SUPREME COURT OF QUEENSLAND

CITATION:	*Singh v Hill & Anor* [2019] QCA 227
PARTIES:	**ISHMEET SINGH as litigation guardian for JASMEET KAUR** (appellant) **v** **NETA HILL** (first respondent) **RACQ INSURANCE LIMITED** ACN 009 704 152 (second respondent)
FILE NO/S:	Appeal No 4361 of 2019 SC No 1491 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2019] QSC 79 (Boddice J)
DELIVERED ON:	25 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	26 August 2019
JUDGES:	Sofronoff P and Gotterson JA and Flanagan J
ORDERS:	**1. Allow the appeal.** **2. Set aside any order of the learned primary judge, dismissing the originating application filed 13 February 2019.** **3. The originating application filed 13 February 2019 is granted.** **4. Order that pursuant to s 57(2)(b), the appellant may commence proceedings within 60 days of a compulsory conference.** **5. There be no order as to costs in respect of the originating application filed 13 February 2019.** **6. The second respondent pay the appellant's costs of the appeal.**
CATCHWORDS:	PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – PERSONAL INJURY OR FATAL ACCIDENTS PROCEEDINGS – PRELIMINARY MATTERS – where the appellant seeks to commence proceedings in respect of personal injuries allegedly sustained in a car accident

involving the first respondent – where the second respondent is the compulsory third party insurer – where the appellant complied with all pre-court steps except for attending to a compulsory conference and exchanging of mandatory final offers – where the appellant and second respondent agreed on seven occasions to extend the limitation period – where the appellant did not instruct her solicitors to make a settlement offer on the basis that her injuries were yet to resolve – where the appellant's solicitors refused to proceed until they received instructions to make a settlement offer – where the limitation period has now expired – where the appellant applied under s 57(2)(b) of the *Motor Accident Insurance Act* 1994 (Qld) for an extension to the limitation period – where the appellant argued below that she did not have capacity during the limitation period to give instructions – where the learned primary judge declined to exercise the discretion to extend time – where the learned primary judge found that the appellant had capacity – where instead, the learned primary judge found that the appellant had unreasonably failed to give her solicitors instructions, had no basis for believing an extension to the limitation period could be easily achieved, and had prioritised her own circumstances over her claim – whether the learned primary judge erred in the exercise of discretion

Limitation of Actions Act 1974 (Qld), s 11
Motor Accident Insurance Act 1994 (Qld), s 57

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, applied
Jonathan v Mangera & Anor (2016) 75 MVR 143; [2016] QCA 86, applied
Morrison-Gardiner v Car Choice Pty Ltd [2005] 1 Qd R 378; [2004] QCA 480, applied
Paterson v Leigh & Anor (2008) 51 MVR 508; [2008] QSC 277, applied
Winters v Doyle [2006] 2 Qd R 285; [2006] QCA 110, applied

COUNSEL: M Horvath with S Lamb for the appellant
No appearance for the first respondent
K S Howe for the second respondent

SOLICITORS: Compensation Partners for the appellant
No appearance for the first respondent
Quinlan Miller & Treston for the second respondent

[1] **SOFRONOFF P:** I agree with the reasons of Flanagan J and with his Honour's proposed orders.

[2] **GOTTERSON JA:** I agree with the orders proposed by Flanagan J and with the reasons given by his Honour.

[3] **FLANAGAN J:** This is an appeal from a decision of the learned primary judge dismissing an application to allow a longer period for the appellant, Ms Jasmeet Kaur by her litigation guardian Ishmeet Singh, to bring proceedings after the end of the limitation period. The proceedings sought to be brought by the appellant are in respect of a claim for damages for personal injury caused by a motor vehicle accident that occurred on 25 August 2012.

[4] The appellant's application was brought under s 57(2)(b) of the *Motor Accident Insurance Act* 1994 (**MAIA**). Subsections 57(1) and (2) of the MAIA provide as follows:

> "**Alteration of period of limitation**
>
> (1) If notice of a motor vehicle accident claim is given under division 3, or an application for leave to bring a proceeding based on a motor vehicle accident claim is made under division 3, before the end of the period of limitation applying to the claim, the claimant may bring a proceeding in court based on the claim even though the period of limitation has ended.
>
> (2) However, the proceeding may only be brought after the end of the period of limitation if it is brought within—
>
> (a) 6 months after the notice is given or leave to bring the proceeding is granted; or
>
> (b) a longer period allowed by the court."

[5] I consider the grounds of appeal in detail below, but in essence the appellant submits that when consideration is given to the whole of the circumstances, including the appellant's efforts to comply with the pre-court steps required by the MAIA, the discretion should have been exercised in favour of the appellant.

[6] For reasons outlined below, I am of the view that the appellant has established errors in his Honour's exercise of discretion that warrant appellate intervention.

[7] The Court is therefore required to exercise the discretion under s 57(2)(b) afresh. This necessitates an independent consideration by this Court of the whole of the circumstances relevant to the application.

The relevant circumstances

[8] The appellant was born in India in 1985.[1] She came to Australia in 2011.[2]

[9] On 25 August 2012 she was involved in a motor vehicle collision at the intersection of Robert and Muir Street at Labrador.[3] According to the appellant, she was heading east along Robert Street.[4] There is a stop sign on Muir Street at the intersection facing south.[5] As she approached the intersection, she saw a glimpse of a car travelling at speed just before it collided with the passenger side of her motor vehicle.[6]

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1 ARB, Vol 2, page 48.
2 ARB, Vol 2, page 48.
3 ARB, Vol 2, page 49.
4 ARB, Vol 2, page 49.
5 ARB, Vol 2, page 49.
6 ARB, Vol 2, page 49.

[10] The appellant claims that she sustained both physical and psychiatric injuries as a result of the collision.[7]

[11] On 30 April 2013, she engaged her former solicitors by signing a retainer which included instructions to institute proceedings.[8] Also on that day, a notice of accident claim form was lodged on the appellant's behalf with the second respondent, RACQ Insurance Limited, pursuant to s 37 of the MAIA.[9] On 24 July 2013, the second respondent confirmed that the notice of accident claim form complied with the requirements of the MAIA.[10]

[12] As the collision occurred while the appellant was driving home from work, a WorkCover claim was made. On 17 May 2013, WorkCover obtained a report from a psychiatrist, Dr Prabal Kar.[11] Dr Kar's diagnosis was as follows: "Mainly clinging dependency on her husband, other anxiety related symptoms, of apparent delayed onset. More information is required to confirm or exclude a work-related psychiatric condition." Dr Kar noted that the appellant had no previous psychiatric history and had never previously been on antidepressants or received counselling.[12] He noted that post-traumatic stress disorder-like symptoms were present but they were unusual in that they had commenced much later.[13] The learned primary judge referred to Dr Kar's opinion:[14]

> "Dr Kar opined that due to the applicant's physical injuries she became overly dependent on her husband and this dependency was a significant factor in her current anxiety. Part of her anxiety regarding her husband was explained by cultural factors. However, the applicant did not meet the full PTSD criteria or criteria for an adjustment disorder. Some of her unusual features raised the issue of personality and complex interpersonal relationship matters which are fostering or increasing dependency on her husband."

[13] On 20 May 2013, the appellant's former solicitors provided a letter of advice.[15] This letter described the accident and listed her injuries, which included "[p]ossible traumatic stress disorder; psychological; anxiety; shock". The letter explained some of the pre-court steps required by the MAIA. It informed her that the insurer was required to advise in relation to its position on liability.[16] The letter further stated as follows:

> "Court proceedings must be commenced within a period of three (3) years from the date of your motor vehicle accident. That is by **24 August 2015** [emphasis in original]. Failure to commence court proceedings prior to that date may prevent you from pursuing your matter unless you are able to provide a reasonable explanation to the court as to the reasons that you were late.

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7 ARB, Vol 2, page 50.
8 ARB, Vol 2, page 81.
9 The giving of a notice of a motor vehicle accident claim is a pre-condition to a claimant bringing a proceeding in court: s 37(1) and s 39(5) of the MAIA.
10 ARB, Vol 2, page 124.
11 ARB, Vol 2, page 284.
12 ARB, Vol 2, page 287.
13 ARB, Vol 2, page 292.
14 *Singh v Hill & Anor* [2019] QSC 79 (**Reasons**) at [53].
15 ARB, Vol 2, pages 115-121.
16 ARB, Vol 2, page 119.

> …
>
> Once a motor accident claim has been finalised no further claims for injuries sustained in the accident can be made. It is therefore very important that your claim is not resolved until you and your solicitor have a clear and complete understanding of the extent of your injuries and the effect those injuries are likely to have on your life. This is normally achieved when your injuries have stabilised as assessed by a medical practitioner. Stabilisation occurs when your condition is not likely to deteriorate or improve in the future.
>
> We do not recommend cases be resolved until stabilisation of injuries has occurred.
>
> …
>
> We will be in a much better position to assist you if you keep us updated in relation to the progress of your treatment program and recovery."[17]

[14] On 7 February 2014, the second respondent denied any liability and offered a walk-away resolution.[18]

[15] On 6 March 2014, the appellant provided further information to her former solicitors, which consisted of:[19]

a) images of the accident;

b) images exported from Google Maps depicting the appellant and first respondent's respective routes and the scene of the accident; and

c) advice that she had ceased working on 14 February 2014 and that she was seeing a psychiatrist, Dr Mario Caesar Briganza, and a psychologist, Ms Kerryn Pinches.

On the same day that she sent this material, there was an internal email within her former solicitors' office questioning whether the firm was proceeding with the matter as it had previously considered ceasing to act because of liability issues.[20]

[16] On 11 April 2014, the appellant sent a follow-up email to confirm that her former solicitors had received pictures of the accident and the routes mentioned. She also inquired "if everything was going well for the case".[21]

[17] On 12 May 2014, the second respondent wrote directly to the appellant to advise that it had been unable to contact her former solicitors for the past 10 months and that if it did not hear from the appellant by 13 June 2014 it was going to close her file.[22] She was angry when she received this letter and called her former solicitors but was only able to speak to paralegals.[23]

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17 ARB, Vol 2, pages 115-121.
18 ARB, Vol 2, pages 129-30.
19 ARB, Vol 2, page 131.
20 ARB, Vol 2, page 133.
21 ARB, Vol 2, page 138.
22 ARB, Vol 2, page 136.
23 ARB, Vol 2, page 52.

[18] On 7 July 2014, the appellant's former solicitors wrote to the second respondent stating that the appellant had ceased work on 14 February 2014 due to her psychological injury from the motor vehicle accident. The letter also provided details of her psychologist.[24]

[19] The former solicitors thereafter took a number of steps, including responding to the investigators of the CTP insurer of the appellant's vehicle, NRMA, as to the cause of the accident,[25] and obtaining a medico-legal report from Dr Wallace, orthopaedic surgeon.[26]

Extensions to the limitation period

[20] On 16 July 2015, the second respondent wrote to the former solicitors in the following terms:[27]

> "We have been contacted by NRMA CTP Insurance whom are in receipt of a personal injury claim for Neta Hill whom is the other party involved in this motor vehicle accident. We have been advised that Lawyers on behalf of Neta Hill are currently obtaining a Traffic Reconstruction Report. We consider it appropriate to await that report before setting the matter down for conference.
>
> In the meantime, we note the limitation period in respect of your client's claim expires on 25 August 2015. The requirements of Part 4, Division 5A of the [MAIA] have not yet been complied with and are unlikely to be complied with prior to 25 August 2015.
>
> RACQ Insurance undertakes not to rely on Section 11 of the Limitation of Actions Act 1974 for a further Three (3) months on the condition that proceedings are commenced prior to **12pm** [emphasis in original] on 24 November 2015."

[21] This was the first of four extensions sought by the second respondent. The other extensions were sought on 30 October 2015,[28] 9 February 2016,[29] and 4 May 2016.[30] RACQ sought these extensions on the ground that they were waiting to receive a traffic reconstruction report from the first respondent's solicitors, and, in respect of the fourth extension, the first respondent had parted ways with her solicitors.

[22] Thereafter, the appellant sought and obtained three extensions until 24 May 2017.[31] The second respondent therefore required over 12 months of extensions while the appellant received nine months of extensions. The effect of the seven extensions was that the second respondent did not rely on s 11 of the *Limitation of Actions Act* 1974 until the expiry of the seventh extension period on 24 May 2017. A close examination of the period during which the parties exchanged these extension offers is critical to the disposition of this appeal.

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24 ARB Vol 2, page 154.
25 ARB, Vol 2, pages 156 and 162-165.
26 ARB, Vol 2, page 169.
27 ARB, Vol 2, page 171.
28 ARB, Vol 2, page 201.
29 ARB, Vol 2, page 207.
30 ARB, Vol 2, page 216.
31 ARB, Vol 2, pages 229, 233 and 237.

[23] On 18 June 2015, the former solicitors briefed counsel.[32] On 27 July 2015, the appellant emailed her former solicitors in the following terms:[33]

> "I am sorry to let [you] know that [I] have not been very well mentally over the weekend and unable to concentrate over the work which had to be done regarding barrister, wondering if we can postpone it to the Friday anytime. I will try and take some time off work to complete all this."

[24] On 4 August 2015, the appellant's former solicitors responded to the second respondent's first extension offer.[34] They advised that she had instructed them to commence proceedings within the limitation period and accordingly sought the second respondent to attend a compulsory conference by telephone on 6 August 2015. The second respondent declined to schedule any compulsory conference for the matter at that time as there had been no final determination in respect of liability. The second respondent sought a response to the proposed first extension offer. On 12 August 2015, the former solicitors wrote to the second respondent accepting the first extension offer to 25 November 2015.[35]

[25] In a letter dated 12 February 2016, counsel, having conferred with the appellant, informed her former solicitors that she had identified further injuries arising from the accident. Counsel advised: [36]

> "The further injuries will not [sic] doubt delay this claim but having regard to time limitation issues my instructing solicitor is to call for a compulsory conference and I look forward to receiving notification of this in due course."

[26] In or around July 2016, the appellant was assessed by Dr Julian Boulnois, a specialist psychiatrist who was a visiting consultant at the Gold Coast Hospital. In his report dated 26 July 2016, Dr Boulnois stated as follows:[37]

> "About this time [ie, the time of the accident] Ms Kaur was treated by my colleague Dr Braganza, names like mirtazapine, Lexapro and Cymbalta were mentioned – yet there is no mention of reopening the Workcover claim for psychiatric reasons?
>
> Since that time her symptoms have been manifold – behavioural, psychological and maybe psychotic – and IVF has led to no grandson for her parents indeed her husband isn't allowed near her sometimes banished to a motel.
>
> Seemingly anxiety symptoms abound, phobic and panic and the only effective treatment (?) being prednisolone…."

Dr Boulnois' tentative diagnosis was one of underlying borderline personality disorder.

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32 ARB, Vol 2, pages 166-170.
33 ARB, Vol 2, page 177.
34 ARB, Vol 2, page 185.
35 ARB, Vol 2, page 186.
36 ARB, Vol 2, page 211.
37 ARB, Vol 2, pages 310-11.

[27] On 9 July 2016, the appellant sent an email to her former solicitors in the following terms:[38]

> "I called in and spoke to the receptionist who was going to pass over the message to you and am also looking at the date we have been provided by the insurer as I have not heard anything about the date since we spoke.
>
> [C]ould you please advise me as I do have travel plans in [A]ugust and [S]eptember and would not be available."

[28] Some three weeks later, on 27 July 2016, the former solicitors replied to the appellant by email. After apologising for the delay in responding, the email continued:[39]

> "The last day in which to commence proceedings in your matter is 24 August 2017. However to do those things we must first go through a settlement conference with the insurer.
>
> **Please provide me with settlement instructions urgently.**
>
> **Enclosed is the Schedule of Damages previously sent to you for your approval. Please urgently provide me with instructions to serve the attached on the insurer.** [emphasis in original]"

Attached to the email was a draft schedule of damages for the appellant's consideration.

[29] It should be noted immediately that the email incorrectly refers to the second respondent's fourth extension offer as expiring on 24 August 2017; the correct expiry date was 24 August 2016. The request to provide "settlement instructions urgently" was made in circumstances where the former solicitors had been advised both by the appellant and by her counsel that her injuries (including psychological injuries) had not yet stabilised. The original letter of advice of 20 May 2013 had recommended that the claim not be resolved until her injuries stabilised. The attached draft schedule of damages made no mention of any psychiatric injuries. This was despite the former solicitors advising the second respondent that the appellant had sustained psychiatric injuries in the accident.[40] The schedule also contained a factual error. In relation to past economic loss, the schedule referred to the appellant being off work from 25 August 2012 to 14 February 2014, at which time she commenced work at the Tweed City Family Practice.[41] This is inconsistent with the former solicitors' letter to the second respondent dated 7 July 2014, which advised that she had ceased working there on 14 February 2014.[42]

[30] In her affidavit in support of her application, the appellant explained why she did not give permission for the schedule of damages to be sent to the second respondent:[43]

> "The draft schedule was sent to me for me to give permission for it to be sent to RACQ. I did not want to give that permission because the

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38 ARB, Vol 2, page 220.
39 ARB, Vol 2, page 220.
40 ARB, Vol 2, page 154
41 ARB, Vol 2, page 221.
42 ARB, Vol 2, page 154.
43 ARB, Vol 2, page 53.

> schedule looked incomplete to me. It didn't mention my psychiatric injuries, I wanted them to claim more so that all my injuries would be covered. It wasn't being explained to me why I couldn't claim what I wanted to claim rather than what was in the schedule. I do recall someone from [my former solicitors] saying that I couldn't have a compulsory conference until all my injuries were stable."

[31] On 28 July 2016, the appellant responded to her former solicitors' in the following terms:[44]

> "Unfortunately there have been too many things happening with me and am not coping too well as I need to work which has not left any time for me to do the paperwork. I have done some bit of it but have not been able to get it across as I am doing it in bits.
>
> However, we would have to extend the date as the injuries have not settled and there are other things which are coming up. Just last week in the scan there is a radial nerve problem in my right elbow which is making me use less of my hands and I have to start on steroids tablets to keep me pain free.
>
> I have started seeing a new psychiatrist – Dr. Julian Boulnois in Southport – [whom] I have seen just once and would be seeing a shoulder specialist on Monday as it is playing up and he would be able to see how much damage and what needs to be done. I will try and get things across as soon as I can.
>
> I am getting my parents over from India to be my carer for the next 12 months as [H]arinder [the appellant's husband] is not able to cope with me as I think he is undergoing stress himself handling me.
>
> Apart from all of the above, I am travelling overseas from the 03rd August 2016 which is next Wednesday till the 10th September 2016 which is a Saturday and would not be contactable on the phone but just via email.
>
> I had to plan my overseas travel as I have not seen my [in-law's] family for the past 6 years that me and Harinder have been married and since the accident, can't travel very well. [A]nd I wasn't aware of the date by the insurer was, and it had been planned and it is last minute now to get any paperwork across – can only forward minimal of what I have done. If you want I can go ahead and speak to the insurer to get the dates postponed or would it be a better idea to get a letter from the GP suggesting that my pains have not settled down and should be extended. [P]lease do let me know what to do as I only have a day for tomorrow (Friday) and Monday if there is anything to be done. [Y]ou can call me anytime tomorrow if need be to discuss or reply on email if it's not urgent."[45]

[32] The former solicitors replied by email dated 2 August 2016 stating:[46]

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44 ARB, Vol 2, pages 224-225.
45 ARB, Vol 2, pages 224-225.
46 ARB, Vol 2, page 224.

> "Unfortunately it is not a case of just obtaining a further extension. The insurer will not agree to this.
>
> I urgently need your instructions please to make a settle offer as per the [S]chedule of [D]amages I sent to you.
>
> If you want to have a phone conference, please let me know and I will organise this."

[33] The appellant replied on the same day:[47]

> "It is not possible [J]ayne. I am flying out tomorrow morning and do not have time for anything. If [you] like, [I] can call and speak to them and then get it around the middle of September. I would kindly request, if [you] could have a word with them.
>
> I saw an orthopaedic surgeon for the shoulder yesterday and his report won't be ready and also gave me an injection for steroids. Also saw the pain specialist and the rheum[a]tologist yesterday. They are still investigating as things are [flaring] up leading to more nerve issues. So [I] am not sure what [I] can do with the claim as we are not sure. The existing injuries have not settled down and more are coming in.
>
> I would appreciate if [you] could call the insurer and let them know that we need an extension as they had always requested an extension and we have not. As the paperwork is not right. So there is no point to [c]lose the case as we are not 100% as to what the injuries have to be claimed.
>
> Please update me. I would not be available on my phone from tomorrow. But still accessible on email from a day or two after once [I] have an internet connection. I would be back middle of September. Then [I] can sit with you on a phone conference and forward all paperwork [a]ccordingly."

[34] By letter dated 12 August 2016, the second respondent agreed to the fifth extension on the condition that proceedings were commenced prior to 12.00 pm on 24 November 2016.[48] The sixth extension was agreed to by the second respondent on 10 November 2016, which extended the time to 12.00 pm on 23 February 2017.[49]

[35] In November 2016, the appellant's father died, which created extra stress for her.[50] On 17 November 2016, the former solicitors wrote to her in the following terms:[51]

> "We advise that the RACQ has agreed to an extension of the limitation period until 23 February 2017.
>
> During this time both the RACQ and yourself are required to attend and discuss settlement of the claim.

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47 ARB, Vol 2, page 227.
48 ARB, Vol 2, page 229.
49 ARB, Vol 2, page 233.
50 ARB, Vol 2, page 54.
51 ARB, Vol 2, page 234.

> As we have previously requested, please provide us with your instructions to serve the Schedule of Damages previously sent to you."

[36] The appellant replied on the same day by email:[52]

> "Thanks so much … Really appreciated. This would give me enough time to recover from dad's death and grieve. [W]ill try and get the paperwork, all in one go and the instructions, latest by the second week of January and then we can sit down and discuss what seems to be relevant.
>
> Really appreciate all the efforts and support during this hard period of my life."

[37] On 13 February 2017, the former solicitors requested an informal extension of the limitation period.[53]

[38] In response, on 15 February 2017, the second respondent undertook not to rely on s 11 of the *Limitation of Actions Act* 1974 for a further three months on the condition that proceedings were commenced prior to 12.00 pm, 24 May 2017.[54] The second respondent noted in this correspondence that the requirements of the MAIA had not been complied with and were unlikely to be complied with prior to 24 February 2017. The second respondent also stated that it was willing to participate in a compulsory conference, subject to a number of conditions. One of those conditions was that the appellant sign a certificate of readiness for trial, which was to be provided no later than one week prior to the compulsory conference. The second respondent required the certificate of readiness to state to the effect that:

1. The appellant was in all respects ready for the conference and the trial.
2. All investigative material required for the trial had been obtained.
3. Medical or other expert reports had been obtained from all persons the appellant proposed to call as expert witnesses at the trial and
4. The appellant had fully complied with her obligations to give the second respondent material relevant to the claim.

[39] The second respondent sought these conditions in circumstances where it was plain from previous correspondence that the appellant's injuries had not yet stabilised and the extent of any potential psychiatric injury arising from the motor vehicle accident had not been assessed.

[40] On 1 March 2017, the appellant sent an email to her former solicitors. As per an earlier phone call, she advised that her health plan had changed in January 2017, outlining the treatment she was currently undertaking.[55] The former solicitors' response by email dated 2 March 2017 was again to seek from her instructions to put a settlement offer to the insurer, reiterating that the matter could not go further until this was done.[56]

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52 ARB, Vol 2, page 234.
53 ARB, Vol 2, page 237.
54 ARB, Vol 2, page 237.
55 ARB, Vol 2, page 213.
56 ARB, Vol 2, page 212.

[41] In an email to the former solicitors dated 16 May 2017, the second respondent noted that the extended period of limitation was to expire on 25 May 2017. The email continued:[57]

> "It appears your client is unwilling to progress her claim to resolution and indeed our understanding is that you are unable to obtain any response or co-operation from your client. We would be reluctant to consider a further informal extension under these circumstances noting that the matter has been on foot for almost 5 years. Could you advise what steps you have taken to address these issues with your client?
>
> Could you urgently advise your position on progressing this matter, at this stage it appears to us that an application to extend limitation with directions requiring your client's cooperation may be necessary?
>
> Please review your position by close of business Friday 19 May 2017 and respond in writing."

[42] As is evident from this email, RACQ was suggesting to the former solicitors that an application under s 57(2)(b) of the MAIA should be made by the appellant. The former solicitors did not relay that suggestion to the appellant. Instead, on 16 May 2017, the former solicitors sent an email in the following terms:

> "Could you please urgently provide me with instructions to place a settlement offer to the insurer.
>
> In short, and as previously advised, the insurer:
>
> - [w]ill not agree to any further extension of the limitation period in your matter;
> - [t]he current agreed extension is until 25 May 2017;
> - I am unable to respond or take your matter any further until you provide me with instructions to make a settlement offer in this matter.
>
> Please reply urgently to this email[.]"[58]

After the expiry of the limitation period

[43] On 14 December 2017, the former solicitors sent another email to the appellant.[59] The email referred to the appellant's recent inquiries. The email set out some of the history of the matter, including that in April 2015 the former solicitors first attempted to discuss resolution of her case with the second respondent. It noted that they had been waiting since that time to be provided with instructions to make a settlement offer but none had been forthcoming. This statement in the email is made in circumstances where the former solicitors must have appreciated that the appellant's psychiatric injuries alleged to have arisen from the motor vehicle collision required further assessment and that her physical injuries had not stabilised. The email continued:

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57 ARB, Vol 2, page 239.
58 ARB, Vol 2, page 240.
59 ARB, Vol 2, page 243.

> "On 16 May 2017, I advised you in an email that the insurer would not agree to any extension of the limitation period beyond 25 May 2017 and unless you provided me with instructions to place an offer of settlement there is nothing further I could do."

[44] The difficulty with this statement is that no mention is made that the appellant could, as was suggested by the second respondent, apply under s 57(2)(b) of the MAIA for an extension of time. It is not correct, as stated in the email, that her only option was to provide her former solicitors with instructions to place an offer of settlement.

[45] In her supporting affidavit, the appellant referred to her efforts to contact her former solicitors between May and December 2017:[60]

> "In the end, in May 2017 and again in December 2017, [my former solicitors] told me that they couldn't do anything more for me. They said I did not let them send the schedule across to RACQ. I kept saying that the schedule was incomplete, but they did not seem to care or listen. There was also a period of months between May and December 2017 when [the solicitor with carriage of the matter] was not available. I would ring up to speak to her and not get any response."

[46] Referring back to the appellant's former solicitors' email on 14 December 2017, the following emails were exchanged on that same day:

1. **The appellant:** "I have forwarded you and sent you paperwork around in [M]ay this year when you gave me the date of claim to be finalizing via express post… [I] spoke to [your secretary] to confirm you had received and have been waiting from your end to get an amount which you would let me know when you go through the paperwork… and since then almost… every two months [I] have been trying to talk to you over the phone to follow this up, with no response."[61]

2. **The former solicitors**: "It has never been a question of what documents you did or did not provide to me or my secretary, it is a question of you never providing any instructions to me to put any settlement offer in over two years. As I said to you in my email of 16 May 2017 if you did not provide me with instructions to place an offer there was nothing further I could do for you."[62]

3. **The appellant**: "In regards to [what] [I] said that [I] will send… paperwork with all the injuries and the amount should be more than [you] had advised and you and/or [your] secretary asked me to forward the paperwork so [you] should be able to see what all injuries [I] have and then claim with the part of the body with the injury and then provide me another figure."[63]

[47] After receiving this email, the appellant sought to engage new solicitors. She approached at least six law firms.[64] She requested her file from her former

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60 ARB, Vol 2, pages 54-55.
61 ARB, Vol 2, page 246.
62 ARB, Vol 2, page 245.
63 ARB, Vol 2, page 245.
64 ARB, Vol 2, page 55.

solicitors in December 2017.[65] Her present solicitors did not receive the file until 31 August 2018.[66] The new solicitors briefed counsel and arranged a conference with the appellant on 24 September 2018.[67] At that conference, she could not answer questions about what happened in the accident because she could not actually remember the accident, only events leading up to it and then events after the collision.[68] In the course of this conference, Mr Lee, the appellant's current solicitor, formed the opinion that the appellant may not have capacity to provide instructions for her motor accident claim.[69] Mr Lee considered it his duty to obtain a medical report on the issue of capacity before proceeding further. A report was obtained from a psychiatrist, Dr Joseph Mathew, dated 17 October 2018. He opined that the appellant was suffering from a major depressive disorder and post-traumatic stress disorder and that she did not have capacity to instruct her solicitors in the matter.[70] A supplementary report was sought from Dr Mathew seeking his opinion as when it was most likely that the appellant was unable to effectively instruct her lawyers. Dr Mathew's opinion was that capacity was lacking from the first half of 2013.[71] As discussed below, this opinion of Dr Mathew's as to the appellant lacking capacity to instruct solicitors since 2013 was not accepted by the learned primary judge. The appellant does not challenge this finding.

[48] On 30 October 2018, Mr Lee filed an application with the Queensland Civil and Administrative Tribunal seeking an order that the appellant, Mr Singh (the appellant's brother), be appointed as the appellant's adult administrator for providing instructions for her claim arising from the motor vehicle collision.[72]

[49] On 22 January 2019, QCAT ordered the appointment of Mr Singh as the appellant's adult administrator for her accident injury claim.[73]

The discretion conferred by s 57(2)(b) of the MAIA

[50] Underlying s 57(2)(b) of the MAIA is the requirement that an action for damages in respect of personal injury must be brought within three years of the accrual of the cause of action (here, 25 August 2012).[74] Together with the requirement imposed by the *Limitation of Actions Act* there are also the requirements of the MAIA. In 2000, Parliament amended the MAIA so as to require a claimant to proceed through a series of pre-court steps prior to bringing an action in court for damages for personal injury arising out of a motor vehicle accident.[75] This was in furtherance of the MAIA's objects, one of which relevantly is "to encourage the speedy resolution of personal injury claims resulting from motor vehicle accidents".[76]

[51] Morrison JA in *Jonathan v Mangera & Anor*[77] considered s 57(2)(b), and observed the following about the MAIA:

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65 ARB, Vol 2, page 55.
66 ARB, Vol 2, page 81.
67 ARB, Vol 2, page 90.
68 ARB, Vol 2, page 90.
69 ARB, Vol 2, page 91.
70 ARB, Vol 2, page 90.
71 ARB, Vol 2, page 90.
72 ARB, Vol 2, page 90.
73 ARB, Vol 2, page 90.
74 *Limitation of Actions Act* 1974 (Qld), s 11(1).
75 *Motor Accident Insurance Amendment Act* 2000 (Qld); s 37(1) of the MAIA.
76 MAIA, s 3(e).
77 (2016) 75 MVR 143; [2016] QCA 86 at [18] (Boddice and Burns JJ agreeing).

> "[18] The objects of the Act are to keep the costs of insurance down and encourage the speedy resolution of personal injury claims. The Act is designed to achieve prompt assessment of claims by the insurer, which is to be given comprehensive information by the claimant, relatively soon after the accident. Claims should be prosecuted diligently. Further, there are provisions which encourage both sides to make offers of settlement."

[52] An unavoidable consequence of requiring claimants to whom the MAIA applies to comply with its pre-court steps is that the limitation period may expire prior to bringing court proceedings. Section 57(2)(b) is Parliament's response to this situation. It permits a claimant to bring a proceeding after the limitation period if the Court so allows.[78]

[53] The discretion in s 57(2)(b) has been extensively considered by this Court. It is neither necessary nor desirable to further elaborate on the nature of the discretion. The learned primary judge correctly identified the pertinent parts of the discussion in the relevant cases, the first of which is *Morrison-Gardiner v Car Choice Pty Ltd*, where Chesterman J (as his Honour then was) stated as follows:[79]

> "[82] … [The discretion] is clearly meant to ameliorate the plight of a claimant who is unable to comply with the requirements of the Act in time to commence proceedings and who, if justice is to be done, should be given the extension. The discretion is likely to be exercised favourably only in those cases where a claimant's circumstances make it difficult to comply with the requirements of the Act and commence proceedings within three years or where, despite making conscientious efforts to comply with the requirements of the Act, a claimant nevertheless does not do so within three years of the accident. Any delay on the part of a claimant in complying with the Act's requirements or in applying for an extension of time will be relevant to the exercise of the discretion. Claimants who ignore the obligations imposed on them by the Act or who make no conscientious efforts to comply with them are unlikely to obtain an extension of time though, of course, each case must be decided on its individual merits."

[54] The next case is *Winters v Doyle*, where Keane JA (as his Honour then was) commented:[80]

> "[24] It can be seen that each member of this Court in *Morrison-Gardiner v Car Choice Pty Ltd* identified, as a consideration of central relevance to the proper exercise of the discretion conferred by s 57(2)(b) of the MAI Act, the relationship between the delay which has occasioned the need to seek relief from the operation of the statutory time bar and the plaintiff's attempts to comply with the requirements of the

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78 Section 57(2)(a) also allows a claimant, despite the expiry of the limitation period, to bring a proceeding as of right within 6 months of serving notice of a motor vehicle accident claim under s 37 or being granted leave to bring proceedings.

79 *Morrison-Gardiner v Car Choice Pty Ltd* [2005] 1 Qd R 378.

80 *Winters v Doyle* [2006] 2 Qd R 285.

> MAI Act. A plaintiff will usually be able to show good reason for the favourable exercise of the discretion conferred by s 57(2)(b) only if he or she can show that the delay which occurred was occasioned by a 'conscientious effort to comply' with the MAI Act."

[55] Finally, in *Paterson v Leigh & Anor*, McMeekin J summarised the following principles that his Honour considered relevant to s 57(2)(b):[81]

> "(a) The discretion to be exercised in respect of an application pursuant to s57(2)(b) of the Act is unfettered;
>
> (b) The onus lies on the applicant to show good reason why the discretion ought to be exercised in his or her favour;
>
> (c) Where an applicant is able to show that the delay which has occurred was occasioned by a 'conscientious effort to comply' with the Act then that would normally be good reason for the favourable exercise of the discretion but is not a 'dominating consideration'. Conversely, claimants who ignore the obligations imposed on them by the Act or who make no conscientious effort to comply with them may have difficulty obtaining a favourable exercise of the discretion;
>
> (d) Where an applicant is not able to show that the delay was occasioned by 'a conscientious effort to comply' with the Act that is not fatal to the application;
>
> (e) Any delay on the part of a claimant in complying with the Act's requirements or in applying for an extension of time will be relevant to the exercise of the discretion;
>
> (f) The length of any delay is important and possible prejudice to the defendant is relevant;
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> (h) Depriving a defendant of the complete defence afforded by the statutory time bar is an important matter;
>
> (i) The interests of justice are of course the overriding consideration and in that regard the question of whether a fair trial of the proceedings is unlikely is an important consideration;
>
> (j) The giving of a notice of claim before the expiry of the limitation period and compliance by a claimant with the provisions of the Act that it provide any information sought by the insurer are both relevant factors." [citations omitted]

[56] In identifying these legal principles, the learned primary judge further observed:[82]

> "Whilst it is not a precondition to the exercise of the discretion that the delay was caused by attempts to comply with that Act [*Ward v Wiltshire Australia Pty Ltd* (2008) 51 MVR 1 at 9 [33]], it is relevant

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81 (2008) 51 MVR 508; [2008] QSC 277 at [8]: cited with approval by this Court in *Blundstone v Johnson & Anor* [2010] QCA 258 and *Jonathan v Mangera & Anor* (2016) 75 MVR 143; [2016] QCA 86 at [22] (Morrison JA, Boddice and Burns JJ agreeing).

82 Reasons at [57].

> to bear in mind that it is a serious matter for a Court to override a defence otherwise available to the defendant [*Winters v Doyle* [2006] 2 Qd R 285 at [34] per Keane JA]. Ultimately, each case turns on its own merits."

The decision below

[57] After setting out the background facts to the application and the legal principles above, the learned primary judge summarised the parties' submissions. His Honour's observation that the appellant had completed all pre-court steps, except for attending a compulsory conference and exchanging mandatory final offers, is undisputed. The appellant draws attention to his Honour's summary of her submissions below wherein his Honour stated that "[her] initial solicitors wrongly determined that there was a need for an expert report on the cause of the collision".[83] It is apparent from the relevant circumstances outlined above that this statement is incorrect. In the period between 16 July 2015 and 9 February 2016, RACQ sought three extensions to the limitation period while it waited to receive the traffic reconstruction report from the first respondent's solicitors.[84] This error forms the basis of ground 3 in the notice of appeal to which I will return.

[58] Upon a consideration of the material, his Honour's conclusion was that the appellant was not conscientious in the pursuit of her claim. Her failure to give instructions "was not reasonable in circumstances where [her former solicitors] had provided a detailed schedule to damages for that purpose" and she had travelled overseas.[85] There was, according to his Honour, no basis for the appellant's assertion that she believed "an extension [to the limitation period] was easily to be achieved upon request", given the warnings she received to the contrary.[86]

[59] His Honour then addressed the appellant's submission that her failure to give instructions was because of her lack of capacity at material times, as opined by Dr Mathew.[87] His Honour rejected that submission for two reasons. First, he rejected Dr Mathew's opinion as being inconsistent with other psychiatric reports which Dr Mathew expressly relied upon, namely the reports of Dr Kar and Dr Boulnois.[88] Secondly, his Honour thought that the appellant's interactions with her former solicitors demonstrated that she had capacity to give instructions.[89]

[60] As to that, his Honour referred to a number of emails from the appellant to her former solicitors. He noted that the appellant had provided information to her solicitors by way of emails on 6 March and 29 September 2014.

[61] His Honour then referred to her emails of 27 July 2015,[90] 28 July 2016,[91] and 17 November 2016:[92]

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83 Reasons at [58].
84 See [21] above.
85 Reasons at [64]-[65].
86 Reasons at [66].
87 Reasons at [67].
88 Reasons at [67]-[69].
89 Reasons at [70].
90 See [23] above.
91 See [31] above.
92 See [36] above.

"[72] Whilst the applicant advised those solicitors, by email dated 27 July 2015, she had not been very well mentally and was unable to concentrate, that email must be viewed in the context of the subsequent email, dated 28 July 2016, in which the applicant sought an extension of the limitation period. Although that email contained a reference to the applicant not coping too well, it also contained a reference to "too many things happening with me" and a "need to work which has not left any time for me to do the paperwork". The applicant expressly acknowledged that she was reviewing that material and had "done some bit of it", but had not been able to get across it as she was doing it in bits.

[73] Most tellingly, in that email [of 28 July 2016] the applicant requested those solicitors obtain an extension of the limitation period, stating her injuries had not settled, there were other things coming up, she had started to see a new psychiatrist and she was getting her parents to come from overseas to be her carers and she was travelling overseas in August and September 2016. When those solicitors indicated by return email that an extension was not possible, the applicant immediately responded stating there was no point in proceeding as her injuries had not yet settled and noting the insurer had previously requested an extension and she had not sought such an extension.

[74] The contents of these emails indicate three things. First, a knowledge by the applicant of a need for, and the significance of, an extension of the limitation period. Second, an understanding of what had occurred to date, including the relevance of changes to her circumstances and ongoing injuries. Third, a willingness to place her own personal needs over her obligations in respect of the claim.

[75] Of equal significance is the applicant's subsequent email of 17 November 2016 in which she advised those solicitors that she appreciated the further extension, noting it would give her enough time to recover from her father's death and to grieve. The applicant said she would give instructions, at the latest, by the second week of January 2017. That email evidenced an understanding by the applicant of the necessity to provide the relevant information and contained no suggestion the applicant could not do so due to any mental incapacity. The delay was solely as a consequence of other circumstances in her life.

[76] A review of the applicant's conduct in the period prior to the expiry of the last extension is completely inconsistent with the applicant not having an ability to understand the nature of the processes and of the steps required of her in order to provide proper instructions to her solicitors. I find the applicant chose to give priority to her own personal circumstances, notwithstanding an obligation to provide instructions in

> circumstances where she had been made well aware of the looming expiry of the limitation period." [citations omitted]

[62] As demonstrated above, rather than showing a lack of capacity, his Honour viewed the appellant's conduct as demonstrating that she prioritised other pursuits over her claim. The issue of capacity – or lack thereof – assumed particular significance at first instance, no doubt because of the way the parties framed their submissions.[93] While important, capacity was one of many relevant considerations. To the extent that the parties over-emphasised its importance, in my view the issue tended to obscure from his Honour the other considerations attending the exercise of the discretion in s 57(2)(b).

[63] His Honour also considered prejudice to the second respondent as being a relevant consideration in the exercise of discretion, noting as follows:

> "[80] Further, the delay has been extensive. It is now over six years since the collision and almost two years since the expiry of the last extension of the limitation period. Those delays have an inevitable impact on the respondent's ability to fully and fairly defend any proceedings commenced as a consequence of leave being granted. This is a significant consideration, when determining whether it is appropriate to deprive the respondents of the complete defence afforded to them by the *Limitation of Actions Act 1974* (Qld)."

The grounds of appeal

[64] There are seven grounds of appeal. While I consider each ground separately, they are interwoven. When the grounds are considered collectively, what is asserted is that the learned primary judge's discretion miscarried in that he both failed to take into account relevant considerations and took into account irrelevant considerations. These errors are said to fall within the class of errors identified in *House v The King*:[94]

> "It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allow extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so."

(a) Ground 1

[65] Ground 1 of the appeal states:

> "His Honour erred in considering that the appellant showing conscientious compliance with the pre-court steps was a precondition to leave being granted. His Honour ought to have considered all of

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93 See the transcript of the proceedings at first instance in ARB, Vol 2, pages 393-397 and 405-6.

94 (1936) 55 CLR 499 at 505 (Dixon, Evatt and McTiernan JJ).

> the circumstances including the appellant's efforts to comply with the pre-court steps."

[66] In advancing this ground of appeal, the appellant does not assert that his Honour failed to identify the relevant principle, namely that a claimant's conscientious compliance with the pre-court steps required by the MAIA does not constitute a precondition to a favourable exercise of discretion.[95] Rather, the effect of the appellant's submission is that when the Reasons are properly analysed, his Honour treated the appellant's conscientious compliance as a precondition. His Honour considered that the material supported a conclusion that she was not conscientious in her pursuit of her claim.[96] In support of this conclusion his Honour specifically referred to the former solicitors' email to her of 14 December 2017. His Honour considered that this email "succinctly summarised what were the obvious difficulties occasioned to them in the applicant's failure to provide them with instructions in respect of an offer to settle."[97] The email of 14 December 2017 is, in my view, an unsatisfactory basis for concluding that the appellant was not conscientious in pursuing her claim. The summary contained in this email is deficient in the following respects:

(a) it failed to refer to the fact that in the original letter of advice dated 20 May 2013 it was recommended to the appellant that her case not be resolved until the stabilisation of her injuries had occurred.[98] This was in circumstances where she had communicated to her former solicitors that not all of her injuries were stable and assessed including her alleged psychiatric injuries;[99]

(b) it omitted the fact that she had complied with pre-court steps, other than providing a settlement offer and attending a compulsory conference. Those steps included the provision, as early as 30 April 2013, of a notice of accident claim pursuant to s 37 of the MAIA; providing the second respondent with an authority to access information; providing follow-up information on the incident when requested by investigators; advising her former solicitors of her injuries and of further injuries including psychiatric injuries as they arose and attending medical assessments when requested both at her solicitors' request and at the second respondent's request;[100]

(c) the schedule of damages provided for the purpose of the appellant giving instructions to make a settlement offer contained factual inaccuracies and made no reference to her alleged psychiatric injuries.[101] This was in circumstances where the former solicitors had communicated in writing to the second respondent that she was suffering psychiatric injuries arising from the motor vehicle collision;

(d) the suggestion in the email that the former solicitors could do nothing further unless she provided them with instructions to place an offer of

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95 Reasons at [57].
96 Reasons at [64].
97 Reasons at [64].
98 ARB, Vol 2, pages 243-4.
99 This is dealt with in more detail below in respect of ground 6.
100 Submissions on behalf of the Appellant filed 20 August 2013, paragraph 16.
101 See above at [29].

settlement was as a matter of fact and law inaccurate. The second respondent had already advised the former solicitors that an application to extend time could be brought under s 57(2)(b) of the MAIA.[102] The appellant was not advised by her former solicitors that such an application could be made;

(e) the email makes no mention that she had communicated to her former solicitors her personal difficulties, including her mental state and the death of her father;

(f) the email makes no mention that the first four extensions (12 months) were requested by the second respondent and that the second respondent agreed to a further three extensions requested by the appellant.

[67] What the material reveals is that the appellant did not accept that the schedule of damages reflected her claim as her injuries, including her psychiatric injuries, had not stabilised or been assessed. Her concerns in this respect had been communicated to her former solicitors.[103] These concerns, in my view, constitute an acceptable explanation as to why she had not completed the final two pre-court steps. It may be accepted that the delay in progressing the claim "was due to the exigencies of the [MAIA] or associated matters, such as the need for the plaintiff's injuries to stabilise before a compulsory conference could be appointed or an application made to the court to dispense with the need for a compulsory conference".[104]

[68] Ground 1 is established primarily for two reasons. First, in reaching the conclusion that the appellant was not conscientious in her pursuit of her claim, the learned primary judge failed to have regard to the relevant considerations in (a)-(f) of paragraph [66]. These considerations were not contained in the former solicitors' email of 14 December 2017. The conclusion was not open on the material and was neither supported by the email of 14 December 2017, nor by the former solicitors' provision of an incomplete schedule of damages.[105] Secondly, even if such a conclusion was open on the material, the fact that the appellant was not conscientious in her pursuit of her claim was not a precondition to a favourable exercise of discretion. Upon a proper analysis of the Reasons, however, it is apparent that his Honour's conclusion was central to an unfavourable exercise of discretion.

(b) Ground 2

[69] Ground 2 states:

> "His Honour erred at [8] in failing to take into account that the advice of 20 May 2013 not only advised of the limitation period and how to extend it but also advised that a claim should not be concluded until the injuries stabilised and were assessed. The appellant's injuries had not stabilised and only some had been assessed at the relevant time in 2016 and 2017."

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102 ARB, Vol 2, page 239.
103 ARB, Vol 2, pages 224-225 and 227.
104 See *Winters v Doyle* [2006] 2 Qd R 285 at [38] per Keane JA.
105 Reasons at [65].

[70] At paragraph [8] of the Reasons, it is apparent that his Honour did not refer to the recommendation made to the appellant by her former solicitors in their letter of advice on 20 May 2013 that the case not be resolved until stabilisation of her injuries had occurred and such injuries been assessed. The letter identified her role as keeping her former solicitors apprised as to her progress and the progress of her treatment. This aspect of the advice was a relevant consideration which should have informed the exercise of discretion. First, in giving effect to that advice, the appellant updated her former solicitors as to her emerging injuries, including psychiatric injuries, on a number of occasions. This in turn led to the former solicitors communicating to the second respondent that the appellant had suffered psychiatric injuries arising from the motor vehicle collision. Secondly, this aspect of the advice informed the appellant's subsequent conduct in not accepting the schedule of damages and requesting her former solicitors to seek further extensions of time from the second respondent so as to allow her injuries to stabilise. This is apparent from her email to the former solicitors of 2 August 2016 set out in [33] above.

[71] Accordingly, I am of the view that ground 2 is established.

(c) Ground 3

[72] Ground 3 states:

> "His Honour erred as [58] in misunderstanding the appellant's submissions that it was the appellant's solicitors that requested an accident reconstruction expert report, when at [21] his Honour noted that it was the second respondent which was awaiting for the accident reconstruction expert report from its insured's solicitors. This wait took up the period between 25 August 2015 to 24 August 2016 before being abandoned."

[73] I have already discussed [58] of the Reasons.[106] The fact that it was the first respondent's solicitors, and not the appellant's, who were obtaining the report was important because it was primarily the basis on which RACQ sought four extensions to the limitation period. This accounted for the delay in the period between 16 July 2015 (when the first extension offer was made) and 24 August 2016 (the expiry of the fourth extension).

[74] In the exercise of his discretion, the learned primary judge viewed the delay and its potential prejudice to the second respondent as significant.[107] The delay and its effects were relevant considerations, however, the fact that RACQ was partly responsible for it was also relevant. Although RACQ's requests to extend the limitation period while awaiting the report were referred to in the background set out by his Honour, they do not appear to have been factored into the exercise of his discretion. This possibly stems from the anterior confusion in [58] of the Reasons as to whose solicitors were obtaining the report. Ground 3 is established.

(d) Ground 4

[75] Ground 4 states:

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106 See [57].
107 Reasons at [80].

> "Although his Honour found at [70] that the appellant had capacity to give instructions, his Honour failed to make a finding whether the appellant suffered from a psychiatric condition, its cause and whether it reduced the appellant's capacity to give instructions when the evidence of Drs Mathew, Kar and Boulnois was available on the issue."

[76] The appellant accepts his Honour's finding that she did not have capacity in the period leading up to the expiry of the limitation period. Rather, the appellant submits that it was also incumbent on his Honour to have found whether the appellant had an underlying psychiatric condition, and if so, its cause, and whether it reduced her capacity to give instructions.

[77] In my view, the learned primary judge was not required to make the findings as submitted by the appellant. The appellants' mental condition was, however, a relevant circumstance personal to the appellant that his Honour should have taken into consideration in the exercise of discretion. Although the appellant did not lack capacity to instruct her former solicitors, her underlying mental state, as evidenced in the psychiatric reports, constituted some explanation as to the difficulties the appellant experienced in complying with the pre-court steps required by the MAIA. His Honour's consideration of the reports of Drs Mathew, Kar and Boulnois was limited to the issue of whether the appellant lacked capacity to give instructions. Aside from this issue, the reports stood for the proposition that the appellant had some underlying psychiatric condition. As to that, Dr Kar in his report of 17 May 2013 opined that the appellant exhibited anxiety-related symptoms and high levels of dependency on her husband, partly explained by cultural factors.[108] In his report on 26 July 2016, Dr Boulnois was drawn to the conclusion of an underlying borderline personality disorder.[109] Dr Mathew's diagnosis was one of major depressive disorder and post-traumatic stress disorder.[110] A finding by his Honour that the appellant did not lack capacity to give instructions was but one aspect of a consideration of the appellant's personal circumstances which may have made it more difficult for her to comply with the requirements of the MAIA.

(e) Ground 5

[78] Ground 5 states:

> "His Honour failed to find or take into account that the delay in complying with pre-court steps was, at least in part, due to the appellant's injuries not being stable and assessed, rather than any conduct of the appellant, her solicitors or the second respondent."

[79] This ground is established for the reasons given in relation to grounds 1 and 6.

(f) Ground 6

[80] Ground 6 reads:

> "His Honour erred:

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108 ARB, Vol 2, pages 188-295.
109 ARB, Vol 2, page 311.
110 ARB, Vol 2, page 270.

(a) at [64] and in [65] in finding that the appellant had unreasonably failed to provide instruction while being capable of travelling overseas during the same period; and

(b) at [66] that there was no basis for the appellant's belief that she could easily obtain an extension; and

(c) at [73] to [76] and in [78] that the circumstances and emails in [71] to [75] indicated that she placed her own personal circumstances above her obligations and that part of the delay was solely due to other circumstances in her life."

[81] These findings are sought to be challenged on the basis that his Honour failed to take into account 15 separate considerations. I have touched upon a number of these considerations in discussing ground 1.

[82] As to (a), the appellant's reluctance to make an offer to settle in spite of her former solicitors' requests was explicable on two bases. The first is that her injuries had not stabilised at the time of the expiry of the seventh extension, 24 May 2017, or, at the very least, she genuinely believed that her injuries had not stabilised. In that regard, his Honour did not refer to the fact that the appellant had been advised at the outset in the letter of advice on 20 May 2013 that it was "very important" that her claim not resolve until her injuries were assessed and stabilised.[111] To that end, she advised her solicitors in her emails of 28 July 2016,[112] 2 August 2016,[113] and 1 March 2017[114] that she was experiencing new problems and had changed her health plan.

[83] Secondly, the appellant was concerned that the schedule of damages was incorrect. That is clear from her email of 2 August 2016 ("there is no point [in closing] the case as we are not 100% as to what… injuries have to be claimed"), and from her affidavit sworn 13 February 2019 wherein she deposed that the schedule was incomplete from her perspective, having made no mention of psychiatric injury.[115] To that end, she provided more information to her solicitors. The schedule remained unaltered yet her solicitors still sought instructions to make a settlement offer. A consideration of the appellant's failure to give instructions could not be divorced from these circumstances. I am drawn to the conclusion that his Honour did not take these matters into account.

[84] As to (b), his Honour's finding was primarily based on the fact that the appellants' former solicitors had repeatedly told her to commence proceedings within the limitation period. This was of course true, but there was no reference to the initial advice from her former solicitors of 20 May 2013 that an extension of time could be obtained for a reasonable excuse. Also absent from the Reasons was a consideration of how the seven agreements to extend the limitation period could have engendered a belief in the appellant that the limitation period could be extended.

[85] As to (c), in so far as his Honour found that the delay was solely due to the appellant's personal circumstances, that finding is controverted by the matters

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111 ARB, Vol 2, page 121: see ground 2.
112 See above at [31].
113 See above at [32].
114 See above at [40].
115 ARB, Vol 2, page 53.

discussed in respect of other grounds of appeal. As to the proposition that the appellant prioritised her own personal circumstances, there were a number of ameliorating factors that his Honour did not take into account. First, his Honour made only passing reference to the appellant grieving the death of her father in November 2016. The death of her father was listed as a stressor by Dr Mathew.[116] Secondly, the delay in completing the paperwork requested of her should have been viewed in the context of someone who had memory and concentration issues, which is referred to in the psychiatrists' reports, and a strained domestic relationship with her husband.[117] Thirdly, prior to travelling overseas on 3 August 2016, the appellant was proactive in contacting her solicitors on 9 July[118] but did not receive a response until 27 July. There was also no mention of the reason she was travelling overseas, which was to meet her in-laws for the first time.

[86] Accordingly, I am of the view that the three findings identified by the appellant were vitiated by error: ground 6 is established.

(g) Ground 7

[87] Ground 7 is as follows:

> "His Honour erred at [80] that the second respondent suffered prejudice in circumstances where:
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> (a) there was early notice of the claim in April 2013 including the appellant's written authority, in the notice, for the second respondent to obtain any relevant information;
>
> (b) regarding liability, there was a traffic accident report, witness versions, photographs of damage to the appellant's car available and the second respondent initially waited for an accident reconstruction expert report but abandoned that course;
>
> (c) regarding quantum, the second respondent was provided with medical information including an orthopaedic report, it obtained its own orthopaedic report and had the appellant's written authority to gather any other relevant information."

[88] The appellant accepts that the loss of a limitation defence is a prejudice in itself and that the expiry of a limitation period brings about a presumption of prejudice.[119] In considering the issue of prejudice, his Honour considered that the delay had been extensive, being a period of over six years since the collision and almost two years since the expiry of the last extension of the limitation period. However, of the approximately six-year delay, 12 months of that delay from 25 August 2015 to 24 August 2016 may be attributed to the second respondent for the four extensions that it sought. Thereafter, the second respondent agreed to three further extensions to 24 May 2017.

[89] In those circumstances the delay is perhaps more accurately described as lengthy rather than extensive.

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116 ARB, Vol 2, page 272.
117 ARB, Vol 2, page 263.
118 See above at [26].
119 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 544 (Dawson J), 549 (Toohey and Gummow JJ), and 555-556 (McHugh J).

[90] The prejudice identified by his Honour was the second respondent's ability to fully and fairly defend any proceedings commenced as a consequence of time being extended. It is difficult to see how such prejudice arises in the present case. As correctly submitted by the appellant, there was early notice of the accident, a complete investigation of the accident, notification of injuries at various times, and assessment by doctors both on behalf of the appellant and the second respondent. Further, some of the appellant's injuries could not have been assessed earlier owing to the fact that they had not stabilised.[120]

[91] Prejudice was not, in my view, a significant consideration in the exercise of the discretion. Ground 7 is established.

The exercise of the discretion afresh

[92] Having regard to the relevant circumstances outlined above, in my view, the discretion under s 57(2)(b) should be exercised in favour of the appellant.

[93] Dealing first with prejudice, it is true that the accident occurred in 2012 and the limitation period has now expired. There is inevitable prejudice to the second respondent if leave is given to commence proceedings. However, for the reasons outlined above, that prejudice does not rise above prejudice in a general sense. Since the accident, the second respondent has had the opportunity to collect material relating to both liability and quantum. I am of the view that there can still be a fair trial in any future proceedings.

[94] As for the delay giving rise to the risk of prejudice, some of that delay lies at the feet of the second respondent. The first four extensions to the limitation period were agreed to at its behest. It then subsequently agreed to three further extensions.

[95] As noted above, it is relevant to consider the appellant's compliance with pre-court steps and her circumstances throughout the relevant time period. She completed a notice of accident claim form on 30 April 2013.[121] Her solicitors then sent her the 20 May 2013 letter of advice. Based on the second respondent's letter to the appellant dated 12 May 2014, there appears to have been a 10 month period where her former solicitors were non-responsive.[122] In the interim, she provided information to her former solicitors. By June 2014, the carriage of the matter was allocated to another solicitor within the firm, and thereafter her former solicitors provided further details to the second respondent, including the fact of her claimed psychiatric injury.[123] She underwent orthopaedic assessment by Dr Wallace in or around January 2015.[124] Counsel was instructed in June 2015 for the compulsory conference. To that stage, it can fairly be said that the appellant demonstrated a conscientious compliance with the requirements of the MAIA. These matters should be taken into account.

[96] The parties then agreed to extend the limitation period on seven occasions for reasons discussed above. In that time, it can be seen that the appellant was having

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120 Submissions on behalf of the Appellant filed 20 August 2019, paragraph 30.
121 ARB, Vol 2, page 111.
122 ARB, Vol 2, pages 37 and 38.
123 ARB, Vol 2, page 154.
124 ARB, Vol 2, page 169.

difficulty in completing the paperwork required of her. (It seems that any outstanding paperwork was completed in May 2017.[125])

[97] The remaining pre-court steps were the holding of a compulsory conference and the exchange of mandatory final offers. The appellant's failure to complete these steps, in the abstract, tells against the exercise of the discretion. Also relevant was the inopportune timing of her overseas trip in July-August 2016 to see her in-laws. However, as explained above, the appellant's failure in this respect is explicable for a number of reasons. First, there is evidence showing that the appellant was, and currently is, suffering from psychiatric symptoms. That is the effect of the medical opinions, although they are divided as to the proper diagnosis. Whether it is causally linked to the accident is disputed, but the point for present purposes is that it is a relevant circumstance shedding light on the appellant's failure to prosecute her claim in this period. Another relevant circumstance was her father's death in November 2016. Secondly, as indicated in counsel's letter of 12 February 2016, and the appellant's emails 28 July 2016, 2 August 2016, and 1 March 2017, the appellant was experiencing new symptoms in this period. Her former solicitors had advised her at the outset that stabilisation of her injuries was important. In my view, her refusal to provide instructions to make a settlement offer in these circumstances was rational. Thirdly, and relatedly, the schedule of damages was incorrect. That served as further justification not to go ahead with the compulsory conference.

[98] As for the period from May 2017 onwards, the delay could have been minimised had the appellant's former solicitors raised the possibility of an application under s 57(2)(b) when it was raised by the second respondent on 16 May 2017.[126] Aside from that, the circumstances the appellant found herself in prevented her from prosecuting her claim. Her former solicitors had effectively refused to proceed until she gave instructions to make an offer. That position was firmly reiterated in December 2017. Afterwards, as deposed in her affidavit, she looked for new legal representation.[127] Her current solicitors agreed to take on her claim in August 2018. They received her file from her former solicitors on 31 August 2018.[128] After the conference with counsel and the appellant on 24 September 2018, Mr Lee, the solicitor with carriage of the matter, was sufficiently concerned to have her examined for the purposes of determining capacity. QCAT subsequently appointed the appellant's brother as her adult administrator for providing instructions in relation to her claim. These steps to ascertain the appellant's capacity and the application made to QCAT constitute a reasonable explanation for the delay from 24 September 2018 to the making of the application to extend the limitation period filed 13 February 2019.

[99] In my view, the appellant has shown good reason why the discretion in s 57(2)(b) ought to be exercised in her favour.

Disposition

[100] I would therefore make the following orders:

1. Allow the appeal.

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125 ARB, Vol 2, page 150.
126 ARB, Vol 2, page 239.
127 ARB, Vol 2, page 55.
128 ARB, Vol 2, page 81.

2. Set aside any order of the learned primary judge, dismissing the originating application filed 13 February 2019.

3. The originating application filed 13 February 2019 is granted.

4. Order that pursuant to s 57(2)(b), the appellant may commence proceedings within 60 days of a compulsory conference.

5. There be no order as to costs in respect of the originating application filed 13 February 2019.

6. The second respondent pay the appellant's costs of the appeal.