CITATION:	*Tanvir Kirkmani v Delaware North Darwin Casino Pty Ltd v QBE Insurance (AUST) Ltd* [2021] NTLC 027
PARTIES:	TANVIR KIRMANI V DELAWARE NORTH DARWIN CASINO PTY LTD V QBE INSURANCE (AUST) LTD
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	WORK HEALTH
FILE NO(s):	2020-02610-LC
DELIVERED ON:	13 OCTOBER 2021
DELIVERED AT:	DARWIN
HEARING DATE(s):	28 July 2021 and 1 September 2021
DECISION OF:	Gordon JR

CATCHWORDS:

Application to join insurer to Work Health Court proceedings - Application of s126A of the Return to Work Act 1986 *– admissibility of evidence not based on deponent's information and belief – admissibility of evidence outside scope of Orders for filing of Affidavit evidence – Validity of Claim in absence of medical certificate – operation of s 82* Return to Work Act 1986 *– exercise of discretion to join party to Work Health Court proceedings*

Return to Work Act 1986

Limitation Act 1981

Work Health Court Rules 1999

Johannsen v Buslink Vivo Pty Ltd [2018] NTMC 23

Official Trustee in Bankruptcy v Waa [2016] NTSC 69

Australian Consumer and Competition Commission v Launceston Superstore Pty Ltd [2013] FCA 279 *citing Knight v Beyond Properties Pty Ltd (No. 2)* (2006) FCA 192

CBI Contractors Pty Ltd v Abbott (No. 2) [2009] FCA 1129

Prime v Colliers International (NT) Pty Ltd [2006] NTSC 83

Bishop v Bridgelands Securities Ltd (1990) 25 FCR 311;

REPRESENTATION:

Counsel:

	Worker:	Ms Hood
	Employer:	Ms Cheong
	Proposed Respondent:	Mr Salagaras

Solicitors:

	Worker:	Halfpenny's
	Employer:	Hunt & Hunt
	Proposed Respondent:	Hall & Wilcox

Decision category classification:	B
Decision ID number:	027
Number of paragraphs:	93

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

No. 2020-02610-LC

BETWEEN:

TANVIR KIRMANI

Worker

AND:

DELAWARE NORTH DARWIN CASINO PTY LTD

Employer

AND:

QBE INSURANCE (AUST) LTD

Proposed Respondent

DECISION OF L GORDON JR
(Delivered 13 October 2021)

1. The Employer is seeking to join QBE Insurance (Aust) Ltd as a party to the current proceedings.
2. For the purposes of the current Application, it is unnecessary to set out in any detail the circumstances of the alleged injury or any medical evidence pertaining to same.
3. At the Hearing of the Joinder Application it transpired that the Court would need to make determinations on four issues:
    a. The admissibility of the Affidavit evidence;
    b. Compliance with the time limitations pursuant to s126A(2)(b) of the Act;
    c. The validity of the claim for compensation pursuant to s82 of the *Return to Work Act 1986* ('the Act'); and finally
    d. Whether QBE Insurance ought be joined to the proceedings.
4. I note that the Worker took a neutral position in relation to the Interlocutory Application and the disputes arising therein.

Admissibility of Evidence

5. The Employer relies on the Affidavits of Kirralee May Pavy promised 13 and 29 July 2021.
6. In relation to the first Affidavit the Proposed Respondent submits that paragraphs 2, 3 and 5 – 7 should be struck.

7. Rule 17.06 of the *Work Health Court Rules 1999* provides the following:

> ***Content of affidavit***
>
> *(1) Unless these Rules provide otherwise, an affidavit is to be confined to facts that the deponent is able to state of his or her own knowledge.*
>
> *(2) In an interlocutory application, an affidavit may contain a statement of fact based on information and belief if the grounds are set out in the affidavit.*

8. Paragraphs 1 -3 of the Affidavit of 13 July read:

> *"1. I am an employed solicitor at Hunt & Hunt Lawyers, solicitors for Delaware North ("the Employer") on instructions from its insurer, Insurance Australia Limited t/as CGU Workers Compensation ("the Subsequent Insurer") in this matter.*
>
> *2. The Worker was employed by the Employer in or around October 2013 as a Security Guard.*
>
> *3. On or about 27 August 2019, the Worker submitted his resignation with his last day to be worked on 16 September 2019.*

9. In the absence of any evidence or submission that the Workers employment history is within the personal knowledge of Ms Pavy, it is apparent that assertions made a paragraphs 2 and 3 are non-compliant with R17.06(2) as they fail to identify the source or grounds on which that information is derived.

10. Paragraph 4 of the Affidavit annexes the Workers Compensation Claim Form, which clearly asks at Part 1 Item 2: "*your occupation and job title at the time of the injury or disease"* to which the Worker has stated: "*Uniformed Security Officer"*.

11. No evidence or submission was received indicating that the information provided by the Worker in his claim form was incorrect or misleading, I therefore have no reason to doubt that the information contained therein and conclude that the Worker was employed by Mindil Beach Casino Darwin as a uniformed security officer.

12. The Employer argues that the Affidavit should be read as a whole and that the Court can reasonably draw the inference that the deponent formed her belief that the Worker was employed as a security guard by reference to the annexed claim form.

13. I accept that submission. Although it may be preferable for the grounds of the belief to be laid bare on the face of the Affidavit, it would be trite to suggest that evidence given in the body of an Affidavit which is clearly verifiable by reference to annexed material be struck and inadmissible.

14. With regard to the assertion at paragraph 2 of the Affidavit that the Worker commenced his employment in October 2013, in my view this is less clear in the annexed material. The Worker states at Part 1 Item 4: *I have joined Mindil Beach Casino (formerly known as Skycity) in year 2015…"* and later states "*I did not work anywhere else since year 2013. From my first joining and then rejoining in year 2015. This is the only job I did for last 5 years."*

15. Given the uncertainty as to the date of commencement and the lack of compliance with R17.06(2) the words "*in or around October 2013'* are struck from paragraph 2 of the Affidavit.

16. Likewise, the date of resignation at paragraph 3 is not otherwise established by the Affidavit and the deponent has not stated basis of that belief. Accordingly, paragraph 3 is struck out.

17. Paragraphs 5, 6 and 7, to which the Proposed Respondent objects, lead evidence with respect to the subsequent and prior insurers and dates on which they were on risk with respect to the Worker's claim. Although in this instance Ms Pavy has indicated the source of her information and belief, being instructions from the claims consultant, the Proposed Respondent takes issue that the grounds of the claims consultant's belief is not set out.

18. The leniency afforded to Affidavit evidence pursuant to R 17.06(2) reflects the nature of how Interlocutory Applications should be heard and determined. That is, ordinarily without cross examination and in the absence of the parties. Interim hearings should be conducted expeditiously and in a cost effective manner.

19. Indeed the Act specifically provides for the substantive proceeding for compensation to be "*conducted with as little formality and technicality, and with as much expedition, as … a proper consideration of the matter permits*".[1] And further "*the Court in proceedings under this Division is not bound by any rules of evidence but may inform itself on any matter in such manner as it thinks fit*"[2]

20. Interlocutory Applications, while often opposed and evidence challenged, are not in the nature of the rigorous testing of evidence as required at a final hearing where one would expect a claims manager would give the primary fist hand evidence of the transition between insurers, should that be in dispute.

21. In the current matter it does not appear that the evidence sought to be struck out is in dispute. Similarly to paragraph 2 the evidence is readily verifiable in annexure 'KP3'[3] and further in the Proposed Respondent's written submissions[4] where the Proposed Respondent confirms QBE was the Employers approved insurer for the period 30 June 2008 to 4 April 2019.

22. In my view Ms Pavy is entitled to rely on the instructions verily believed when deposing to the matters in paragraphs 5 – 7. Further and noting s110A(3), I accept the submissions of Ms Cheong for the Employer that the Affidavit does not offend the rules of evidence so fundamentally that the evidence should be struck out.

23. Accordingly paragraphs 5, 6 and 7 of the Affidavit of 13 July 2021 remain undisturbed.

24. In relation to the second Affidavit of 29 July 2021, the Proposed respondent notes that at the first adjournment of the Joinder Application the Employer was given leave "*to file further Affidavit evidence in relation to the date of service of the Worker's Application to the Work Health Court…*" and submits that the paragraphs[5] which go outside the constraints of that Order should be struck.

25. The offending paragraphs relate primarily to matters relevant to the time limitation argument which was first postured by the Proposed Respondent at the Hearing on 28 July. It was the raising of this argument that gave rise to the need for an adjournment and additional evidence regarding the date of service and prejudice.

[1] Section 110A(2)
[2] Section 110A(3)
[3] Being correspondence from the subsequent insurer to the primary insurer that the date of injury likely places both insurers on risk.
[4] Filed in Court at the first hearing of the application on 28 July 2021
[5] Being paragraphs 3 & 4 and 7 – 16.

26. The Employer argues that the Affidavit material simply seeks to put a full narrative before the Court of the events which occurred following the lodging of the Workers claim for compensation. The Employer submits that the time limitation defence raised triggered the need for further evidence in this regard and while the Orders of 28 July did not provide for evidence of this nature, nor did it prohibit same.

27. Ordinarily the provision of additional evidence relevant to matters in issue is unlikely to result in significant controversy. In the current matter however, during the period of adjournment there was an exchange of correspondence between parties and the Court which went to, inter alia, the filing of further evidence.

28. On Thursday 5 August 2021 at 5.17 am the Proposed Respondent by email sought the following:

> *"a. Respondent to file all further affidavit material by 6 August 2021;*
>
> *b. Leave for the Respondent to file written submissions by 6 August 2021."*

29. By reply email at 5.29 pm I advised:

> *"I confirm the time for filing the Respondents further Affidavit will be extended to close of business 6 August. In relation to the filing of further written submissions, I will await the Employers view prior to formally making any further directions in relation to same.*
>
> *I trust the Worker will take a neutral position, please advise if this is not the case.*[6]*"*

30. Ms Cheong on behalf of the Employer responded on the following day:

> *"… I note that Mr Salagaras, on behalf of the respondent objected to any further time to the applicant employer to provide any further affidavit material and submitted that the applicant's employer's application should be dismissed on the basis that the employer had failed to adduce sufficient evidence to the Court for its application.*
>
> *Notwithstanding the position taken by the respondent and Mr Salagaras at the hearing of the employer's application, I note that the respondent and Mr Salagaras now seek an indulgence from the Court by correspondence that was sent arguably after the time set for compliance by the Court's order had expired. Nonetheless, I note that the Judicial Registrar has indicated that she would grant the extension of time sought. I advise that my client and I have no difficulty with the extension of time, however I request the following in relation to same:*
>
> *1. the extension of time to the respondent is subject to order 3 of the Court's Orders made on 28 July 2021, namely the affidavit to be filed and served on behalf of QBE is limited to any evidence relied upon to establish actual prejudice occasioned by any delay; and*

[6] The Worker did so confirm by email on 6 August 2021.

2. *the respondent, QBE should not be permitted to file an affidavit of any other evidence at large in relation to the application, as the respondent already had the opportunity to do so but chose not to file any affidavit in support of its opposition to the application when same was argued before the Court on 28 July 2021."*

31. By reply I confirmed that the leave granted pertained to an extension of time only and was not intended to increase the scope of evidence for which the Court had granted leave.

32. I accept the Employers submission that the narrative in the Affidavit of Ms Pavy dated 29 July was intended to assist the court and did not seek to flaunt the Orders of 28 July 2021. Nonetheless, particularly so in a matter where the scope and admissibility of the evidence being relied upon was evidently contentious, it is in my view, important that all parties are held to the same standard. I find that the Employer was on notice that the scope of the further evidence to be filed was limited that that set out in the Orders dated 28 July and that any attempt to broaden that scope without leave would likely be opposed.

33. Accordingly, the evidence of Ms Pavy filed 28 July 2021 is limited to paragraphs 1, 2, 5 and 6. The balance is struck.

Compliance with the time limitations pursuant to s126A(2)(b)

34. The Employer submits that their Joinder Application has been served within the requisite time limit.

35. However, on 1 September at the recommencement of the Hearing the Employer filed an amended application seeking, 'out of an abundance of caution' an "*extension of time to 6 September 2021 pursuant to s126A(2)(b) in which to join QBE Insurance (Aust) Ltd as a party to these proceedings*".

36. Section 126A(2) provides (emphasis added):

> *(2) Where an approved insurer who has indemnified an employer for the employer's liability to pay compensation to a worker under this Act is aware that another approved insurer may be liable to indemnify the employer for all or a part of the compensation paid, the first-mentioned insurer:*
>
> *(a) shall notify the other insurer as soon as practicable after becoming aware of the insurer's potential liability; and*
>
> *(b) may, **within 6 months after becoming aware of the other insurer's potential liability** or such longer period as the Court may allow:*
>
> *(i) commence proceedings in the Court to recover from the other insurer all or a part of the compensation paid; or*
>
> *(ii) where other proceedings in respect of the claim for compensation have been commenced, join the other insurer as a party to those proceedings.*

37. The first notice given by the Employer's insurer to the Proposed Respondent was under cover of correspondence dated 1 July 2021[7] which advised:

> *We advise that CGU Workers Compensation is the current insurer on risk for the above employer, Delaware North Darwin Casino (previously Skycity Casino) pursuant to the Return to Work Act (NT) ("the Act").*
>
> *We have received a workers' compensation claim from the abovenamed Worker, Tanvir Kirmani who was previously employed by Skycity as a Security Guard prior to 4 April 2019. We attach (*) a copy of that claim form for your information and records.*
>
> *Given that the Worker alleges he first noticed his injury as occurring around "Year*
>
> *2018/2019", we hereby provide notice pursuant to s126A of the Act that QBE may be liable for all or part of the injury so claimed by the Worker.*
>
> *We advise that CGU has disputed liability for the worker's claim / injury and anticipate that he may commence application from the Work Health Court in relation to the dispute. In the circumstances please consider this correspondence as notice of QBE's potential liability for the worker's injury / claim and in the event that the worker commences proceedings from the Work Health Court, it is likely that QBE will be joined to those proceedings.*

38. As it transpires, following the claim submitted on or about 20 April 2020[8], a Notice of Decision[9] disputing liability on 27 April 2020 and a mediation, the Worker did commence proceedings in the Work Health Court. Those proceedings were commenced on 14 July 2020.

39. Notably though, the proceedings were not served on the Employer until 3 March 2021[10], some 7 ½ months after being filed and 8 months after the s126A(2)(a) notice set out in paragraph 33 was given.

40. The Employer argues that if the time limitation to invoke a s126A(2)(b) joinder commenced strictly on 1 July 2020, the Employer would have been compelled, by 1 January 2021, to commence a proceeding against the Proposed Respondent under s 126A(2)(b)(i).

41. Such proceedings would seek to recover from the Proposed Respondent all or a part of the compensation paid when, not only had no compensation been paid under the disputed claim, but there was no knowledge held by the Employer that the Worker intended to pursue compensation.

42. The Employer submits that such an interpretation, to put the Employer and another insurer to the cost and inconvenience of commencing a proceeding to determine a, potentially indefinitely hypothetical dispute, would be a nonsense. With respect, I agree.

43. In my view, the operation of s126A(2)(i) is more properly construed to apply in circumstances were the discovery of an additional insurer potentially at risk in relation to a Workers claim is made post the resolution of any disputed Court proceedings, or during the management of an accepted claim. Not in the current circumstances.

[7] Annexure 'KP3' of the Affidavit of Kirralee May Pavy promised 13 July 2021
[8] Annexure 'KP1' of the Affidavit of Kirralee May Pavy promised 13 July 2021
[9] Annexure 'KP2' of the Affidavit of Kirralee May Pavy promised 13 July 2021
[10] Affidavit of Kirralee May Pavy promised 29 July 2021 at para 6

44. The *Work Health Court Rules 1999* do not provide a strict time limit for the service of a Form 5A Application. Rule 5.03(2) simply provides that an Application to the Work Health Court be served "*personally on the other parties as soon as practicable*".

45. No submissions were received as to why the Worker did not serve his Application for over 7 months, nor has any Application been made in relation to alleged non-compliance with R5.03(2).

46. Indeed, there may be many legitimate reasons why a Worker would file an Application and withhold service. First, they are compelled to file an Application in the Work Health Court within 28 days of receipt of a mediation certificate[11] to protect their interests, lest their application fail due to non-compliance with time limitations.

47. Thereafter the Worker may seek further medical evidence, may not be suffering economic loss, may seek legal advice in relation to their application, many scenarios which can be reasonably considered in the test of 'as soon as practicable'.

48. This comparative freedom, established by the Rules of the Court, with respect for service of the Application should not, in my view, operate to compromise an Employer's statutory rights under s 126A(2)(b).

49. The notice given on 1 July 2020 was of a *potential* liability. Liability for the disputed injury had not been established, nor had the Worker signalled to the Employer, beyond his participation in a mediation, an intention to pursue compensation when the 6-month post initial notice period expired on 1 January 2021.

50. The existence of the *potential* liability was further indicated when the Workers Application was served on the Employer on March 3 2021. The Employer sought to invoke its rights pursuant to s126A(2)(ii) of the Act by virtue of its application filed 13 July 2021 - within the 6 month time frame.

51. I find that the Employer was not restricted by the Notice provided on 1 July 2021 and while the earlier notice was not given improperly, the Employer is entitled to rely on the date of the service of the Worker's Application to the Court, for further notice of the potential liability and an Application under s126A(2)(ii).

52. I note however, that in the event I am wrong and the initial date of notice is final and binding with respect to any application under s 126A(2)(b), that the Court has a discretion to extend the time for the making of a joinder application for "*such longer period as the Court may allow*"[12].

53. In considering the Amended Interlocutory Application which sought, to the extent it was necessary, an extension of time for the filing of the Joinder Application, I am mindful of the comments of Stipendiary Magistrate (as he then was) Wallace who in *Allianz Australia Insurance Limited (re Nayda) v Territory Insurance Office*[13]reflected:

> *"The Act is beneficial legislation aimed at putting compensation in the hands of deserving workers without unnecessary delays. In my view, the six months prescribed in s 126A(2)(b) should be taken at least as strictly as ordinary limitations on actions, and sometimes more so. Insurance companies ought to be able to conduct their business to fit within that limit, or not far outside it at worst."*

[11] Section 104(3) *Return to Work Act 1986*
[12] S126A(2)(b)
[13] [2007] NTMC] 058 at 46

54. I concur with the comments regarding the expectations that might reasonably be placed on insurance companies in relation to legislative time limits. I note however, that the delay arising in this matter did nothing to delay putting compensation into an entitled Workers hands expeditiously. Rather it was his election to delay service and the Insurers decision not to commence speculative and potentially unnecessary proceedings under s126A(2)(b)(i) which has given rise to the passage of time exceeding six months.

55. With respect to the exercise of discretion to extend the time limitation, the Employer and Proposed Respondent relied upon *HIH Casualty & General Insurance Ltd v Territory Insurance Office*[14] and *Allianz Australia Insurance Limited v Territory Insurance Office*[15] respectively. In short, the precedents prescribe the following considerations to such an application:

    a. The conduct of the parties to the litigation;

    b. The strength of the claim;

    c. The length and explanation for the delay;

    d. Any hardship to the Applicant should an extension not be granted;

    e. Any prejudice to the Respondent should the extension be granted;

56. Items a. and b. are largely irrelevant. Being an application for joinder, the Proposed Respondent has not participated in the litigation to date, save for being heard on this application. There is nothing of note in relation to the Employers conduct which would effect this application.

57. Likewise, this being a joinder for the purposes of contribution or indemnification the strength of the Workers claim is not relevant to consideration of whether the Proposed Respondent ought be joined.

58. Key dates relating to the delay are established on the evidence admitted, including the date of the Claim[16], the Application to the Work Health Court[17], the date of service of the Application[18] and the initial notice given to the Proposed Respondent[19]. In short, from the claim to the filing of the Joinder Application for which an extension of time is sought, a period of 15 months elapsed. Although, noting the first instance of notice in July 2020, it could not be said that the Proposed Respondent was in the dark as to the potential for disputed litigation for the whole 15 month period.

59. As the evidence of Ms Pavy in the Affidavit dated 29 July 2021 has been constrained to matters relating to service as ordered, there is limited evidence in explanation for the delay, save for the delay in service of the substantive Application, discussed above. The Employer submits that post service of the proceedings they have acted expeditiously and has brought the current application in just over 4 months after service.

60. The potential hardship to the Employer should an extension not be granted is plain on the face of the matter. They believe any liability for the Worker's injury, should it be established, should be shared because multiple insurers were on risk during the period in which the injury is alleged to have developed. In the event they are precluded from joining and claiming contribution from the Proposed Respondent, they will solely bear any such liability.

---

[14] Northern Territory Supreme Court No. 169 of 1998 (23 January 1998) at p 30
[15] [2008] NTSC 22 at 23
[16] Annexure "KP1" of the Affidavit of Kirralee May Pavy promised 13 July 2021
[17] Affidavit of Kirralee May Pavy promised 29 July 2021 at para 5
[18] Affidavit of Kirralee May Pavy promised 29 July 2021 at para 6
[19] Affidavit of Kirralee May Pavy promised 13 July 2021 at para 9 and the Affidavit of Cindy Louise Uren filed 6 August 2021 at para 4.

61. As noted by the Proposed Respondent, the Supreme Court has said the following about prejudice arising[20]:

> *"It is not a matter of weighing the appellants prejudice against that of the respondent. The longer the delay, the more likely it is that the case will be decided on less evidence than was available previously and lengthy delay gives rise to a general presumption of prejudice. Prejudice one way or the other is not a necessary prerequisite to the granting or withholding of relief by way of extension of time within which to proceed."*

62. In support of the prejudice to the Proposed Respondent, the Proposed Respondent relies on the Affidavit of Cindy Louise Uren filed 6 August 2021. The evidence of the Proposed Respondent is that as a result of receiving no further updates during the 6 months post the initial notice of 1 July the Proposed Respondent did not[21]:

> *"a. investigate;*
>
> *b. take any further action to assess the merits of the Worker's claim or potential indemnification;*
>
> *c. initiate stakeholder contact;*
>
> *d. consider intervention in the Worker's claim for the purposes of treatment or rehabilitation;*
>
> *e. take any other action relevant to the Notifying Correspondence, CGU or the Worker."*

63. The evidence establishes that the Proposed Respondent has lost a period of time in which these tasks could be attended to. What has not been established is that these interventions cannot be attended to in a reasonable manner now.

64. Further, as submitted by the Employer while the Proposed Respondents evidence establishes the normal operating procedures, it does not establish a preferred time frame for same, nor how it is impacted by the delay. There is no evidence as to how the procedures are compromised, for instance in the event a witness was dead or evidence lost or diminished.

65. On the evidence before the court, I find that the Proposed Respondent has established that normal operating procedures have not been engaged, however has failed to establish an actual prejudice relevant to the litigation, one which cannot be overcome, beyond the mere delay of normal operating procedures.

66. I am satisfied that a material fact,[22] being the service of the Worker's proceedings, has taken place and that the Employer has taken steps to join the Proposed Respondent to the proceedings within the requisite period prescribed by the *Limitation Act 1981*.

67. In all of the circumstances and considering the relevant factors established by reference to the authorities, including the length and impact of the delay that an extension of time to file the Joinder Application should be afforded to the Employer.

---

[20] *Allianz Australia Insurance Limited v Territory Insurance Office* [2008] NTSC 22 at para 23
[21] Affidavit of Cindy Louise Uren filed 6 August 2021 at para 7
[22] As required for an extension of time pursuant to s44(3)(b)(i) of the *Limitation Act 1981*

The validity of the claim for compensation pursuant to s82 of the *Return to Work Act 1986*

68. The Proposed Respondent submits that an alleged non-compliance with section 82 creates a fundamental flaw in the substantive application which means that the threshold test in s126A(1) cannot be met.

69. In essence the Proposed Respondent says that the Court need not concern its self with whether an additional insurer ought be joined to the proceedings under s 126A(2) in circumstances where the Worker fails to first establish that *"an employer is liable under this Act to pay compensation to a worker*[23]*"*

70. Part 5 Division 5 of the Act sets out the procedures for making a claim for compensation, with s 82 providing:

> *"Form of claim*
>
> *(1) A claim for compensation shall:*
>
> *(a) be in the approved form; and*
>
> *(b) unless it is a claim for compensation under section 62, 63 or 73 – be accompanied by a medical certificate of capacity in a form approved by the Authority; and*
>
> *(c) subject to section 84(3), be given or served on the employer.*
>
> *(2) If the claim and medical certificate of capacity are not given or served at the same time, the remaining document shall be given or served on the employer within 28 days after the first document is given or served and the claim for compensation shall be deemed not to have been made until the day on which the remaining document is given to or served on the employer."*

71. The claim form[24] which is in evidence[25] for the Joinder Application does not contain a medical certificate of capacity in a form approved by the Authority.

72. The Proposed Respondent relies on *Alexander v Perpetual Trustees WA Limited*[26] where the plurality agreed:

> "*in the context of a claim for contribution under the statutes, the entitlement which it postulates must be actual, not merely hypothetical and conditional… If it were otherwise, Minters would have a claim for contribution with respect to a liability which may not exist."*[27]

73. Conversely, the Employer argues that in the Work Health Court authority has established that the omission of medical certificate of capacity in a form approved by the Authority does not serve to invalidate the Worker's claim nor render potential entitlements as hypothetical or conditional.

---

[23] S126A(1)
[24] Annexure "KP1" of the Affidavit of Kirralee May Pavy promised 13 July 2021
[25] Noting that R6.06(1) of the *Work Health Court Rules* requires that all evidence in respect of an interlocutory application be given by way of Affidavit unless the Court orders otherwise.
[26] [2004] HCA 7
[27] Ibid at 54

74. *Prime v Colliers International (NT) Pty Ltd*[28] *(Prime)* dealt with an appeal from the Work Health Court where summary judgment was entered for the Employer on the basis that non-compliance with ss82(1) and 82(2) of the Act rendered the claim invalid.

75. On appeal, Mildren J observed a number of instances where a claim can be pursued in the absence of a medical certificate[29], including a death claim[30] or a claim solely for medical expenses[31].

76. His Honour found:

> *"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. Secondly, the failure of a 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) 228 ALR 387 at paras [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 court proceedings does not have the consequence that the proceedings are a nullity. Procedural bars merely bar the remedy, not the claim itself."*[32]

77. And further:

> "*The effect of an invalid claim is that the employer is not bound to accept it… But an employer may waive non-compliance and accept the claim notwithstanding that there is no medical certificate… 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."*[33]

78. In my view, the Proposed Respondent's submission in relation to invalidity due to the purported absence of the medical certificate is problematic when considering the findings in *Prime.*

79. In any event I should make it clear that I have considered that argument, on the balance of probabilities, as to whether it precludes joinder only. I do not find it necessary to make a conclusive finding as to the validity of the claim in the context of the application for joinder, save for that I do not accept that the lack of medical certificate invalidates the claim to any degree which results in the threshold in s126A not being met.

80. Noting that summary judgment sits outside my powers as Judicial Registrar to hear and determine a claim, I consider it remains open for the Proposed Respondent, should they be joined as a party to the proceedings, to press this argument in full before a Judge, should they wish to do so.

---

[28] [2006] NTSC 83
[29] Ibid at para 24
[30] ss 62 and 63 *Return to Work Act 1986*
[31] s 73 *Return to Work Act 1986*
[32] *Prime v Colliers International (NT) Pty Ltd* [2006] NTSC 83 at 27
[33] Ibid at 27 - 28

The Joinder of QBE Insurance to the proceedings.

81. Having not been persuaded that joinder should be precluded on the basis that s126A(1) has not been enlivened, I must now consider whether QBE should be joined as a party to the proceedings.

82. In *Johannsen v Buslink Vivo Pty Ltd*[34], Managing Work Health Court Judge Neill identified 3 clear avenues provided for in the Act for the joinder of parties[35] being:

    a. Subsection 55(3): allowing a current employer to apply to join a previous employer. If the injury is a disease and there is evidence the disease may have been contracted with the previous employer;

    b. Subsection 126A(2)(b)(ii): allowing a current insurer to commence proceedings against a previous insurer of the same employer, or apply to join it in an existing proceeding. In the event the current insurer alleges the injury may have arisen during the course of employment when the previous insurer was on risk;

    c. Section 167: allows a Worker to make a claim against the Nominal Insurer, in various circumstances, where certain preconditions are met.

83. There is no dispute that for the period 30 June 2008 to 4 April 2019 that QBE Insurance Aust (Ltd) was the approved insurer for the Employer and that from 4 April 2019 CGU Workers Compensation was the approved insurer for the Employer[36].

84. The Worker's Claim form, when asked 'When did injury or knowledge of the disease first occur' he states "*Year 2018/2019"*[37]. It would appear then, on a prima facie basis and no doubt subject to medical evidence in relation to the alleged injury, that the period during which the injury is alleged to have occurred, includes periods in which the two insurers, QBE and CGU were on risk.

85. There is no doubt, in my view, that the Court has the requisite power pursuant to s126A(2)(b) to join the Proposed Respondent in all of the circumstances of the current matter.

86. Master Luppino (as he then was) in *Official Trustee in Bankruptcy v Waa* [2016] NTSC 69 found that the Courts power to join a party is discretionary and largely unconstrained[38]. He affirms the following considerations in the application of the Courts discretion:

    a. A course conducive to a just resolution with the desirability of limiting costs and delays of litigation;[39]

    b. Avoiding unfairness to any party – balancing the prejudice of joining a party who may not be heard on some issues against the inconvenience of one party having to litigate in duplicitous proceedings;[40]

    c. Efficiency of the use of Court resources.[41]

---

[34] [2018] NTMC 23
[35] Ibid at paras 33 - 35
[36] Employers Outline of Submissions filed 1 September 2021 at para 1 and Respondent's Submissions against Application for Orders in respect of Joinder of Party filed 28 June 2021 at paras 4 & 5
[37] Annexure "KP1" of the Affidavit of Kirralee May Pavy promised 13 July 2021 at Part 1 Item 3
[38] *Official Trustee in Bankruptcy v Waa* [2016] NTSC 69 at 29
[39] *Bishop v Bridgelands Securities Ltd* (1990) 25 FCR 311;
[40] Ibid and *Australian Consumer and Competition Commission v Launceston Superstore Pty Ltd [2013] FCA 279 citing Knight v Beyond Properties Pty Ltd (No. 2) (2006) FCA 192*
[41] *CBI Contractors Pty Ltd v Abbott (No. 2)* [2009] FCA 1129

87. Once the statutory authority to permit joinder of a party to a proceeding is established, in my view, these principles are likewise applicable to the question of joinder in the Work Health Court.

88. At the first Hearing of the matter Ms Cheong for the Employer referred to the current application as 'a classic s126A situation' and in the Employer's Outline of Submissions filed on 1 September 2021 further submitted[42]:

> *"The Worker's claim relates to a back injury that on the current evidence appears to have occurred by way of a gradual onset over a period of time from about mid 2018 through to September 2019…*
>
> *During the period referred to [above], the Employer was insured by two approved insurers with respect to its liability to the Worker under the Act, namely QBE was the insurer for the Worker's period of employment from say mid 2018 to April 2014* (sic) (*a period of approximately 10 months), and CGU was the insurer for the Worker's period of employment from approximately 4 April 2019 to 16 September 2019 (a period of some 4.5 months).*
>
> *It is therefore just and proper for the two relevant insurers for the Employer to be respondents to the Worker's claim and the joinder of QBE as a party to the Worker's proceedings will ensure all parties who have a potential liability in this matter are before the Court in the same proceedings."*

89. I agree with these submissions. Irrespective of my findings on the admissibility of the evidence, there is sufficient material before the Court that supports the joinder of QBE to the proceedings to ensure the dispute can be litigated in an efficient, expeditious manner, avoiding any potentially duplicitous proceedings and unnecessary costs.

90. For the reasons set out above the Proposed Respondent will be joined as a party to the proceedings and to the extent it is necessary, the Employers time to seek joinder pursuant to s126A(2)(b)(ii) of the Act is extended to the date of the filing of the Amended Interlocutory Application.

ORDERS

91. The time for filing an application for joinder pursuant to s126A(2)(b)(ii) is extended to 1 September 2021;

92. Pursuant to s126A(2)(b)(ii) of the *Return to Work Act* (1986) the QBE Insurance (Aust) Ltd at level 2/43 Mitchell Street, Darwin City in the Northern Territory of Australia is joined as a Respondent to Work Health Court proceedings 2020-02610-LC;

93. Parties to the Application are at liberty to apply in relation to costs.

Dated this 13th day of October 2021

LEANNE GORDON
JUDICIAL REGISTRAR

[42] Paras 6 - 8