1).

Construction of the statute

19 There is no doubt that s 151C imposes a form of restriction or bar upon the commencement of court proceedings, but the dispute concerns the effect of non-compliance. Resolution of that issue requires close attention to the words of the statute and the statutory scheme in general.

20 For many centuries the courts have developed a well-known interpretative approach to construing certain statutory bars. In *The Commonwealth v Mewett*, Gummow and Kirby JJ said of a limitations statute[10]:

> "[A] statutory bar, at least in the case of a statute of limitations in the traditional form, does not go to the jurisdiction of the court to entertain the claim but to the remedy available and hence to the defences which may be pleaded. The cause of action has not been extinguished. Absent an appropriate plea, the matter of the statutory bar does not arise for the consideration of the court[11]. This is so at least where the limitation period is not annexed by statute to a right which it creates so as to be of the essence of that right[12]."

What was there being referred to was a law which barred the remedy for the plaintiff's cause of action without extinguishing the right. There are numerous examples of such statutory bars. The two with the longest pedigree are s 3 of the *Statute of Limitations* 1623 (Eng)[13] applicable to personal actions ("all Actions ... shall be commenced ... within the Time ...") and s 4 of the *Statute of Frauds* 1677

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10 (1997) 191 CLR 471 at 534-535.

11 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 473-474.

12 *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471 at 488-489; *Pedersen v Young* (1964) 110 CLR 162 at 169; *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 497-498; *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1 at 43.

13 21 Jac I c 16.

(Eng)[14] ("no Action shall be brought ... unless ..."). Other examples were given in the decisions mentioned by Mason CJ in *The Commonwealth v Verwayen*[15].

21 In *Dawkins v Lord Penrhyn*[16], Earl Cairns LC drew a distinction between those cases and the limitations statute applicable to real actions which resulted in the extinguishment of the title of the plaintiff to the property in question after the stipulated period of time. This distinction reflects the settled approach of courts to interpreting statutes of that kind in the adversarial system of litigation which obtains in common law jurisdictions. The New South Wales legislature must be taken to have been aware of this when enacting s 151C.

22 Counsel for the employer urged upon this Court a construction of s 151C of the 1987 Act designed to establish that it was not a statutory bar to which that construction would apply. The construction pressed was one which would regard the worker's right as being subjected to a statutory moratorium which rendered that right incapable of exercise in a court before the expiration of that period of time. This amounted to a submission that the worker's common law right was impaired by s 151C to such a degree that, until the six months had elapsed, the worker had *no right* which could attract the processes of the court so as to be the subject of judicial adjudication. On the other hand, counsel for the worker sought to place s 151C within the field of discourse referred to earlier, submitting that the effect of the statute was not to strip away the worker's right, but merely to postpone or temporarily bar the remedy.

23 What is the effect of s 151C? It may be said at the outset that the scheme contained in Pt 5 of the 1987 Act does not represent an instance of a statutorily created right which is subject to an inherent limitation or qualification going to the nature of the right of the kind referred to in the passage cited previously from *Mewett*[17]. The right is sourced in common law. The approach of the courts has consistently been to require very clear legislative intent before treating a statutory provision as taking away common law rights of a plaintiff, where there is an

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14 29 Car II c 3.

15 (1990) 170 CLR 394 at 405.

16 (1878) 4 App Cas 51 at 58.

17 (1997) 191 CLR 471 at 534-535.

alternative construction available[18]. If s 151C is properly to be regarded as analogous to the statutory bars referred to earlier in these reasons, this militates against the construction espoused by the employer.

Statutory purpose

24 In one sense, as Mason CJ noted in *Verwayen*[19], all statutes give effect to some public policy. It may be accepted that the primary objective of s 151C is to encourage an injured worker to attempt in the first instance to satisfy his or her claim for damages by negotiation with the employer rather than by immediate recourse to litigation. However, the statute does not in terms oblige litigants to engage in any form of negotiation or settlement procedure during the six month period which s 151C envisages.

25 Counsel for the employer sought to establish that the section was intended for the benefit of the public, in as much as it promotes non-litigated solutions for the benefit of the broader community. However, to describe the effect of a section concerned with litigation in this way is misleading. The public may well benefit and be intended to benefit from general compliance with s 151C, but that does not in any way lessen the benefit also received by the defendant in being freed from litigation for a stipulated period of time. The strategic advantage of such a provision in an adversarial system may be significant. As Mason CJ pointed out in *Verwayen*[20], the critical question is whether that benefit is personal or private or whether it rests in the relevant sense upon considerations of State. The public benefit here is mediated through a benefit conferred on individual litigants, not (as will be seen below) through restricting the court's jurisdiction.

26 Even if it be accepted that the provision evinces a wider policy, that does not warrant the conclusion that non-compliance inevitably results in invalidity. An essential ingredient in postulating that settlement negotiations or non-litigated solutions should take place during the six month period must be that there is something to compromise. This rather tells against a construction of s 151C

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18 *Sargood Bros v Commonwealth* (1910) 11 CLR 258 at 279 per O'Connor J; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328 at 341 per Mason ACJ, Wilson and Dawson JJ.

19 (1990) 170 CLR 394 at 405.

20 (1990) 170 CLR 394 at 405.

which regards it as denying or severely impairing the plaintiff's rights. It may instead suggest that the statute postpones the remedy, as counsel for the worker contended. In this sense, the policy of the statute weakens rather than strengthens the construction favoured by the employer.

27 Much was made by counsel for the employer of the submission that the statute prohibits the worker from commencing proceedings, and that to allow a construction which gives any legal effect to proceedings commenced in contravention of s 151C undermines that legislative prohibition. Once the role of procedural law is understood, there is no substance to that submission. The submission requires acceptance of the proposition that the New South Wales Parliament intended that potential invalidity should attend all steps taken in reliance upon proceedings wrongfully commenced, regardless of the procedural history and context of the litigation. To attribute such potentially indiscriminate consequences to non-compliance would be to confer upon the statute a character which its words do not readily bear and which is quite removed from facilitating non-litigated settlements.

Jurisdiction

28 Counsel for the employer expressly eschewed a "jurisdictional analysis" of s 151C, and conceded that in terms the section is not addressed as a command to the court but to the litigants. However, the question of statutory construction cannot easily be severed from that of jurisdiction because s 151C concerns the submission of contested rights to a court for curial adjudication in an adversarial system. This is to be distinguished from the situation in *Project Blue Sky Inc v Australian Broadcasting Authority*[21]. That case concerned breach of a statutory direction addressed to an administrative decision-maker which was a condition regulating the exercise of a statutory power. *Project Blue Sky* was not concerned with questions relating to the jurisdiction of courts.

29 Where one is concerned with the impairment of a common law right of action, by a statute such as s 151C, in substance there is little difference between a characterisation that the plaintiff has no right capable of being submitted to a court for adjudication and one to the effect that the court has no jurisdiction to adjudicate the plaintiff's right. The substantive outcome of the construction preferred by the employer in so far as it denies efficacy to the engagement of the

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21 (1998) 194 CLR 355.

court processes in contravention of s 151C is to contract the jurisdiction of the courts.

30 In this context the term "jurisdiction" must be understood in the second of the senses referred to in *Lipohar v The Queen*[22]:

> "'Jurisdiction' may be used (i) to describe the amenability of a defendant to the court's writ and the geographical reach of that writ, or (ii) rather differently, to identify the subject matter of those actions entertained by a particular court, or, finally (iii) to locate a particular territorial or 'law area'[23] or 'law district'[24]."

31 In the joint judgment of five members of this Court in *Plaintiff S157/2002 v Commonwealth*[25], reference was made to a "basic rule" that a legislature does not intend to cut down the jurisdiction of the courts "save to the extent that the legislation in question expressly so states or necessarily implies". Earlier, in *Parisienne Basket Shoes Pty Ltd v Whyte*, Dixon J said[26]:

> "[I]f the legislature does make the jurisdiction of a court contingent upon the actual existence of a state of facts, as distinguished from the court's opinion or determination that the facts do exist, then the validity of the proceedings and orders must always remain an outstanding question until some other court or tribunal, possessing power to determine that question, decides that the requisite state of facts in truth existed and the proceedings of the court were valid. Conceding the abstract possibility of the legislature adopting such a course, nevertheless it produces so inconvenient a result that no enactment dealing with proceedings in any of

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22 (1999) 200 CLR 485 at 517 [79] per Gaudron, Gummow and Hayne JJ.

23 An expression used by the Court in *Laurie v Carroll* (1958) 98 CLR 310 at 331, with respect to New South Wales and Victoria. See also *Breavington v Godleman* (1988) 169 CLR 41 at 77, 97, 107.

24 An expression used by Wilson and Gaudron JJ in *Breavington v Godleman* (1988) 169 CLR 41 at 87.

25 (2003) 211 CLR 476 at 505 [72]. See also *Fish v Solution 6 Holdings Ltd* [2006] HCA 22 at [33] per Gleeson CJ, Gummow, Hayne, Callinan and Crennan JJ.

26 (1938) 59 CLR 369 at 391 (with whom Evatt and McTiernan JJ agreed).

the ordinary courts of justice should receive such an interpretation unless the intention is clearly expressed."

32 It may not appear from originating process that six months have elapsed from receipt of notice by the employer of the injury. The employer's construction implicitly requires the court to undertake a jurisdictional inquiry in each case as to whether or not s 151C has been satisfied. That is not the usual function which a court (as distinct from an administrative body) performs when called upon to exercise judicial power in a matter which prima facie is within the jurisdiction of the court. That is the nature of this case, as explained above. Further, such an inquiry is likely to be complex, especially when regard is had to the terms of s 151C(2).

Conclusion respecting s 151C

33 Section 151C should not be read as if the entitlement of a plaintiff to commence court proceedings after the passage of six months from the giving to the employer of notice of the injury was a pre-condition to the jurisdiction conferred upon the court to determine claims for work injury damages. The considerations adverted to earlier in these reasons all point against the employer's construction of s 151C.

34 The better view is that the provision does not inevitably result in the invalidity of proceedings commenced in contravention of it, either for want of the court's jurisdiction or because the court has no jurisdiction except to accede to a defendant's application (whenever brought) to set aside the proceedings and to do so without regard to the procedural history and the relevant Rules of Court.

35 The construction advanced by counsel for the worker should be accepted. Section 151C does not extinguish rights or create new rights. Rather, it postpones the remedy for the common law right to initiate proceedings in a court of competent jurisdiction. The "right" which s 151C does confer is conferred upon the defendant employer and must be raised in accordance with the procedural rules appurtenant to the particular court.

36 Proceedings commenced by a worker in contravention of s 151C engage the jurisdiction and procedural rules of the court in question. Such proceedings are vulnerable to an application by the defendant to strike out the initiating process or to move for summary dismissal, but they are not a "nullity". Once a plaintiff has commenced proceedings, s 151C must be understood in connection with the procedural structure for the conduct of litigation in that court, not in isolation from it. This is not to subjugate the statute to the Rules, but to

recognise that the subject-matter with which the statute deals is "rights" in the context of actual or apprehended litigation, and to understand the function of the Rules of Court and procedural law in facilitating adjudication of disputed claims.

37 The upshot is that the effect of non-compliance with s 151C will depend in each case upon the actions of the defendant in the context of the relevant Rules of Court. Where the defendant requires an order by the court for the defendant to give effect to a point as to s 151C, in exercising its discretion the court will take into account numerous factors. Not all of these (as Lord Griffiths recognised in *Ketteman v Hansel Properties*[27]) may be measured in economic terms.

"Waiver"

38 This conclusion does not depend upon the application of concepts such as "waiver", although submissions both in the Court of Appeal and in this Court sought to enlist them. To embark upon a consideration of what is involved in this case by considering whether there was a "waiver" by the employer of its "rights" would be unproductive. "Waiver" is a word which Cardozo J described as "misleading" on account of the many things for which it is made to stand[28].

39 It is one thing to speak of the waiver of a legal, equitable or statutory right or privilege. However, once it is appreciated that the court has jurisdiction and that its procedural rules have been engaged, concepts such as "waiver" (and acquiescence and estoppel) are confusing and imprecise. This was pointed out by Dawson J in *Verwayen*[29] and Lord Browne-Wilkinson in *Roebuck v Mungovin*[30]. The conduct of pending proceedings by a party is relevant upon an application by that party for the exercise in its favour of a power of the court. The outcome of such an application depends not upon the exercise of the right of a litigant or upon its denial, but upon the exercise of a discretionary power given to the court. The decision of the court often will depend upon many different factors[31]. An outcome favourable to one party cannot be described adequately in

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27 [1987] AC 189 at 220.

28 *Beatty v Guggenheim Exploration Co* 122 NE 378 at 381 (1919).

29 (1990) 170 CLR 394 at 456.

30 [1994] 2 AC 224 at 235-236. See also *Giumelli v Giumelli* (1999) 196 CLR 101 at 122 [38].

31 See *Ketteman v Hansel Properties* [1987] AC 189 at 220 per Lord Griffiths.

terms of the waiver of the legal, equitable or statutory rights of the unsuccessful party.

40 We turn now to consider the particular facts of the case.

Procedural history

41 On 23 November 2001, the worker filed a Statement of Claim in the Dubbo Registry of the District Court of New South Wales in respect of an injury alleged to have been suffered by him on 2 October 2001 in the course of his employment. Notice of that injury was given to the employer on 12 October 2001, thereby enlivening s 151C(1) of the 1987 Act. Had s 151C(1) been complied with, the worker should have commenced proceedings not before six months after that date, namely 12 April 2002. There is no doubt, however, that it was not complied with. It was suggested that, had the worker complied with s 151C, he would have fallen under a less beneficial regime for the assessment of damages owing to the commencement on 27 November 2001 of the *Workers Compensation Legislation Further Amendment Act* 2001 (NSW). This heavily amended Pt 5 and prevented recovery of damages unless the injury resulted in permanent impairment to the worker of at least 15 per cent (see s 151H). However there were no findings in the District Court or the Court of Appeal that this was the reason for the worker's course of conduct, and further conjecture on the subject is inappropriate.

42 It is not in dispute that the employer did not take any point in relation to the non-compliance with s 151C until 20 May 2003 (the day before the matter was fixed for hearing in the District Court). Apparently the significance of s 151C was overlooked.

43 Prior to 20 May 2003, the employer's solicitors had taken numerous steps in the proceedings without taking the s 151C point. A Notice of Grounds of Defence dated 21 March 2002, traversed the allegations made by the worker denying negligence and breach of statutory duty, but pleaded contributory negligence in the event that negligence was proven. By the time the employer became alive to the point, leave was required to amend the Notice of Grounds of Defence, under the Rules[32]; this was because more than four months had elapsed

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32 Part 17 r 2(1) provided:

> "A party may, without leave, amend any pleading of his once at any time not more than 4 months after the filing of the statement of claim in the proceedings."

since the Statement of Claim was filed. The matter had also proceeded through arbitration on 3 February 2003, resulting in an award in favour of the worker (the employer then applying for a re-hearing). It can be inferred that s 151C did not play any part at this stage of the proceedings.

44 Critically, an offer of compromise had been made pursuant to Pt 19A r 1(1) of the Rules[33]. Because the offer was made within a regime established by the Rules, it acquired a significance which a settlement offer made under ordinary contractual principles[34] would not have attracted. The offer was expressed to remain open for the ordained period of 28 days from the date of receipt[35]. This offer was made on 6 May 2003. The Rules provided that, in the ordinary course, the worker could accept the offer of compromise at any time before the earlier of the expiry date specified in the offer or the time when the judge commenced to give judgment or reasons for decision[36]. The Rules went on to state that, where an offer is accepted, a party to the compromise "may apply to the Court to enter judgment accordingly"[37].

45 The Rules also provided that the employer was not at liberty to withdraw the offer during that period "unless the Court otherwise orders"[38]. The Rules did not expressly provide for the criteria upon which the Court may make orders that an offer of compromise be withdrawn. However the material point is that, where a party has made an offer of compromise pursuant to the Rules (thereby attracting the potentially advantageous costs consequences provided by those Rules[39]), that party has no entitlement as of right to withdraw that offer. Rather, that party requires an indulgence of the Court, namely the favourable exercise of a judicial discretion.

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33 These provisions were not materially different to those in the Uniform Civil Procedure Rules 2005 (NSW), Pt 20 Div 4.

34 See *Harvey v Phillips* (1956) 95 CLR 235.

35 Pt 19A r 3(3).

36 Pt 19A r 3(4).

37 Pt 19A r 3(7).

38 Pt 19A r 3(5).

39 Pt 39A r 25.

46 At about 5.30 pm on 20 May 2003, the employer's legal representatives signalled to the worker's solicitors that they were instructed "to withdraw the employer's offer of compromise, to put on application to the Dubbo District Court in that regard, to seek an order that the proceedings were a nullity ab initio and to seek summary dismissal"[40]. The employer's solicitor served an unsealed copy of a Notice of Motion and supporting affidavit to that effect by facsimile later that evening. The worker's solicitors obtained instructions on the morning of 21 May 2003, and thereafter forwarded urgently to the employer's solicitors a document entitled Notice of Acceptance of Offer of Compromise by facsimile sent and received at 9.37 am and 9.43 am respectively.

47 The position that then obtained under the Rules was that the worker had accepted an offer of compromise which was not capable of being withdrawn without the leave of the court. The worker had by this means put himself in the position where he could apply for judgment to be entered in his favour in the sum of the offer, in accordance with Pt 19A r 3(7) of the Rules. Such an application could fail only if the proceedings were a "nullity" as asserted by the employer, or if the employer obtained leave to withdraw the offer of compromise. In this Court, counsel for the employer did not contend otherwise.

The litigation

48 The employer's Notice of Motion came on before Sir Robert Woods ADCJ on 21 August 2003. The basis upon which the application was brought was unclear. On the one hand, the employer's solicitors had asserted the proceedings to be a "nullity ab initio". On the other hand, the notice of motion sought relief in the form of, first, an order granting leave to withdraw the offer of compromise and, secondly, dismissal of the proceedings. A further prayer for leave to file an amended notice of defence was added with leave of the Court on the hearing of the motion.

49 It does not seem to have been appreciated by the employer that, if it was correct in its contention that the proceedings were a nullity ab initio, then the further prayers apart from leave to amend pleadings and leave to withdraw the offer of compromise were superfluous. The latter should have been framed in the alternative if the application for dismissal based upon "nullity" failed.

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40 *Gordon v Berowra Holdings Pty Ltd* (2005) 62 NSWLR 427 at 430 per Mason P.

50 The Acting District Court Judge concluded:

> "[T]he proceedings are a nullity, and everything done following the issue of these proceedings must be a nullity. Therefore these proceedings should be dismissed and the offer of compromise being part of the proceedings has no validity and can be withdrawn.
>
> For completeness therefore I grant leave to file an amended defence in the terms of the Amended Defence filed 10 June 2003. I grant leave for the [employer's] offer of compromise of 6 May 2003 to be withdrawn, and I order that the proceedings be dismissed."

The foregoing passage reveals that the true basis for the formal order of the Court that the proceedings be dismissed was that they were a "nullity". It is unclear, given that conclusion, why the primary judge felt that the procedural orders needed to be made "for completeness". To the extent that his Honour did consider the discretionary applications, it is clear that the ground upon which his discretion was exercised was his conclusion as to "nullity".

51 When regard is had to the proper construction of s 151C set out earlier in these reasons, it is apparent that the proceedings were not a "nullity".

The Court of Appeal

52 On appeal by the worker to the Court of Appeal, the leading judgment was given by Mason P (with whom Sheller and Beazley JJA agreed). Mason P correctly concluded that the proceedings were not a nullity[41]. However his Honour did so with a consideration of the submissions discussing "waiver", a term the use of which did not assist in a context such as this. Leaving that matter aside, an error of the kind considered in *House v The King*[42] having been established, it fell to the Court of Appeal to re-exercise the primary judge's discretion with respect to the applications for leave to withdraw the offer of compromise and leave to amend the Notice of Grounds of Defence[43]. Mason P held[44]:

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41 (2005) 62 NSWLR 427 at 433.

42 (1936) 55 CLR 499.

43 *Supreme Court Act* 1970 (NSW), s 75A(10).

44 (2005) 62 NSWLR 427 at 437.

> "The offer of compromise made by the defendant on 6 May 2003 represented what it considered at the time to be a fair compromise of the litigation. The Rules gave the [worker] 28 days within which to consider acceptance, absent an order permitting withdrawal (cf r 3(5)). Nothing happened during the currency of the offer except the [employer] realising the application of s 151C to the particular case and signalling its intention to move the court for leave to withdraw the offer. At all material times the defence stood unamended, without invocation of s 151C."

His Honour then refused the application for leave to amend and then the application for leave to withdraw the offer of compromise, in that order[45]. In so doing, Mason P referred to passages from Dawson J and Toohey J in *Verwayen*[46], and it is clear that his Honour took the view that the s 151C point had been raised so late that an award of costs in favour of the worker would not be adequate to prevent injustice to him. Given that the defence stood unamended, there was no relevant basis on which the application to withdraw the offer of compromise should succeed.

The appeal to this Court

53 The employer did not attack the exercise of that discretion by the Court of Appeal. Its appeal to this Court was confined to the contention that the Court of Appeal erred in discerning error in the approach of the primary judge. It would follow that the Court of Appeal ought never to have reached the point of re-exercising the primary judge's discretion.

54 Therefore, once it is accepted that the primary judge erred in characterising the proceedings and all steps taken under the Rules in consequence upon them as a "nullity", it follows that, subject to one further matter, the appeal to this Court should be dismissed.

Illegality

55 During the course of argument and in written submissions, it was suggested by counsel for the employer that the appeal raised issues of contractual

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45 (2005) 62 NSWLR 427 at 437.

46 (1990) 170 CLR 394 at 456 per Dawson J, 464-465 per Toohey J.

illegality of the kind considered by this Court in a number of authorities[47]. This was said to follow in so far as the offer of compromise was only made and maintained as open to acceptance by the worker under the Rules by reason of the worker's antecedent breach of s 151C. It is incorrect to analyse an offer of compromise made and accepted pursuant to the Rules in purely contractual terms. Nor, given the proper construction of s 151C, may the proceedings be classified as "illegal" in any accepted sense of that term.

Orders

56 The appeal should be dismissed with costs.

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47 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410; *Nelson v Nelson* (1995) 184 CLR 538; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215.

57 KIRBY J. This appeal from a judgment of the New South Wales Court of Appeal[48] concerns s 151C(1) of the *Workers Compensation Act* 1987 (NSW) ("the Act").

58 That is a provision by which a person, entitled to compensation under the Act, "is not entitled to commence court proceedings" for damages before the elapse of a specified time. In breach of that provision, such proceedings were commenced in this case. For a lengthy period, no objection was raised. Nor was any application made to have the proceedings struck out. On the contrary, an offer to compromise the proceedings was made. That offer was purportedly accepted.

59 The question in this appeal is whether the Court of Appeal erred in holding, notwithstanding s 151C(1) and non-compliance with its provisions, that a belated attempt to withdraw the offer of compromise should be refused and judgment should be entered in accordance with the acceptance of the compromise.

60 The appeal raises questions concerning the meaning and purpose of the provision of the Act; the effect of non-compliance with its terms; and whether Rules of Court, requiring leave and restricting withdrawal of an offer of compromise, can have effect in the face of the public policy evident in s 151C.

The facts

61 Mr Rodney Gordon ("the plaintiff") was injured in the course of his employment with Berowra Holdings Pty Ltd ("the defendant"). The injury occurred on 2 October 2001. On 12 October 2001, a claim form, containing written notice of the injury, was given to the defendant. The defendant admitted liability for workers' compensation payments. It commenced paying compensation immediately.

62 On 23 November 2001 the plaintiff commenced proceedings for damages in the District Court of New South Wales. He did so by filing a statement of claim. The proceedings were thus commenced before six months had elapsed from the giving of the notice of injury to the employer. The exact reason for the prompt commencement of proceedings was not established. The possibility that it had happened in an attempt to avoid the application to the proceedings of

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48 *Gordon v Berowra Holdings Pty Ltd* (2005) 62 NSWLR 427; *Gordon v Berowra Holdings Pty Ltd [No 2]* [2005] NSWCA 123.

further restrictive provisions, limiting access to common law damages[49], was postulated by the Court of Appeal[50]. However, as neither party at any stage gave evidence concerning their state of mind at the relevant times, this issue was left unresolved. Materially, a defence, filed by the defendant on 23 March 2002, raised no point as to the non-compliance of the plaintiff's proceedings with s 151C(1) of the Act.

63 To the contrary, the proceedings progressed in a way normal for a determination of such a claim brought within time. In February 2003, the proceedings went to arbitration in Dubbo. The arbitrator made an award in favour of the plaintiff[51]. The defendant sought a rehearing of the claim in the District Court. This was listed for trial before a judge of that Court in May 2003. A hearing date of 21 May 2003 was assigned[52].

64 In April 2003, the plaintiff made an offer of compromise to the defendant[53]. This was not accepted[54]. Then, on 6 May 2003, the defendant made an offer of compromise to the plaintiff. It was signed on its behalf by its solicitor. It stated[55]:

> "The Defendant offers to compromise this claim on the following terms:
>
> (1) The Defendant to pay to the Plaintiff the sum of $50,000.00 plus costs as agreed or assessed;
>
> (2) This offer remains open for 28 days from the date of receipt;
>
> (3) This offer is made in accordance with Part 19A of the District Court Rules."

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49 The *Workers Compensation Legislation Further Amendment Act* 2001 (NSW) substituted s 151H of the Act. The section commenced operation on 27 November 2001.

50 (2005) 62 NSWLR 427 at 430 [6].

51 (2005) 62 NSWLR 427 at 430 [8].

52 (2005) 62 NSWLR 427 at 430 [8].

53 Pursuant to District Court Rules (NSW), Pt 19A ("the DCR").

54 (2005) 62 NSWLR 427 at 430 [9].

55 (2005) 62 NSWLR 427 at 430 [10].

65 At about 5.30 pm on 20 May 2003, the day before the hearing, counsel for the defendant telephoned the plaintiff's solicitor. He told him that he had instructions from the defendant to withdraw the offer of compromise; to apply to the court "in that regard"; and to seek an order that the proceedings "were a nullity ab initio and to seek summary dismissal"[56]. In terms, the defendant did not withdraw its offer. For the first time between the parties, reference was made to s 151C of the Act.

66 Events then moved swiftly. On the following morning, 21 May 2003, the plaintiff gave instructions to his solicitor to accept the defendant's offer of compromise. At 9.37 am a letter notifying such acceptance was sent by facsimile to the defendant's solicitor. It was received immediately afterwards. The trial was abandoned as the parties manoeuvred to protect their respective positions.

67 The defendant's solicitor, by letter, rejected the purported acceptance of the offer of compromise. She stated that the offer was not available for acceptance having regard to the notification on the previous evening and "our intention to seek the necessary leave from the District Court … to withdraw our Offer of Compromise"[57]. Later that day, a notice of motion was filed in the District Court. By this, the defendant sought leave to withdraw its offer of compromise, seeking as well an order that the proceedings be dismissed. On 4 June 2003, an amended defence, pleading contravention of s 151C of the Act, was purportedly filed. However, this was done without the consent of the plaintiff or leave of the Court and it was treated as ineffective. Such leave was eventually sought on 21 August 2003.

The decisional history

68 The various motions of the defendant for leave to withdraw its offer of compromise, for leave to file an amended defence and for summary dismissal of the proceedings came on for hearing in the District Court before Woods A-DCJ on 21 August 2003. The defendant argued that the plaintiff's proceedings were a nullity; that the steps purportedly taken in accordance with Pt 19A of the DCR were of no legal effect in light of s 151C(1) of the Act; and that, accordingly, relief should be granted to the defendant, as asked.

69 The primary judge accepted the defendant's submission that the proceedings were "a nullity or void". He concluded[58]:

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56 (2005) 62 NSWLR 427 at 430 [11].

57 (2005) 62 NSWLR 427 at 431 [15].

58 Reasons of Woods A-DCJ at 4.

"[t]hese proceedings should be dismissed and the offer of compromise being part of the proceedings has no validity and can be withdrawn.

For completeness … I grant leave to file an amended defence in the terms of the Amended Defence filed 10 June 2003. I grant leave for the defendant's offer of compromise of 6 May 2003 to be withdrawn, and I order that the proceedings be dismissed."

70 Against these orders the plaintiff sought, and obtained, leave to appeal to the Court of Appeal. That Court (consisting of Mason P, with whom Sheller and Beazley JJA concurred) upheld the appeal. It set aside the orders of the primary judge. In their place[59], the Court of Appeal directed the entry of judgment in favour of the plaintiff in the sum of $50,000 plus costs, being the amount of the defendant's offer of compromise which the plaintiff submitted, and the Court agreed, he had accepted.

71 By special leave, the defendant now appeals to this Court against those orders. The appeal was heard concurrently with an appeal in *Brighton Und Refern Plaster Pty Ltd (Under External Administration and/or Controller Appointed) v Boardman*[60]. There is some overlap between the issues raised in the two appeals. It is convenient to set out the relevant legislation in these reasons. The Court of Appeal's decision in Mr Boardman's case[61] was expressed as applying the conclusions reached in this case.

The legislation

72 *Legislative background*: Until 1987 in New South Wales, claims for damages by workers, entitled to benefits under workers' compensation law, were generally regulated by the common law[62]. However in 1987, Pt 5 of the Act (specifically, ss 149 and 150) abolished the "common law right" to recover damages from employers in respect of injuries for which the employers were liable to pay compensation under the Act. Those provisions remained in force

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59 Invoking the powers of the Court of Appeal under the *Supreme Court Act* 1970 (NSW), s 75A(10) read with Pt 19A r 3(7) DCR. See (2005) 62 NSWLR 427 at 437 [63].

60 [2006] HCA 33.

61 [2005] NSWCA 167.

62 See *Attileh v State Rail Authority* (2005) 62 NSWLR 439 at 441 [6]-[7] per Mason P. As pointed out there, the entitlement to common law remedies against employers, fellow workers and others was abolished by the Act, s 149(1) (as originally enacted).

until the amendment of the Act by the *Workers Compensation (Benefits) Amendment Act* 1989 (NSW) ("the 1989 Act").

73 As a result of the 1989 Act, a new Pt 5 was inserted into the Act. That Part, entitled "Common Law Remedies", repealed the original ss 149 and 150. Division 2 and Div 3 of Pt 5 restored the right to "common law damages" against such employers, although with certain modifications[63]. The result of this amendment was that the defendant's "right" was restored by statute. What was restored was the right to "common law damages". This is not therefore a case of a right based in, and defined by, legislation (such as entitlements under a workers' compensation statute). There the enacted law grants the rights and fixes the preconditions to recovery. Here the source of the right, once restored, was the common law[64]. The modifications introduced by statute included an obligation to elect between a claim for common law damages and a claim for lump sum compensation under the Act; the introduction of caps on damages for non-economic loss and on some forms of economic loss; the institution of thresholds before common law damages could be recovered; and the introduction of procedural requirements. Such procedural requirements included the one contained in s 151C, the subject of this appeal. Part 5 of the Act applied only to injuries suffered after 30 June 1987[65]. It therefore applied to the plaintiff's case.

74 Further modifications, imposing additional limitations on the award of damages, were later enacted, as by the introduction in 2001 of s 151H, earlier referred to[66]. The effect of these provisions is that separate regimes operate in respect of claims for damages for workplace injuries. The differentiation in entitlements turns on the date on which the injury occurred. In respect of injuries occurring before 30 June 1987, claims at common law are generally unrestricted. In respect of injuries occurring afterwards, the amended limitations in Pt 5 of the Act (including s 151C) apply. The stringent requirements of s 151H apply to limit the award of damages still further in proceedings commenced after 27 November 2001.

75 *The Act's provisions*: The following provisions of the Act are relevant. They appear in Pt 5 Div 2:

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63 cf *Pye v Butterfield Cheese Factors Pty Ltd* (1996) 39 NSWLR 425 at 429-430.

64 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 534-535.

65 See the Act, s 151U and Sched 6, Pt 14, cl 1; cf *Attileh* (2005) 62 NSWLR 439 at 441 [8].

66 These reasons at [76].

"151 Common law and other liability preserved

This Act does not affect any liability in respect of an injury to a worker that exists independently of this Act, except to the extent that this Act otherwise expressly provides.

…

151C 6-months delay before commencing of court proceedings against employer for damages

(1) A person to whom compensation is payable under this Act is not entitled to commence court proceedings for damages in respect of the injury concerned against the employer liable to pay that compensation until 6 months have elapsed since notice of the injury was given to the employer.

(2) Despite subsection (1), the person is entitled to commence court proceedings against the employer if either of the following occurs:

(a) the employer wholly denies liability in respect of the injury,

(b) the employer admits partial liability in respect of the injury but the person is dissatisfied with the extent to which liability is admitted.

…

151D Time limit for commencement of court proceedings against employer for damages

…

(2) A person to whom compensation is payable under this Act is not entitled to commence court proceedings for damages in respect of the injury concerned against the employer liable to pay that compensation more than 3 years after the date on which the injury was received, except with the leave of the court in which the proceedings are to be taken.

(3) The *Limitation Act 1969* does not apply to or in respect of court proceedings to which this section applies.

(4) This section does not apply to the commencement of court proceedings in respect of a claim within the meaning of

Part 5 of the *Motor Accidents Act 1988* or Chapter 5 of the *Motor Accidents Compensation Act 1999*."

76 The foregoing provisions may be contrasted with provisions in Div 3 of Pt 5 of the Act, in which the stated requirements are addressed not to the person claiming damages, but (in various ways) to the court asked to award damages:

"151F General regulation of court awards

A court may not award damages to a person contrary to this Division.

151G Only damages for past and future loss of earnings may be awarded

(1) The only damages that may be awarded are:

(a) damages for past economic loss due to loss of earnings, and

(b) damages for future economic loss due to the deprivation or impairment of earning capacity.

(2) This section does not apply to an award of damages in an action under the *Compensation to Relatives Act 1897*.

151H No damages unless permanent impairment of at least 15%

(1) No damages may be awarded unless the injury results in the death of the worker or in a degree of permanent impairment of the injured worker that is at least 15%.

…".

77 *District Court Rules*: Pursuant to the *District Court Act* 1973 (NSW), the DCR were made. These Rules have been amended from time to time. At the times relevant to the present proceedings, the DCR included Pt 19A, entitled "Offer of compromise"[67]. Relevantly, the following rules appeared in Pt 19A:

"(1) Mode of making offer

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67 The provisions of Part 19A of the DCR in force at the time of these proceedings were superseded by the Uniform Civil Procedure Rules 2005. Rules analogous to Pt 19A of the former District Court Rules are found in the new rules, Pt 20, Div 4, r 20.25-20.32.

(1) An offer of compromise is made to a party under this Part by serving a notice of the offer on the party.

(2) A notice of offer shall:

(a) be prepared in accordance with Part 47 rules 1-5, and

(b) bear a statement to the effect that the offer is made in accordance with this Part …"

78 It will be remembered that par 3 of the defendant's offer of compromise stated that the offer was made in accordance with Pt 19A of the DCR. The relevant rules in that Part provide:

"(3) Time for making or accepting offer

(1) An offer may be made at any time before the time prescribed by subrule (8) in respect of the claim to which it relates.

(2) …

(3) An offer may be expressed to be limited as to the time it is open to be accepted but the time expressed shall not be less than 28 days after it is made.

(4) An offeree may accept the offer by serving notice of acceptance on the offeror or before:

(a) the expiration of the time specified in accordance with subrule (3) or, if no time is specified, the expiration of 28 days after the offer is made, or

(b) the time prescribed by subrule (8) in respect of the claim to which the offer relates,

whichever event is the sooner.

(5) An offer shall not be withdrawn during the time it is open to be accepted, unless the Court otherwise orders.

(6) An offer is open to be accepted within the period referred to in subrule (4) notwithstanding that during that period the party to whom the offer … is made makes an offer … to the party who made the first offer whether or not the second offer is made in accordance with this Part.

> (7) Where an offer is accepted under this rule, any party to the compromise may apply to the Court to enter judgment accordingly.
>
> (8) The time prescribed for the purposes of subrules (1) and (4) … is
>
> (a) where the trial is before a jury – after the Judge begins to sum up to the jury,
>
> (b) where the action has been referred under section 63A of the Act for determination pursuant to the *Arbitration (Civil Actions) Act* 1983 – after the conclusion of the arbitration hearing, or
>
> (c) in any other case – after the Judge gives his decision or begins to give his reasons for his decision on a judgment (except an interlocutory judgment), whichever is the sooner."

79 Provision was made in Pt 19A of the DCR for the withdrawal of acceptance of an offer where the relevant sum was not paid in time or where the court gave leave to do so[68]. Where a party to an "accepted offer" failed to comply with its terms, unless the court "for special cause" otherwise ordered, the other party was entitled "as he may elect" to "such judgment or order as is appropriate to give effect to the terms of the accepted offer"; and "where the party in default is the defendant, an order that the defence be struck out, and … to judgment accordingly"[69].

80 Just as the Act has successively included significant modifications and amendments concerning the rights of workers entitled under the Act to pursue claims for "common law damages", so the DCR introduced, in Pt 19A, significant modifications to the "classical principles dealing with offer and acceptance"[70]. Most importantly, as the Court of Appeal remarked, in a proceeding to which Pt 19A of the DCR applied, an offer "may not be withdrawn unilaterally during the 28 days or more that it is expressed to remain open for acceptance"[71].

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68 DCR Pt 19A r 5.

69 DCR, Pt 19A r 8(1).

70 (2005) 62 NSWLR 427 at 431 [20].

71 (2005) 62 NSWLR 427 at 431 [20].

The issues

81 The following issues arise in the appeal:

(1) *The nullity issue*: Having regard to the terms of s 151C(1) of the Act, were the proceedings commenced by the plaintiff in non-compliance with that provision "a nullity", as found by the primary judge[72]? Did it follow that the offer of compromise, made before the non-compliance with s 151C(1) was relied on, had "no validity and can be withdrawn"[73]? Did the Court of Appeal err in rejecting the defendant's submission to the effect that the offer of compromise, and any acceptance of it, was invalid and in concluding that "no reason in public policy [requires that] a defendant should be prevented from waiving the right to insist on compliance" with s 151C(1)[74]?

(2) *The offer withdrawal issue*: If the District Court proceedings were not a nullity, did the Court of Appeal err in finding, notwithstanding non-compliance with s 151C(1), that the plaintiff might accept the defendant's offer of compromise irrespective of the notice of the defendant's intention to seek leave to withdraw the offer and to raise a defence based on s 151C(1) of the Act? Did the primary judge err in granting that leave? Or did the Court of Appeal err in holding that the leave should be refused and that, in the circumstances then applicable, the application for leave to withdraw the offer of compromise should likewise be refused[75]?

(3) *The waiver and estoppel issue*: Alternatively to (2), was it open to the Court of Appeal, in the light of the terms and purposes of s 151C(1) of the Act, to conclude that the defendant had waived reliance upon that provision or was otherwise precluded from doing so, at the time it first sought to rely on the provision, by reason of the principles of estoppel[76]?

(4) *The judgment validity issue*: In light of the resolution of the foregoing issues, did the Court of Appeal err in concluding that judgment should be

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72 Reasons of Woods A-DCJ at 4.

73 Reasons of Woods A-DCJ at 4.

74 (2005) 62 NSWLR 427 at 435 [47].

75 (2005) 62 NSWLR 427 at 437 [62].

76 (2005) 62 NSWLR 427 at 436 [50].

entered in favour of the plaintiff in accordance with the defendant's offer of compromise that the plaintiff had accepted[77]?

82 *The finding of nullity*: The conclusion that the proceedings in the District Court, commenced contrary to s 151C(1), were void and a nullity, rendering "everything done following the issue of these proceedings … a nullity"[78] was central to the reasoning of the primary judge. It was on the basis of that conclusion that his Honour held that the offer of compromise and purported acceptance of it were also nullities and that the entire proceedings should be dismissed. The conclusion that the offer of compromise had "no validity" and could be withdrawn, together with the grant of leave for such withdrawal, the permission to file an amended defence and the order of dismissal, were all dependent upon that conclusion.

83 So much is clear from the terms of the primary judge's reasons. They were based on his Honour's view that s 151C(1) of the Act was enacted as a statutory precondition to the valid commencement of proceedings and that it was designed to protect a facility for settlement negotiations outside the courts that reflected a public policy which the courts were obliged to uphold[79]. Treating the defendant's offer of compromise and the acceptance of that offer as something done by the parties in breach of the precondition established by Parliament, the primary judge concluded that such steps in the proceedings could not exist separately from the invalid proceedings themselves. They therefore fell with them, once the invalidity was exposed, as it had been, on the initiative of the defendant.

84 *The error of the finding*: Ultimately, the consequences of s 151C(1) of the Act, in the events proved in the evidence, depend upon the purpose and application of the Act, derived from its language. For a number of reasons, the Court of Appeal was correct to reject the conclusion of the primary judge that non-compliance with s 151C(1) rendered all that followed in the proceedings null and void and of no effect.

85 First, s 151C(1) does not use the language of nullity or voidness. It is, instead, expressed in terms of what a person to whom compensation is payable under the Act is entitled, or not entitled, to do. Unlike ss 151F, 151G and 151H,

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77 (2005) 62 NSWLR 427 at 437-438 [63]-[64].

78 Reasons of Woods A-DCJ at 4.

79 He referred to *National Mutual Fire Insurance Co Ltd v The Commonwealth* [1981] 1 NSWLR 400 and *Howard v Bodington* (1877) 2 PD 203 at 210 per Lord Penzance.

it is not addressed to what the court may do in the award of damages. The Act does not state the consequences of breach of the non-entitlement expressed in s 151C(1). Deriving those consequences therefore depends on drawing, from the language and apparent purpose of the provision, outcomes which the Parliament has not stated.

86 The duty imposed on a person by s 151C(1) is one of imperfect obligation[80]. Where Parliament has enacted a provision in language which holds back from attaching consequences of nullity and voidness to the acts of a person in breach, it requires a very strong indication elsewhere in the Act that this is Parliament's purpose, if the Court is to derive an implication that this is so. This is because of the drastic consequences that can follow conclusions of nullity and voidness in the law[81].

87 Secondly, an indication that a different consequence was envisaged by the Parliament appears in the fact that the subject matter of s 151C(1) of the Act is the commencement of court proceedings. In referring to non-entitlements, the Act does not use language appropriate to the denial of jurisdiction in the courts concerned or the withdrawal of jurisdiction earlier exercised. It is self-evidently a serious matter to suggest that a proceeding in a court, although apparently valid, is conducted without lawful jurisdiction, and is void and without effect. To impose such drastic consequences, so potentially disruptive to court proceedings, disconcerting to parties and misleading to the public that relies on the validity of such proceedings, the clearest language in the legislative prescription would be required. The language of s 151C(1) falls far short of requiring such an interpretation[82].

88 Thirdly, it is relevant that s 151C(1) of the Act is addressed, without differentiation, both to the District Court of New South Wales (where the plaintiff commenced his proceedings) and also to the Supreme Court of that State (where he might have done so). The Supreme Court is constitutionally

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80 cf *The Commonwealth v Mewett* (1997) 191 CLR 471 at 550; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 53 [138]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 360 [70]; *Truong v The Queen* (2004) 78 ALJR 473 at 498 [140]; 205 ALR 72 at 106-107; *Bashford v Information Australia (Newsletters) Pty Ltd* (2004) 218 CLR 366 at 420 [145].

81 *Gordon v Berowra Holdings Pty Ltd* (2005) 62 NSWLR 427 at 434 [42]; cf *Minister for Immigration & Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597.

82 For an example of an obligatory requirement, see *Gordon v Berowra Holdings Pty Ltd* (2005) 62 NSWLR 427 at 434 [41]-[42].

recognised[83]. It is a superior court of record whose orders are treated as valid until set aside by a court with the authority to do so[84]. In the face of the language of s 151C(1), which refers generally to "court proceedings", it is difficult to adopt a differential interpretation of the consequences of non-compliance in the case of proceedings in the District Court, as in the Supreme Court. Yet the Supreme Court is a superior court of general jurisdiction, whose orders are not invalid, even if made in excess of jurisdiction, until quashed or set aside on appeal[85]. This is a further reason for rejecting the inference of nullity and voidness of the proceedings.

89 Fourthly, the particular provisions of s 151C(2) of the Act hypothesise that, at the very least, the court in which proceedings are commenced has jurisdiction to decide whether either of the events specified in that sub-section has occurred so as to entitle the person to commence the proceedings. Because exceptions are expressly allowed to the enacted non-entitlement to commence proceedings, it is clear that Parliament entrusted the courts in which proceedings are commenced to differentiate between cases where facts are established which would enliven the exceptions; and cases where they are not. Once this feature of the court's jurisdiction is recognised, the proposition that all proceedings brought in breach of s 151C(1) are null and void *ab initio* cannot be upheld[86].

90 Fifthly, it is also important to recognise that neither of the exceptions contemplated by s 151C(2) is such that it would necessarily, or at all, appear on the record of the court proceedings. Whilst a defence, filed after six months from the commencement of proceedings, might disclose an employer's denial of all liability, par (a) of s 151C(2) contemplates an earlier such denial which may have been made informally, orally or by letter, and not disclosed in the pleadings. Likewise, to establish that the employer has admitted partial liability but that the person "is dissatisfied with the extent to which liability is admitted" for the purposes of par (b) of s 151C(2), would require proof of facts typically external to the court record. In these circumstances, the provisions of s 151C(1) of the Act are not apt to the postulated consequence of voidness and nullity. The internal evidence of the section, read as a whole, contradicts such a conclusion.

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83 Constitution, s 73(ii).

84 *Supreme Court Act* 1970 (NSW), Pt 2, Div 1, s 22; cf *DJL v Central Authority* (2000) 201 CLR 226 at 280-281 [140]-[141]; *Moll v Butler* (1985) 4 NSWLR 231 at 234.

85 *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 184 [49], 235-236 [216] and 249 [257]; *Ruddock v Taylor* (2005) 79 ALJR 1534 at 1561-1562 [169]-[174]; 221 ALR 32 at 68-70.

86 cf *Ruddy v Procurator Fiscal, Perth* [2006] UKPC D2 [55]-[57] per Lord Carswell.

91 Sixthly, where jurisdiction is vested in courts to resolve disputes between parties, it ordinarily follows that such courts enjoy the jurisdiction and powers to decide the relevant factual and legal issues incidental to the establishment of their jurisdiction[87]. To deprive a court of such entitlements is a serious thing[88]. To have that effect, legislation will not normally leave the outcome to inference but will spell it out in terms that are clearer than those of s 151C(1) of the Act.

92 Seventhly, whilst it is true that "no Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act"[89], where illegality and contrary public policy are propounded, and the rule is expressed in legislation, the obligation of a court is to derive the purpose and intended operation of the legislation from its language and apparent purpose[90].

93 In the present case, the purpose of s 151C(1) is to afford parties, potentially engaged in proceedings for damages in respect of workplace injuries, an opportunity to settle their disputes before proceedings are begun. The experience of the law has shown that, once proceedings are commenced (especially in comparatively small claims), the costs of the proceedings in relation to the recovery of the plaintiff become critical to the prospects of settlement. That is why s 151C(1) has removed the entitlement, which an injured person would otherwise enjoy, to commence court proceedings for damages immediately.

94 However, as s 151C(2) indicates, there will be circumstances (as there stated) where it is clear that liability is wholly or partly denied and that an interval for settlement negotiations is likely to be unfruitful. Similarly, apart from the exceptions stated in s 151C(2), other circumstances may exist where a defendant does not wish to plead the disentitlement stated in s 151C(1).

95 The reasons for this may be complex or simply reasons of convenience. The language of s 151C(1) is not stated in the imperative terms apt to forbid the parties, despite their own assessment of their interests and convenience, to

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87 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 505 [72] and cases there cited.

88 See for instance, *Brakespeare v The Northern Assurance Co Ltd* (1959) 101 CLR 661 at 668.

89 *Holman v Johnson* (1775) 1 Cowp 341 at 343; 98 ER 1120 at 1121.

90 See for instance, *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 427, 429, 430.

proceed to litigation within a shorter time[91]. Doing so would not be such an "immoral or illegal act" as to attract a public policy reason for denying the parties the opportunity to choose their own litigious battleground. The court has no power, under s 151C(1) to extend time or to ignore a time default. But consistent with the long-standing interpretation of like provisions in limitation statutes, a party might elect not to raise the provisions of the section[92]. To deny a defendant the right to do this and to insist on intervention by the court (although the court will ordinarily be unaware of the date when "notice of the injury was given to the employer") is to impose a meaning on s 151C(1) that the language of the sub-section and settled authority contradicts[93].

96 Eighthly, when s 151C(1) was enacted to address court proceedings for damages, it was provided against the background of the character of such proceedings, as they are ordinarily conducted in the District Court of New South Wales, indeed in courts throughout this country. Such proceedings are typically conducted between disputing parties, commonly represented by qualified lawyers, who define the issues for trial and choose those issues which they select according to their view of the parties' own best interests[94].

97 It is for this reason that procedures are adopted to define the issues. In the District Court, those procedures envisage that it is for a defendant to plead its grounds of defence. Ordinarily, it is not for the Court to intervene to insist that grounds be litigated which the parties have not chosen to dispute.

98 In the present case, it seems unlikely that the defendant, represented by an experienced solicitor, presumably retained by the defendant's insurer, was totally unaware of the procedural provisions of the Act, and specifically of s 151C(1). In these circumstances, given the way such proceedings are normally conducted (a fact of which Parliament would be taken to have been aware) it is impossible to accept an interpretation of s 151C(1) that postulates that proceedings which have commenced in a time short of the six months provided, forever carry a fatal "brand of invalidity on [their] forehead" that might render such proceedings void and their outcomes a nullity[95].

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91 *Admiralty Commissioners v Valverda* [1938] AC 173 at 185.

92 *Hawkins v Clayton* (1988) 164 CLR 539 at 560.

93 *Whiteford v The Commonwealth* (1995) 38 NSWLR 100 at 106, 114; *The Commonwealth v Rhind* (1966) 119 CLR 584; cf *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850.

94 *Hawkins v Clayton* (1988) 164 CLR 539 at 549.

95 *Smith v East Elloe Rural District Council* [1956] AC 736 at 769 per Lord Radcliffe.

99 In the type of "proceedings" to which s 151C(1) of the Act was addressed, it was left to the parties, in the ordinary way, by their pleadings, to raise issues such as the application of s 151C(1), thereby presenting them to the court for resolution. This the defendant in the present case failed to do until virtually the last moment before the trial. Whatever the reason for that omission, nothing in s 151C(1) of the Act forbade the defendant from earlier omitting to raise the requirements of the sub-section in defence. Nothing imposed on the District Court an obligation, of its own initiative, to discover the omission and to insist that it be cured.

100 *Conclusion – the primary decision miscarried*: The foregoing conclusions follow from an analysis of the meaning of s 151C(1) of the Act, derived from its language, its presumed purpose and its intended operation. It follows that the primary judge therefore erred in concluding that the proceedings commenced by the plaintiff outside the time stated in s 151C(1) were a nullity for non-compliance with an essential statutory precondition. It follows that the primary judge's conclusion that the offer of compromise, as part of the proceedings, was a nullity and on that ground had no valid operation, was also mistaken.

101 The result of this analysis is that the reasoning of the primary judge was wrong and the exercise of his powers miscarried. The Court of Appeal was correct to so hold and, in consequence, to address for itself the decision which the District Court ought to have made on the defendant's motion for leave to file an amended defence, to withdraw the defendant's offer of compromise and to have the proceedings dismissed[96].

The applications for leave and judgment

102 *The approach to leave*: It sometimes happens that parties, faced with the obligations of the trial, discover grounds of defence, not earlier noticed, and seek, belatedly, to amend their pleadings to raise such a defence for the first time.

103 In *The Commonwealth v Verwayen*[97], Dawson J explained what should happen where a statutory period of limitation upon the bringing of proceedings exists which had not earlier been pleaded. The first question for determination is whether the legislative provision in question "bars a remedy rather than extinguishes a cause of action"[98]. Statutes of limitation exist in both of these

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96 (2005) 62 NSWLR 427 at 436 [49]-[55].

97 (1990) 170 CLR 394 at 456.

98 *Verwayen* (1990) 170 CLR 394 at 456; see also *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 543 [98].

forms[99]. But where expressed in terms that only limit the bringing of the action, such provisions have "been long held to go, not to the jurisdiction of a court to entertain a claim, but to the remedy available and hence to the defences which may be pleaded"[100]. In the absence of a pleading, raising such a procedural bar, the statutory limitation question "does not arise for the consideration of the court"[101]. To be given effect, a limitation provision of this kind must be pleaded[102]. If it is not pleaded it is said to have been waived although, as Dawson J pointed out in *Verwayen*[103], "the use of the term 'waiver' in this way exemplifies its imprecision. A waiver of this kind does not amount to an election and does not necessarily give rise to an estoppel."

104 What, then, is to happen when a provision of the kind found in s 151C(1) of the Act is raised? If it is pleaded promptly, there is no question but that it must be given effect so as to uphold the express command of Parliament. So much was accepted by the Court of Appeal in the present case[104]. It concluded that, in such a case, where a defendant was faced with a clear breach of the requirements of s 151C of the Act, it might move on that basis for summary dismissal of the proceedings. A court would then have no power to excuse non-compliance or to grant leave for the proceedings to continue. Unless the case fell within the very limited exceptions provided in s 151C(2) of the Act, the terms of s 151C(1) would have to be given effect[105].

105 But what is to be done when a suggested non-compliance with s 151C(1) of the Act is not raised promptly but presented as an issue for the first time on the eve of the trial? The Court of Appeal considered that, in such a case, the defendant required leave to raise the point. Having regard to the particular circumstances, the Court of Appeal concluded that such leave should be refused,

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99 For example, a difference introduced by the *Limitation Act* 1969 (NSW), s 63 was that many causes of action were "extinguished" at the expiry of the limitation period. See *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166 at 182.

100 *Verwayen* (1990) 170 CLR 394 at 473 per Toohey J.

101 (1990) 170 CLR 394 at 473; cf *The Commonwealth v Mewett* (1997) 191 CLR 471 at 534-535; *Ronex Properties Ltd v John Laing Constructions Ltd* [1983] QB 398.

102 *Verwayen* (1990) 170 CLR 394 at 456 citing *Re Burge; Gillard v Lawrenson* (1887) 57 LT 364.

103 (1990) 173 CLR 394 at 456.

104 (2005) 62 NSWLR 427 at 433 [35].

105 (2005) 62 NSWLR 427 at 433 [35], [37]; cf 433 [39], 434 [42].

as should the associated application for leave to withdraw the offer of compromise[106]. The defendant contested the Court of Appeal's approach to its belated applications. It argued that s 151C(1) of the Act, and the policy to which it gave effect, obliged the provision of relief, so as to uphold the purpose of the Parliament.

106 In *Verwayen*[107], Dawson J succinctly explained the approach proper to such circumstances:

> "A defendant who fails to plead a period of limitation may apply for leave to amend his defence to enable him to do so … The considerations which govern a decision to grant or refuse leave to amend are of a different kind from those which go to establish an estoppel. The rules of court have always provided that leave to amend pleadings may be given for the purpose of determining the real question in controversy between the parties … and an amendment should ordinarily be allowed if any harm arising from so doing can be compensated for by the imposition of terms upon the party asking for the amendment[108] … The usual terms which are imposed are an order for costs or an adjournment. In granting leave to amend, a court is concerned with the raising of issues and not with their merits. Of course, an amendment which is futile because it is obviously bad in law will not be allowed. But it is no ground for refusing an amendment that it raises a claim or defence which ought not to succeed. That will be an issue upon trial. An amendment may, however, be refused because it is made at such a late stage that neither costs nor an adjournment can compensate the other side for the failure to raise the issue at an earlier stage."

107 In support of this last proposition, Dawson J cited *Ketteman v Hansel Properties Ltd*[109]. In that case, the House of Lords had to consider an application for amendment, to plead a limitation defence, made at the stage of final addresses during the trial. Of such a grossly delayed plea, Lord Griffiths said[110], in a passage cited with approval in *Verwayen*[111]:

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106 (2005) 62 NSWLR 427 at 437 [62].

107 (1990) 170 CLR 394 at 456.

108 Citing *Shannon v Lee Chun* (1912) 15 CLR 257; *Tildesley v Harper* (1878) 10 Ch D 393 at 396-397; *Cropper v Smith* (1884) 26 Ch D 700 at 710.

109 [1987] AC 189.

110 [1987] AC 189 at 219.

111 (1990) 170 CLR 394 at 457 per Dawson J. See also at 465 per Toohey J.

> "I have never in my experience at the Bar or on the Bench heard of an application to amend to plead a limitation defence during the course of the final speeches. Such an application would, in my view, inevitably have been rejected as far too late. A defence of limitation permits a defendant to raise a procedural bar which prevents the plaintiff from pursuing the action against him. It has nothing to do with the merits of the claim which may all lie with the plaintiff; but as a matter of public policy Parliament has provided that a defendant should have the opportunity to avoid meeting a stale claim. The choice lies with the defendant and if he wishes to avail himself of the statutory defence it must be pleaded. A defendant does not invariably wish to rely on a defence of limitation and may prefer to contest the issue on the merits. If, therefore, no plea of limitation is raised in the defence the plaintiff is entitled to assume that the defendant does not wish to rely upon a time bar but prefers the court to adjudicate on the issues raised in the dispute between the parties. If both parties on this assumption prepare their cases to contest the factual and legal issues arising in the dispute and they are litigated to the point of judgment, the issues will by this time have been fully investigated and a plea of limitation no longer serves its purpose as a procedural bar."

108 In *Verwayen*, the defendant had applied to amend its defence to plead the limitation provision and had been granted such leave. The plaintiff then pleaded waiver or estoppel. The case proceeded to resolution on one or other of these grounds[112]. However, in *Ketteman*, as in the present case, the defendant raising the limitation point so belatedly had first to overcome a procedural barrier to having the point considered at all. This was presented by the necessity to secure leave to raise the point at such a late stage. The need for such leave obliged the court, asked to provide it, to consider all the circumstances of the case and to decide where the requirements of the law and the balance of justice lay.

109 *The parties' arguments*: Keeping in mind the considerations referred to by Dawson J in *Verwayen*, can it be said that the Court of Appeal erred in this case in concluding that such leave should be refused? This question presents subordinate questions such as: Would a decision to refuse leave impermissibly elevate the power in the DCR to grant or refuse such leave so as to negate the command of Parliament in s 151C(1) of the Act? Would upholding a settlement achieved by accepting an unwithdrawn offer of compromise, after notice had been given of intended reliance on s 151C(1), amount to an impermissible gloss on the provisions of that sub-section? Should the leave be granted because the point had been raised before final judgment, indeed before trial?

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112 *Verwayen* (1990) 170 CLR 394 at 463. As Dawson J pointed out, Deane J and he resolved the issues in that appeal on the basis of estoppel. Toohey and Gaudron JJ did so on the basis of waiver.

110 The defendant emphasised that the policy reflected in s 151C(1) of the Act was addressed to something more important than the interests of the plaintiff and the defendant *inter se* in their particular case. It was addressed to the efficient management of personal injury litigation; the provision of a timetable designed to promote effective settlement negotiations; and the appropriate use of the courts in personal injury proceedings at common law. Such proceedings, it will be remembered, had earlier been abolished. They were only restored on conditions designed to reduce needless or unwarranted litigation.

111 Such arguments constitute alternative ways of looking at the issues presented by cases of this kind. They can be viewed, on the one hand, as raising questions concerning the construction of the applicable legislation and ascertaining its intended operation in the given case. Alternatively, they can sometimes be viewed as raising questions as to the suggested illegality of invoking jurisdiction and the power of a court to enforce rights classified as illegal because of statutory provisions enacted to achieve an identified public policy of general application[113].

112 The defendant submitted that, even if the primary judge had been wrong in categorising the proceedings brought by the plaintiff (and the consequential offer of compromise made by the defendant) as null and void, he had been correct to allow the defendant the belated opportunity to raise its defence based on s 151C(1) of the Act and, in consequence of granting such leave, to dismiss the plaintiff's proceedings. Upon this argument, the plaintiff might be entitled to be protected as to his costs. But the issue having been raised, even at a late stage, it was properly placed before the District Court and correctly admitted so that the ultimate determination would involve the application of the law as enacted by the Parliament.

113 It is true that in the present case, the s 151C point was not raised as belatedly as was the limitation defence described by Lord Griffiths in *Ketteman*. On the other hand, it was not signalled by the defendant until late on the afternoon on the day before the trial was listed for hearing. Moreover, it was not presented to the District Court for decision until the very day assigned for the hearing. Most especially, it was not so presented until after the defendant had made a formal offer of compromise, never expressly withdrawn, and declared to be made in accordance with Pt 19A of the DCR. Under that Part of the Rules, and in accordance with the terms of the offer made, it remained open for 28 days from the date of its receipt. It was thus open on the morning of trial when the

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113 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410 at 413; *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215 at 218-219, 226, 236.

plaintiff purported to accept it. In accordance with Pt 19A r 3(5) DCR, it could not be withdrawn without an order of the District Court.

114 By filing its notice of motion in the District Court, seeking leave to withdraw the offer of compromise which it had made, the defendant affirmed the making of its offer and its validity, until such leave was granted. No evidence was given by or for the defendant, or its solicitor, to explain the failure to plead the defence earlier. In particular, no evidence was offered to suggest that the defendant had acted under a misapprehension about the law or mistake about the facts concerning the application of s 151C of the Act. Certainly, there was no explicit evidence to suggest that, by his conduct, the plaintiff had contributed in any way to the defendant's state of mind[114].

115 The defendant objected to the Court of Appeal's reliance on the requirement in the DCR obliging it to secure leave to withdraw the offer of compromise. This, it was suggested, elevated court Rules, designed for the *ordinary* case and placing them above the proscription enacted by the Parliament for this *exceptional* case. As the defendant put it, neither the offer of compromise made under Pt 19A of the DCR, nor its purported acceptance, nor any common law contract between the parties, could oust the operation of s 151C(1) of the Act, with its public policy purposes, once that provision was pleaded and presented to the court for determination.

116 The difficulty with these propositions is that they contradict the actual course which the defendant took. The defendant sought leave to file the belated amendment to its defence raising the s 151C point. Moreover, it sought leave, as contemplated by Pt 19A of the DCR, to withdraw its offer of compromise expressly made under that provision. Such leave having been sought, it was the duty of the District Court (and of the Court of Appeal) to grant or withhold such leave in accordance with the relevant considerations. Whilst those considerations necessarily included the policy reflected in s 151C(1), they also included considerations arising from the justice of the particular case. This was so, once it is acknowledged that the restriction on the commencement of proceedings did not destroy the plaintiff's cause of action; that a commencement of proceedings otherwise than in accordance with s 151C(1) of the Act did not render such proceedings null and void; and that, by its pleadings and its conduct, a defendant may be taken to have previously waived reliance on a defence based on s 151C(1) so as to make it unjust in some circumstances to grant leave. If leave were not granted, it would follow that the procedural threshold which the defendant was obliged to pass would remain as a barrier to the consideration and determination of the s 151C issue. As the Court of Appeal observed[115]:

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114 (2005) 62 NSWLR 427 at 437 [59].

115 (2005) 62 NSWLR 427 at 437 [61].

> "The defendant had had well over a year, including the arbitration, to assess its prospects. The fact that it made the offer indicates its ability to do so."

Conclusions, relief and order

117 *Operation of the DCR on the settlement*: It will be apparent that this appeal is ultimately one that turns upon particular facts and the application to them of a procedural discretion afforded to judges of the District Court, by the DCR then applicable, and, on appeal, to the Court of Appeal.

118 Once it is decided that non-compliance with s 151C(1) of the Act did not render the plaintiff's proceedings void or a nullity (as the primary judge thought) those proceedings were validly before the District Court until steps were taken, in accordance with that Court's Rules and practice, to permit a defence based on s 151C(1) to be raised. Before the application for leave for such a purpose was heard, or the leave granted, the plaintiff had accepted the defendant's offer of compromise, and done so within the time limit. The offer had never been expressly withdrawn (if that was legally possible) and was still available for acceptance until leave to withdraw it had been granted by the District Court.

119 By the time the application for leave was before the District Court for consideration, the position of the parties had changed. On the face of things, the plaintiff had accepted the defendant's offer and his proceedings were thereupon settled in accordance with the acceptance of the offer and the application of the DCR. Contrary to the opinion of the primary judge, the provision of leave at that stage would not simply permit the defendant belatedly to withdraw its offer of compromise and to raise a defence under s 151C(1), thereby tendering that issue for trial. It would require the undoing of the completed compromise achieved between the parties by the plaintiff's acceptance of the defendant's offer within time.

120 Once the primary judge's classification of the proceedings as void and a nullity is rejected, his view that the offer of compromise was also null and void must likewise be rejected. The offer was valid until withdrawn. Under the DCR, any such withdrawal required leave of the Court. And such leave was not given before the offer was accepted.

121 *The appellate refusal of leave*: The only way that this reasoning could be defeated would be if the defendant was correct in its argument that a purpose, evident in s 151C(1) of the Act, would be defeated by giving primacy, in the circumstances, to the operation of the DCR, sustaining the consequence of the acceptance in time of the defendant's offer of compromise. The defendant advanced this argument by reference to what it said was the public policy evident

on the face of s 151C(1) of the Act and the illegality involved in the premature commencement of proceedings, contrary to that sub-section.

122 Neither of these arguments is convincing. The fundamental policy evident on the face of s 151C(1) is to promote early settlement of proceedings. Once it is accepted that s 151C(1) does not concern the jurisdiction of the court in which proceedings are commenced and that it is open to a party to refrain from relying on the provision, its essential purpose is revealed as one promoting settlement. Where a considered offer of compromise is made and accepted, that purpose is fulfilled. The provisions of s 151C(1), so understood, do not require the undoing of such a settlement. Nor are the provisions such as to demand orders that would have the effect of voiding the settlement on the grounds of illegality. Section 151C(1) is not expressed in language apt for such a drastic consequence.

123 Normally, even a belated application to raise new defences will be allowed, on terms as to costs, where this would permit a court, before judgment, to decide a matter by the application of the relevant law[116]. However, court practice in respect of belated applications to plead limitation defences has not always been uniform. Thus, different practices arose in England in this regard as between the Court of Exchequer and the Court of Common Pleas, on the one hand, and the Court of King's Bench, on the other[117].

124 In every case where a belated application is made to raise such a defence, it is necessary for the court considering it to weigh all of the relevant considerations and to reach a conclusion that is lawful and just in all of the circumstances. In the present case, the primary judge failed to do this because of the erroneous view that he took that proceedings brought in contravention of s 151C(1) were a nullity and that all aspects of those proceedings were likewise null and void. It therefore fell to the Court of Appeal to reach its own conclusions on the applications for leave. The purpose and effect of s 151C(1) of the Act did not demand that leave be granted. It was open to the Court of Appeal in the circumstances to conclude that it should not be. That was the kind of decision, in the particular facts, that this Court would be slow to disturb[118].

125 *Waiver and estoppel*: In light of this conclusion it is unnecessary in this appeal to embark on an examination of the law of waiver and estoppel. As in the

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116 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 155, 172; cf *Jackamarra v Krakouer* (1998) 195 CLR 516 at 519-520 [4], 539-543 [66].

117 See *Proctor v Jetway Aviation Pty Ltd* [1984] 1 NSWLR 166 at 182.

118 *In the Will of F B Gilbert (dec)* (1946) 46 SR (NSW) 318 at 323; *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* (1981) 148 CLR 170 at 177-178.

Court of Appeal, resolution can be reached by reference to the procedural requirements of the case, determined in the light of the particular facts. Nor, in light of this conclusion is it necessary to examine the separate entitlements (if any) of the plaintiff under what he says were the common law contractual consequences, apart from the DCR, of his acceptance of the offer of compromise whilst it was still open for acceptance. Once the DCR were engaged, a statutory regime governed the rights and entitlements of the parties in respect of the offer of compromise. The appeal to common law "rights" appears to be misconceived. However, it is unnecessary to consider this point further.

126 It might be argued that the Court of Appeal failed to give explicit attention to the relevance to the disposition of s 151H of the Act, with its substantial threshold to the establishment of an entitlement in the plaintiff to damages against the defendant. But once the validity of the defendant's offer of compromise is accepted, until set aside, it must be assumed that such offer took into account any operation of s 151H in the circumstances. No evidence was tendered for the defendant that would have permitted the Court of Appeal to conclude otherwise.

127 In the result, the conclusion reached by the Court of Appeal should stand. It has not been shown to be erroneous. The appeal should be dismissed with costs.