CITATION: *Johnson v Artback NT* [2011] NTMC 031

PARTIES:	MARGARET JOHNSON
	v
	ARTBACK NT: ARTS DEVELOPMENT TOURING INC
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Work Health
FILE NO(s):	20830195
DELIVERED ON:	20 May 2011
DELIVERED AT:	Darwin
HEARING DATE(s):	6 December 2010, 7 December 2010, 8 December 2010 Date of final submissions 3 May 2011
JUDGMENT OF:	Dr John Allan Lowndes

CATCHWORDS:

WORK HEALTH COURT – PROCEDURAL BAR – APPLICATION TO STRIKE OUT – LATE AMENDMENT OF PLEADINGS

Workers Rehabilitation and Compensation Act s 163J(1), s 103D
Berowra Holdings Pty Ltd v Gordon [2006] 225 CLR 363, applied
Prime v Colliers International [2004] FLR 220, considered

REPRESENTATION:

Counsel:

Plaintiff:	Mr O'Loughlin
Defendant:	Mr Cole

Solicitors:

Plaintiff:	Halfpennys
Defendant:	Minter Ellison

Judgment category classification:	B
Judgment ID number:	[2011] NTMC 031
Number of paragraphs:	74

IN THE WORK HEALTH
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20830195

[2011] NTMC 031

BETWEEN:

MARGARET JOHNSON
Plaintiff

AND:

ARTBACK NT: ARTS DEVELOPMENT
Defendant

REASONS FOR DECISION

(Delivered 20 May 2011)

Dr John Allan Lowndes SM:

The Court's Earlier Decision

1. On 23 December 2010 I published my reasons for decision underpinning the Court's conclusion that the present proceedings were commenced prematurely and are barred by the provisions of s 103J(1) of the *Workers Rehabilitation and Compensation Act*. At the same time I invited submissions from the parties in relation to consequential and ancillary matters.

2. I do not propose to repeat my reasons for decision except to say that as there had been no attempt to resolve a dispute concerning the cancellation of payments by mediation the worker was barred from commencing proceedings, seeking a declaration that the cancellation of payments in 2002 was invalid and a reinstatement of benefits. Furthermore, to the extent the worker was, in the alternative, seeking a determination of a

claim for compensation based on a change of circumstances,[1] the commencement of proceedings in that regard were similarly barred because no such claim (or dispute in relation thereto) had been mediated beforehand.

3. However, it became apparent from the worker's written submissions filed on 19 January 2011 regarding consequential and ancillary orders that the worker was never, in fact, pursuing an alternative remedy, but simply seeking a declaration that the cancellation of benefits was invalid and a reinstatement of those benefits. This, in my view, only adds to the confusion and uncertainty surrounding the dispute that was the subject of pre action mediation; and reinforces the conclusion that the Court could not be satisfied that an attempt had been made to resolve by way of mediation a dispute concerning the validity of the cancellation of benefits in 2002 and reinstatement of those benefits.

The Subsequent Course of the Matter

4. In the written submissions filed on 19 January 2011 the worker submitted that given the Court's reasons for decision the proceedings ought to be dismissed. However, it was submitted that the costs of the proceedings should be reserved on the basis that both parties had shown some interest in having the evidence in the present proceedings adopted in further proceedings. [2]

5. The employer made the following submissions:

> The employer submits that the Court should proceed to make a final order in this matter as contemplated by s 166(3) of the *Workers Rehabilitation and Compensation Act* (the Act) and Rule 22 of the *Work Health Court Rules* (the Rules).
>
> Given the finding by the Court that the worker's proceedings were commenced prematurely and are barred by the provisions of section 103

[1] The Statement of Claim was drafted in such an imprecise fashion as to create the impression that the worker was seeking an alternative remedy.
[2] See [4] of the worker's written submissions filed on 19 January 2011.

> J(1) of the Act, the Court should order that the proceedings be dismissed and struck out.[3]

6. The employer proceeded to make submissions in relation to costs. Its primary submission was that the worker should pay the employer's costs. Its secondary submission was that the Court should order the worker to pay some of the employer's costs.

7. Finally, the employer made the following submission:

> An order in relation to costs of the proceedings ought not to await the conduct and outcome of any fresh proceedings for two reasons. The first is that it cannot be assumed that fresh proceedings will be commenced (for example, the matter will likely be the subject of a mediation). The second is that the conduct and outcome of any fresh proceedings can be reflected in a costs order made in relation to those proceedings.[4]

8. During the course of considering those submissions the Court drew the parties' attention to the recent decision of *Cook v Suplejack Pastoral Pty Ltd* 2011 NTMC 02.[5] By way of response the worker filed an interlocutory application dated 25 February 2011, seeking leave to file a further amended Statement of Claim.[6] The amendment which was sought related to paragraph 11 of the Amended Statement of Claim:

> Pursuant to s 103D(4) the worker seeks an order to extend the period to a date to be fixed for the worker to apply to the Authority to have the dispute over the 2002 decision to cancel benefits referred to mediation.
>
> Particulars
>
> The worker had reasonable cause for the failure to apply within the 90 days of the receipt of the s69 notice because:
>
> The worker had no legal representation from 2002 to 2008.
>
> The worker was suffering from the consequences of the injury during the relevant period including:
>
> cognitive deficits;
>
> difficulties with forward planning;

[3] See the employer's written submissions dated 12 January 2011 at [1] and [2].
[4] See [9] of those submissions.
[5] That decision was published on 27 January 2011.
[6] The proposed Further Amended Statement of Claim was attached to the interlocutory application.

difficulties with processing information.

The worker wrongly believed she was not incapacitated or wrongly believed she was going to recover and restore her pre-injury capacity.

9. The Court also received further written submissions from both parties concerning the application of *Cook v Suplejack Pastoral Pty Ltd* to the present case.[7]

10. Having considered the parties' submissions in relation to consequential and ancillary orders, I then drew the parties' attention to the decisions of the High Court in *Berowra Holdings Pty Ltd v Gordon* [2006] 225 CLR 363 and *Brighton Und Refern Plaster Pty Ltd v Boardman* [2006] 225 CLR 402.

11. Those two authorities raised the possibility that the worker's non-compliance with section 103J(1) of the Act may not render the proceedings commenced by the worker invalid or a nullity. Those two authorities suggested that the worker's non- compliance may merely render the proceedings vulnerable to an application to strike out the proceedings or for summary dismissal. It also seem to follow from those two authorities that the current proceedings, although commenced in contravention of section 103J (1) may, nonetheless, survive an application to strike out the proceedings or to move for summary dismissal, and be permitted by the Court to continue.

12. I have since received submissions from both parties in relation to the bearing of those authorities on the present matter.[8]

13. I propose to deal with the matters raised by the two High Court authorities, before dealing with the *Cook v Suplejack Pastoral Pty Ltd* aspect, because the logical starting point is whether the current proceedings are a nullity. The fate of the current proceedings turns upon the answer to that fundamental question.

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[7] See the worker's written submissions filed on 25 February 2011 and the employer's further submissions dated 1 March 2011.

[8] See the worker's written submissions filed on 21 April 2011 and the employer's written submissions in response filed on 3 May 2011.

Are the present proceedings a nullity

14. While noting that the High Court in *Berowra Holdings Pty Ltd v Gordon* found that the commencement of proceedings before the required six months did not make the proceedings invalid or a nullity, the employer submitted that "the decision of the Court was addressing a substantially different statutory scheme from Part 6A of the Workers Rehabilitation and Compensation Act (NT)".[9]

15. The employer submitted as follows:

> ...Gleeson CJ et al in paragraph 16 expressed the view that none of the principles which were applied in the case denied 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. It is submitted that the worker's right in this case to invoke the jurisdiction of the Court is, as expressed by the statute, conditional on the worker taking action before issuing proceedings, namely to attempt to resolve the dispute by mediation.
>
> "...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: *Berowra Holdings* per Kirby J at paragraph 19."
>
> It is the employer's submission that in the within case, the statutory scheme is such that the proceedings are not within the jurisdiction of the Court and/or are a nullity and/or are invalid.
>
> Part 6A of the Act deals with dispute resolution, and in particular mediation. Section 103C provides for the appointment of mediators and sets out the function of a mediator and the purpose of promoting the resolution of a dispute. Section 103D deals with applications for and conduct of mediation and includes the setting of time limits for applying for mediation, documents that the mediator is entitled to receive, and the obligations on mediators to attempt to resolve the dispute. Section 103H creates offences for not complying with the requirements of the mediator.
>
> As the Court has already said in *Johnson v Artback NT* [2010] NTMC 071 the application for mediation plays a pivotal role in defining the scope of the dispute (at paragraph 21).
>
> Section 103 J provides that subject to subsection 3, a claimant is not entitled to commence proceedings under Division 2 in respect of a

[9] See [6] of the employer's written submissions in response filed on 3 May 2011.

dispute unless there has been an attempt to resolve the dispute by mediation under this Division, and that attempt has been unsuccessful.

Section 103 J(2) provides that at the conclusion of a mediation, the mediator must issue to each of the parties a Certificate in the approved form stating that a mediation had taken place, listing the written information provided, setting out recommendations if any, and stating what the outcome of the mediation was.

Section 103K provides that a Certificate issued under section 103J(2) is admissible in proceedings under the Act.

Thus the scheme relating to mediation and the commencement of proceedings under the Act is distinctly different from section 151 C(1) of the 1987 Act which was dealt with in *Berowra Holdings*. Section 151C (1) of the 1987 Act provided that a person to whom compensation is payable under this Act is not entitled to commence proceedings for damages in respect of the injury concerned against the employer liable to pay that compensation until six months have elapsed since notice of injury was given to the employer. As was said in *Berowra Holdings* a Court would not necessarily have the information about how much time had elapsed since notice of injury was given to the employer. In contrast, the pre-condition to the issuing of proceedings in section 103J(1) of the Act is in the context of the mandatory requirement in section 103J(2) that at the conclusion of a mediation the mediator must issue to each of the parties a Certificate in the approved form. That Certificate is admissible in proceedings under the Act and would of course be admissible for the purpose of proving the pre-conditions set in section 103J(2) had been met (assuming that the content of the Certificate of Mediation was accurate and met the requirements of the Act).

The statutory scheme of Part 6A relating to dispute resolution is strongly founded on the compulsory attempt to resolve disputes by mediation before proceedings are issued. It is not, as in *Berowra Holdings*, merely a time issue, which the Court said a defendant may choose to ignore. The legislation contemplates a positive action on the part of the parties to the dispute, namely that they attempt to resolve the dispute by mediation. As a matter of statutory construction, it is a pre-condition to the commencement of proceedings, and a pre-condition which must be met.

It is not a condition which any of the parties can agree not to meet. It is quite different from a statutory time limit which a defendant may choose to ignore if the time limit is not met. It is a legislative requirement imposed on the parties within a legislative scheme establishing a formal mediation process. Section 103J(1) does more than create a right in the employer to plead the failure of the worker to attempt to resolve the dispute by mediation before issuing proceedings.

It is therefore the employer's submission that the legislative provisions of the Act, and in particular section 103J, are sufficiently different from those dealt with by the Court in *Berowra Holdings* that the proceedings in this case commenced without complying with the requirements of section

> 103J(1) are not within the jurisdiction of the Court and/or are a nullity and/or are invalid.[10]

16. The employer submitted that it was unnecessary for it to make a formal written application for the proceedings to be struck out:

> Prior to the conclusion of the hearing on 8 December 2010, the employer made an oral submission that the proceedings be struck out, and has repeated that in subsequent written submissions. Indeed, the worker accepted that was the proper outcome in her written submissions in response. Section 110A(2) provides that the proceedings of the Court under this Division shall be conducted with as little formality and technicality and with as much expedition as the requirements of this Act and a proper consideration of the matter permits.[11]

17. In the alternative, the employer submitted that the Court could summarily dismiss the proceedings.[12]

18. The employer went on to submit that should the Court find that the proceedings are not a nullity or invalid, they should in any event be struck out or summarily dismissed:

> The findings of the Court are that the worker did not comply with the pre-conditions of section 103 J(1). It is submitted that there is no legislative intent that non-compliance can be ignored. There is no legislative provision permitting the non-compliance to be ignored.
>
> The failure to comply with section 103J(1) cannot be cured by an amendment, for the reason that an amendment to the worker's pleadings cannot cure the omission to attempt to resolve the dispute by mediation. An amendment which seeks to extend the time for a mediation presupposes that a mediation has taken place but that the time for doing so has not been met. In this case there was no mediation; no amendment to the pleadings can cure that.[13]

19. Finally, the employer submitted that "even if the proceedings are within the jurisdiction of the Court and are not a nullity and not invalid, section 103J creates a bar which the employer has raised by pleading, and the proper course and the only outcome is to strike out the proceedings (or dismiss summarily)".[14]

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[10] See [7] – [18] of those submissions.
[11] See [19] of those submissions.
[12] See [21] of those submissions.
[13] See [22] – [23] of those submissions.
[14] See [24] of those submissions.

20. The worker's position is that, in light of the decision in *Berowra Holdings Pty Ltd v Gordon*, she should be permitted to continue the present proceedings, notwithstanding her failure to comply with section 103J(1) of the Act.

21. The worker submits that in *Berowra Holdings Pty Ltd v Gordon* the High Court dealt with a very similar provision to section 103 J of the Workers Rehabilitation and Compensation Act.[15] It was submitted on behalf of the worker that both provisions had the objective of promoting the resolution of a dispute before commencing proceedings.[16]

22. The worker noted the observation made by the High Court in *Berowra Holdings Pty Ltd v Gordon* that the New South Wales provision created "an imperfect obligation", and that the statute did not make express provision for the consequences of non-compliance with the provision. [17]

23. The worker relied upon the following passage from the decision of the High Court:

> 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. 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: " A statutory bar, at least in the case of a statute 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…[18]

24. The worker also relied upon the following passage:

> 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 eighteen months later… The employer contends that the second fact is irrelevant and that the first fact constitutes a complete answer to the case. The submissions by the

[15] See [13] of the worker's written submissions filed on 21 April 2011.
[16] See [15] of those submissions.
[17] See [16] of those submissions.
[18] See [17] of those submissions.

> employer should not be accepted. We turn to explain why this is so. 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.[19]

25. It was submitted on behalf of the worker that in *Prime v Colliers International* [2004] FLR 220 at [27] Mildren J appeared to have no doubt that *Berowra Holdings Pty Ltd v Gordon* had general application to the *Work Health Act* (the predecessor to the current Act):

> ...in my opinion, a finding that the claim is invalid does not carry with it a finding that the proceedings in the Work Health Court are a nullity for two reasons. First, in so far as the proceedings may seek an order for medical treatment under s 73, the claim is not invalid. Second, the failure of the worker to make a valid claim, even if it affects the validity of the entire claim, does not necessarily have the consequence that any proceedings brought in the Court are null and void ab initio. In *Berowra Holdings Pty Ltd v Gordon* (2006) 80 ALJR 214 at [13]-[16], the High Court, in a joint judgment of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, pointed out that even in the case of inferior courts, the failure to comply with procedural bars to the commencement of proceedings does not have the consequence that the proceedings are a nullity. Procedural bars merely bar the remedy, not the claim itself.[20]

26. The worker also relied upon the following passages taken from the decision of Mildren J in *Prime v Colliers International*:

> Consequently, in a case such as the present where the worker has brought his claim in the Work Health Court seeking weekly payments, the respondent may seek to have that part of the claim struck out or it may waive its rights and allow the claim to be litigated. As was said in *Berowra Holdings Pty Ltd v Gordon* at [36] "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". The outcome of such an application may depend upon whether the employer has waived non-compliance or is otherwise estopped by its conduct and it may also depend on other factors as the Court's procedural rules have been engaged and the power of the Court which is being invoked is discretionary: see *Berowra Holdings Pty Ltd v Gordon* at [39].
>
> I therefore accept the appellant's argument that the Court does have a power to consider whether it ought to grant relief under s 182(3). I go further: the Court has a discretion to reject the respondent's application also on wider grounds. If relief is granted under s 182(3) the failure to comply with the making of a valid claim within the six month period can

[19] See [18] of those submissions.
[20] See [19] of those submissions.

> be excused. If so, there is no need to require the claimant to commence by lodging his claim all over again.[21]

27. The worker submitted that the employer should be required to file a formal application seeking that the proceedings either be struck out or summarily dismissed.

28. In my opinion, the present proceedings are not a nullity for the following reasons.

29. First, s103J(1) does not use the potent language of nullity or voidness.[22] Rather it is couched in neutral terms of what a claimant is not entitled – or by implication entitled – to do. Furthermore, s 103J (3) provides an entitlement to commence proceedings prior to any attempt to resolve a dispute by mediation.

30. Secondly, the Act does not specify the consequences of failing to comply with s 103J(1). Accordingly, as stated by Kirby J in *Berowra Holdings Pty Ltd v Gordon* "deriving those consequences ...depends on drawing, from the language and apparent purpose of the provision, outcomes which the Parliament has not stated".[23]

31. Thirdly, the duty imposed by s 103J(1) is "one of imperfect obligation".[24] As observed by Kirby J in *Berowra Holdings Pty Ltd v Gordon*:

> 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 of nullity and voidness in the law.
>
> ...and 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 proceedings. In referring to non-entitlements, the Act does not use language that is 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

[21] See [20] of those submissions.
[22] This was a consideration that led Kirby J in *Berowra Holdings Pty Ltd v Gordon* to find that non-compliance with s 151 C(1) of the NSW Act did not render the proceedings a nullity.
[23] [2006] 225 CLR 364 at [85].
[24] [2006] 225 CLR 364 at [86] per Kirby J.

> suggest that a proceeding in a court, although apparently valid, is conducted without lawful justification, 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 such an interpretation.[25]

32. In my opinion those observations equally apply to s 103J(1) of the *Workers Rehabilitation and Compensation Act*. The language of that provision falls far short of evincing an intention that non-compliance with the provision renders any proceedings commenced in contravention of the provision null and void.

33. Fifthly, the purpose of s 103J (1), to borrow the words of Kirby J in *Berowra Holdings Pty Ltd v Gordon*,

> is to afford the 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 prospect of settlement. That is why s151C(1) has removed the entitlement, which an injured person would otherwise enjoy, to commence proceedings for damages immediately. [26]

34. In my opinion, the public policy underpinning the provisions of s 103 J (1) – namely the encouragement of a worker to engage in mediation without immediate recourse to litigation – is not such as to support the construction that non-compliance with the provision renders any proceedings commenced in contravention of the section a nullity. What the underlying policy evinces is the undeniable desirability of parties attempting to resolve their differences through alternate dispute resolution mechanisms without invoking the processes of the Court. This suggests that the statutory provision does not extinguish the right to claim compensation, but rather postpones the remedy for the right to initiate proceedings for the purpose of claiming compensation.

[25] [2006] 225 CLR 264 at 86] – [87].
[26] [2006] 225 CLR 264 at [93].

35. All things considered, proceedings commenced in contravention of section 103J(1) do not render those proceedings invalid or a nullity. If proceedings are commenced in contravention of s 103J(1), then it simply means that the premature commencement of those proceedings is vulnerable to being challenged by the opposing party, and liable to be struck out or summarily dismissed upon the initiative of that party. Until such time such a challenge is mounted the proceedings are properly instituted and remain on foot.

The application to strike out or summarily dismiss the proceedings

36. I now turn to consider whether the proceedings – although not a nullity - should be struck out or summarily dismissed.

37. At the outset I do not consider it is necessary to require the employer to file an application to strike out the proceedings or to move for summary dismissal.

38. Although Rule 21.03(1) of the Work Health Court Rules requires an application for summary judgment to be made in accordance with Part 6 of the Rules,[27] s 110A(2) of the Act and Rule 3.04(1) of the Rules effectively give the Court power to dispense with the requirement to file an interlocutory application, seeking that the proceedings be struck out or summarily dismissed. I see no need for a formal application to be filed seeking the relief sought. Nor do I see the need for any evidence by affidavit. The Court is sufficiently informed of the procedural history of the matter, and seized of the relevant arguments, to enable it to decide whether or not to strike out, or summarily dismiss, the proceedings.

39. In my opinion, a number of matters militate against the proceedings being struck out or summarily dismissed.

40. The power to strike out or summarily dismiss proceedings is discretionary, and is to be exercised judicially, after taking into account all the relevant considerations.[28]

[27] Part 6 of the Rules requires the filing of an interlocutory application together with an affidavit in support.
[28] *Berowra Holdings Pty Ltd v Gordon* [2006] 225 CLR 264.

41. One very relevant consideration is the procedural history of these proceedings.

42. The employer did not seek to raise the s 103J(1) point until after the hearing had commenced. Prior to that time the employer had participated in the mediation process and conducted the proceedings without making the slightest suggestion that the worker's proceedings ran foul of s 103J(1). The only procedural issue that the employer took – and pleaded in its Notice of Defence – was the failure of the worker to apply for mediation within the prescribed period of 90 days. The matter proceeded to hearing on that basis. The s 103J(1) issue only emerged during the course of the hearing.

43. Although the Court granted leave to the employer to amend its Notice of Defence to enable it to plead, and rely upon the provisions of s 103J(1), it is important to put that grant of leave in proper context. Earlier, the Court had given the worker leave to amend her Statement of Claim to include an application for extension of time pursuant to s 103D(4) of the Act. I allowed that amendment so as to enable a real question in controversy to be decided.[29] Having done that, the Court considered that it was also appropriate to allow the employer to amend its Defence. The Court considered that the s103J(1) point was so inextricably linked to the worker's application for extension of time that the employer should be granted leave to amend its Defence. It seemed to me that if the worker was to be afforded an opportunity to seek an extension of time under s 103D(4), then as a matter of logic and commonsense – as well as fairness – the employer should be given an opportunity to raise the worker's non – compliance with s 103J(1).

44. It is important to note that at the time the Court allowed the employer to amend its Defence, it was far from clear that there had been non-compliance with s 103J(1). Furthermore, at that point, I was of the view, however erroneous that might have been, that the provisions of s 103J(1)

[29] See [8] of my reasons for decision delivered on 23 December 2010.

may go to the jurisdiction of the Court to entertain the worker's claim.[30] What I was contemplating at that juncture was an investigation of the relevant factual and legal issues incidental to the establishment of the Court's jurisdiction.

45. As it transpired, I found that the worker's proceedings had been commenced prematurely, and were barred by the provisions of s 103J(1) of the Act. As stated in these reasons, s103J(1) operates as a procedural bar that merely postpones the remedy for the statutory right to bring proceedings under the *Workers Rehabilitation and Compensation Act*.

46. Although the employer managed to overcome the procedural threshold of being allowed to raise the s 103J(1), and having the matter considered by the Court, it does not necessarily follow that the Court should now accede to the employer's application to have the proceedings struck out or summarily dismissed.

47. In my view, the actions of the employer in the context of the *Work Health Court Rules* are a critical factor in considering how the Court should exercise its discretion in relation to the employer's application.

48. By commencing proceedings in the Work Health Court the worker invoked the jurisdiction of the Court, thereby engaging "the procedural law appurtenant to the …court, which in modern times is found primarily in the Rules".[31] Once that procedural law was engaged, the employer chose not to raise the s103J(1) point – nor to move for summary dismissal of the proceedings – until the hearing had commenced. Prior to that time, the employer's inaction had affected the path that the proceedings would take towards ultimate disposition.[32] In my opinion, the worker was entitled to assume that the employer did not wish to take any point in relation to the pre-proceedings mediation, except for her failure to apply for mediation within the prescribed 90 day period. Both parties appeared to have

[30] See [11] of those reasons for decision.
[31] *Berowra Holdings Pty Ltd v Gordon* [2006] 225 CLR 364 at [13].
[32] *Berowra Holdings Pty Ltd v Gordon* [2006] 225 CLR 364 at [14].

prepared their cases on that basis. Furthermore, the matter was litigated on that basis up to the date of hearing and after the hearing, had commenced.

49. Although Kirby J in *Berowra Holdings Pty Ltd v Gordon* was addressing the issue as to whether the employer in that case should be given leave to rely upon the defence based on s 151C(1) of the NSW statute I consider his Honour's observations at [116] to be have equivalent force in the context of the employer's application to have the proceedings struck out or summarily dismissed:

> ...once it is acknowledged that the restriction on the 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 must 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.[33]

50. As made clear in *Berowra Holdings Pty Ltd v Gordon*, the power to strike out or summarily dismiss proceedings is a discretionary power, and the procedural history of a matter is a relevant consideration in the exercise of that discretion. However, as observed by the majority in *Berowra Holdings Pty Ltd v Gordon*, reference to a waiver of an employer's right to rely on s151C(1) is misleading when the outcome of a summary application in reliance on s151C depends on the exercise of a discretionary power given to the court. The conduct of an employer in the nature of a waiver is but one of many factors to be taken into account in exercising the discretion. Any injustice that might be occasioned to a plaintiff or, in the present context, a worker, by a dismissal of the proceedings is another relevant consideration.

51. In my opinion, notwithstanding that the proceedings were commenced by the worker in contravention of the provisions of s 103J(1) of the Act, I do not consider, in the exercise of the Court's discretion, that the proceedings should be struck out or summarily dismissed for the following reasons:

[33] *Berowra Holdings Pty Ltd v Gordon* [2006] 225 CLR 364 at [116].

1. The s 103J(1) was raised by the employer belatedly, it having chosen not to raise the point at an earlier time, within the matrix of the adversarial process and the context of the Rules of Court;

2. The plea based on s 103J (1) was raised so late in the proceedings as to no longer effectively serve its purpose as a procedural bar.[34]

3. The worker's non-compliance with the provisions of s 103 J(1) did not evince a deliberate or intentional disregard for the provisions for s103J(1) of the Act;

4. The worker attended mediation, without the benefit of legal representation, and could not be reasonably expected to know of the pre –conditions for commencing proceedings. Nor could she be reasonably expected to know what issues had to be mediated so that proceedings could be properly commenced in the Work Health Court.

5. Since the s 103 J(1) issue was raised the worker has been willing, ready and able to return to mediation to mediate the s 69 cancellation issue , thereby demonstrating a willingness to take remedial steps to cure the procedural defect with the proceedings. The employer, on the other hand, resisted a return to mediation.

6. In my opinion, the employer has not demonstrated any prejudice that it would suffer if the proceedings were allowed to continue.

7. If the proceedings were to be struck out or dismissed the worker would have to start afresh. That, in my opinion, would be an unjust outcome in all the circumstances.

8. In a case like the present, the Court is obliged to "weigh all of the relevant considerations and to reach a conclusion that is lawful and just in all the circumstances".[35] Put another way, the Court needs to consider "all the circumstances of the case and to decide where the requirements of the law and the balance of justice lay".[36]

9. In my opinion, the requirements of law and the balance of justice lay in favour of allowing the proceedings to continue.

52. Consequently, the proceedings should be allowed to continue, although there has never been an attempt to resolve by way of mediation the dispute concerning the cancellation of benefits. In my opinion, that is not a strange result. Had the employer chosen not to raise the s 103 J(1) point – a choice that was freely available to the employer in the context of the adversarial

[34] See *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 219.
[35] *Berowra Holdings Pty Ltd v Gordon* [2006] 225 CLR 364 at [124] per Kirby J.
[36] *Berowra Holdings Pty Ltd v Gordon* [2006] 225 CLR 364 at [108] per Kirby J.

process and the Work Health Court Rules – the proceedings would have proceeded to finality, without the parties ever having attempted to resolve by way of mediation a dispute that was central to the litigation between the parties. Similarly, had the employer not be granted leave to amend its defence and thereby rely upon the procedural bar, the proceedings would have continued despite non-compliance with s 103J(1).[37] The result would have been analogous to the outcome in *Berowra Holdings Pty Ltd v Gordon*. In my opinion, the procedural bar established by s 103 J(1) of the *Workers Rehabilitation and Compensation Act* is not materially different from the procedural bar created by s 151C(1) of the NSW statute.[38] The two statutory provisions share the common objective of promoting and facilitating the resolution of disputes prior to the commencement of legal proceedings.

The Worker's application to amend and the decision in Cook v Suplejack

53. In light of my conclusion that the proceedings should be allowed to continue, notwithstanding the worker's non-compliance with s 103J(1) of the Act, it is strictly unnecessary to consider the worker's interlocutory application filed on 25 February 2011. However, I think it is appropriate to consider the application, as it raises some important issues concerning the operation of the pre-action mediation process under the *Workers Rehabilitation and Compensation Act*.

54. The worker sought an amendment to the Statement of Claim to enable her to obtain, pursuant to s 103D(4), an extension of time to apply for mediation in relation to the unmediated s 69 cancellation issue. The intention was that upon obtaining such an extension the parties would mediate the issue, thereby remedying (albeit retrospectively) the defective proceedings (due to non-compliance with s 103J(1)). Upon obtaining the

[37] I digress to say that, with the benefit of hindsight, I was possibly too quick to have granted the employer leave to amend its Defence to include the plea based on s 103J(1). Had I refused leave then the proceedings would have been allowed to proceed, notwithstanding non-compliance with the provisions of s 103 J(1) of the Act.

[38] Section 151 C (1) provides that a person to whom compensation is payable under the Act is not entitled to commence court proceedings for damages in respect of the injury concerned against the employer liable to pay compensation until 6 months have elapsed since notice of the injury was given to the employer.

necessary mediation certificate the Court would then be "entitled, as a matter of procedure, to make a nunc pro tunc order permitting the hearing to continue in respect of the cancellation".[39]

55. The employer resisted the application on the following grounds:

1. Once the Court had ruled that the proceedings were barred by the provisions of s 103J(1) the Court cannot grant leave to the worker to amend her pleadings for the reason that the proceedings are not validly before the Court;[40]

2. The Court's power to grant leave to amend proceedings necessarily assumes that the pleadings which are sought to be amended are valid pleadings;[41]

3. Pleadings of proceedings which are barred have no legal status except for the purpose of the Court determining whether the Court has jurisdiction in relation to the matter before the Court, and making consequential orders if jurisdiction is not established;[42]

4. It would an error of law to grant leave to amend pleadings of proceedings which are barred, and accordingly the Court cannot grant such leave;[43]

5. The failure to comply with s 103J(1) cannot be cured by amendment, for the reason that an amendment to the worker's pleadings cannot cure the omission to attempt to resolve the dispute by mediation. An amendment which seeks to extend time for a mediation presupposes that a mediation has taken place but the time limit for doing so has not been met. In this case, there was no mediation; no amendment to the pleadings can cure that.[44]

56. The employer made these submissions in relation to the application of Cook v Suplejack Pastoral Pty Ltd:

> The decision of *Cook v Suplejack Pastoral Pty Ltd* [2011] NTMC 002 does not provide any support for the worker's application to further amend her pleadings. The question for the court in that case is identified in paragraph 10 of the reasons for Judgment, namely:
>
> > Can proceedings be commenced simply by amending pleadings in existing proceedings to introduce new issues in dispute

[39] See [27] of the worker's written submissions filed on 21 April 2011.
[40] See [5] of the employer's further written submissions dated 1 March 2011.
[41] See [7] of those submissions.
[42] See [8] of those submissions.
[43] See [9] of those submissions.
[44] See [23] of the employer's submissions in response filed on 3 May 2011.

> (assuming those new issues have been mediated as required by the Act), or must one or more sets of proceedings be commenced?

It is notable that in *Cook* :

- The proceedings are valid proceedings;
- A primary claim was already before the Court;
- The proposed amendment to the pleadings pursued claims ancillary to the matter already before the Court;
- The Court found expressly that there had been compliance with the mediation required in Division 1 of Part 6A of the Act.

Cook is readily distinguishable from the matter before the Court, and does nothing to assist the worker to overcome the finding already made that the proceedings are barred by section 103J(1) of the Act.[45]

57. The worker, on the other hand, submitted that the application to amend was supported by the decision in Cook v Suplejack Pastoral Pty Ltd:

> The reasoning in *Cook v Suplejack Pastoral Pty Ltd* expresses a view that the Court can, indeed should, allow a matter to be mediated after proceedings have been commenced so as to allow an issue to be determined promptly and efficiently.
>
> Mr Neill SM reached that conclusion after a detailed analysis of the provisions of the Act and Rules, including noting at paragraph 6:
>
> > S 110A(2): The proceedings of the Court under this Division shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Act and a proper consideration of the matter permits.
>
> And at paragraph 8 the Court made mention of sub rule 3.04(1) allowing the Court to make orders relating to "the conduct of the proceedings that the Court thinks are conducive to its fair, complete, prompt and economical determination".
>
> At paragraph 10 Neill SM asked the question.
>
> > Can proceedings be commenced simply by amending pleadings in existing proceedings to introduce new issues in dispute (assuming those new issues have been mediated as required by the Act), or must one or more new sets of proceedings be commenced? The answer to this question requires a consideration of the Act and the Rules.

[45] See [10] – [12] of the employer's further submissions dated 1 March 2011.

It is clear that the question assumes that the matter has been mediated and here the cancellation issue has been held not to have been mediated. But the worker's application in the amendment is to permit this mediation to occur. This is what the worker intends to do, and Mr Neill SM found that this could occur under the Act and the Rules...

And at paragraph 22 the Court rightly concluded that:

> The fact that the Rules specifically allow for the addition by amendment to pleadings of a cause of action which arose after the proceedings were commenced, necessarily contemplates a new dispute which will require mediation pursuant to Part 6A Division 1 of the Act.

At 24 the Court stated "I am satisfied that the manner in which proceedings are commenced before this Court is a matter of procedure rather than substance".

Finally the Court concluded at paragraph 25:

> Accordingly, I conclude for the foregoing reasons that the Work Health Court has the discretion to permit the commencement of proceedings before the Court other than by use of Form 5A or indeed of any form whether prescribed or otherwise. Specifically, I find that the Court can exercise its discretion to permit proceedings to be commenced by amendment to pleadings in existing proceedings so as to add a new or further cause of action, provided that there has first been compliance with the mediation requirements in Division 1 of Part 6A of the Act as to any cause of action.

The cancellation issue can still be mediated if the extension of time is granted. This is permissible and warranted as it allows this Court to progress the matter promptly and economically.

The matter can continue if the following occurs:

1. Worker is given leave to make the application to amend;

2. Extension of time for mediation of the cancellation is granted;

3. Mediation occurs;

4. If not settled at mediation, proceedings resume.[46]

58. The first observation I make is that although the present proceedings are not a nullity and invalid, once the s 103J(1) point was allowed to be taken the proceedings were not properly commenced in accordance with the provisions of that section and therefore liable to be struck out or summarily dismissed. The present proceedings are immediately distinguishable from

[46] See [10] – [20] of the workers submissions filed on 25 February 2011.

the proceedings in Cook v Suplejack Pastoral Pty Ltd. There the existing proceedings had been properly commenced and did not suffer from the procedural flaw, which has been found exist in the present proceedings.

59. I find it difficult to see how the Court, once it has concluded that the proceedings are the subject of a procedural bar, and is in the process of deciding whether or not to terminate the proceedings, can entertain an application to amend the pleadings in any respect. If the Court were, in the exercise of its discretion to decline to strike out or dismiss the proceedings, and to allow the proceedings to continue, it would then be open to, and proper for, the Court to consider an application to amend the pleadings.[47]

60. In my opinion, the Court cannot entertain the worker's application at this stage of the proceedings.

61. However, should that be an incorrect view of the processes of the Court, the relief or remedy sought by the worker does not have a proper statutory basis; and the application should be refused.

62. The objective of the worker's application is to enable the worker to mediate the section 69 cancellation issue, which has been found not to have been mediated prior to the commencement of these proceedings.

63. Section 103D(4) provides that a worker who fails to apply for mediation within the prescribed 90 day period may apply for an extension of time under s104(1). The Court may extend the period if it is satisfied that the failure was occasioned by mistake, ignorance of a disease, absence from the Territory or other reasonable cause: see s 103D(5).

64. In my opinion, the failure to apply referred to in s 103D(4) does not include a complete failure to apply for mediation at all, as is the case in these proceedings. The provision only relates to applications for mediation made outside the specified 90 days. In that regard I agree with the submission made by the employer to the effect that an application for an extension of

time presupposes that a mediation has taken place but the time limit for doing so has not been met.

65. Sections 103D(4) and (5) appear in Division 1 of Part 6A of the Act under the heading of "Application for and Conduct of Mediation". Those provisions are segregated from s 103 J, which is headed "Pre-Condition for Court Proceedings". Between the two sets of provisions there are several other intervening provisions dealing with the mediation process. In terms of the structure of Division 1, there is no structural relationship between ss 103D(4) and (5) and s 103J(1). Nor, in my opinion, is any textual relationship between the two sets of provisions. In my opinion, it was the legislative intent that the two sets of provisions were to stand alone and to operate independently of each other.

66. Section 103J(1) creates a procedural bar, and if invoked by an employer the worker cannot answer or resist an application to strike out or summarily dismiss the proceedings by applying for an extension of time under s 103D(4) of the Act. Proceedings commenced in contravention of s 103J(1) cannot be salvaged by recourse to ss 103D(4) and (5).

67. Had the legislature intended otherwise, then it had at its disposal statutory mechanisms to give effect to that intention.

68. At the time the mediation provisions were introduced into the Act the legislative draftsman could have included in Division 1 of Part 6A of the Act a provision along the lines of s 182 of the Act.[48] That section creates a

[47] However, on the basis of the view I have taken of the consequences of allowing the proceedings to continue, despite non-compliance with s 103J(1), any subsequent application in the form currently before the Court, would be otiose.
[48] This section pre-existed the introduction of the mediation provisions.

precondition for court proceedings, but incorporates a power to dispense with non-compliance: see s182(3).[49] It was open to the draftsman to include a provision excusing compliance with s 103J(1). However, the draftsman chose not to include such a provision in Division 1 of Part 6A.

69. Secondly, the draftsman could have included a nunc pro tunc provision , allowing a worker to apply for mediation after proceedings had been commenced in contravention of s 103J(1), and permitting the Court to give retroactive effect to the mediation, and to treat it as though it had taken place prior to the commencement of proceedings. The draftsman chose not to include such a provision.[50]

70. Finally, the present proceedings are readily distinguishable from the proceedings in *Cook v Suplejack Pastoral Pty Ltd*. Not only had the existing proceedings been properly commenced in the latter case, but the mediation related to a new dispute, which had been mediated as required by the Act.

Formal Orders

71. I make the following orders:

1. The employer's application to strike out the proceedings is dismissed.

2. The worker's application to amend the Statement of Claim is dismissed

72. It follows from the first order that the proceedings are to continue and will need to be re -listed for further hearing. I propose to hear the parties as to the future conduct of these proceedings, including any consequential or ancillary orders.

Dated this 20th day of May 2011.

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Dr John Allan Lowndes
STIPENDIARY MAGISTRATE

[49] In *Prime v Colliers International* [2004] FLR 220 at [29] Mildren J held that the power to excuse under s 182(3) is a power to excuse not only a failure to make a valid claim, but a power to excuse a complete failure to give a notice of claim at all. His Honour's reasoning in *Prime v Colliers International Prime v Colliers International* cannot be extrapolated to the present case because ss 103D(4) and (s) and s 103J(1) are entirely separate provisions and cannot be equated with s 182.

[50] The worker is, in effect, seeking a nunc pro tunc order – an order which the Court has no power to make.