SUPREME COURT OF QUEENSLAND

CITATION:	*Hewitt and Hosking v The Property Agents and Motor Dealers Tribunal and John Gallagher* [2003] QSC 101
PARTIES:	**TREVOR JOHN HEWITT and ROZALYN ANN HEWITT** (applicants) v **THE PROPERTY AGENTS and MOTOR DEALERS TRIBUNAL and JOHN GALLAGHER** (first respondents) and **THE CHIEF EXECUTIVE, DEPARTMENT OF TOURISM, RACING AND FAIR TRADING** (second respondent) and **GEOFFREY HOSKING and LYNETTE HOSKING** (applicants) v **THE PROPERTY AGENTS and MOTOR DEALERS TRIBUNAL and JOHN GALLAGHER** (first respondents) and **THE CHIEF EXECUTIVE, DEPARTMENT OF TOURISM, RACING AND FAIR TRADING** (second respondent)
FILE NOS:	4925 of 2002 4926 of 2002
DIVISION:	Trial Division
PROCEEDING:	Applications
DELIVERED ON:	16 April 2003
DELIVERED AT:	Brisbane
HEARING DATES:	12 and 13 November 2002
JUDGE:	Wilson J
ORDER:	**In each case:** **Tribunal's decision quashed.** **Declaration that the applicants do not have a valid and enforceable claim against the claim fund established under the *Property Agents and Motor Dealers Act* 2000.**

Order that there be no order as to costs.

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – Orders in the nature of Prerogative Writs – Certiorari – Mandamus

LIMITATION OF ACTIONS – APPLICATION OF STATUTES OF LIMITATIONS – APPLICATION TO NEW RIGHT CREATED BY STATUTE – where *Auctioneers and Agents Act* 1971 created right to claim against fund – where notice of claim to be given within specified period – whether right conditional upon compliance with time limitation

STATUTORY INTERPRETATION – where applicants suffered pecuniary losses – where *Auctioneers and Agents Act* 1971 provided for a fund to be held and applied to reimburse persons who suffered such pecuniary losses – where time limits applied – where applicants did not claim against the fund within time limit – where *Auctioneers and Agents Act* 1971 repealed and replaced by *Property Agents and Motor Dealers Act* 2000 – where *Property Agents and Motor Dealers Act* 2000 provided for a new fund to be held and applied to reimburse persons who had suffered pecuniary losses – whether the applicants entitled to make claims against the new claim fund

Judicial Review Act 1991 (Qld)
Property Agents and Motor Dealers Act 2000 (Qld), s 408, s 409(1), s 471(2)(h), s 472, s 604, s 634
Auctioneers and Agents Act 1971 (Qld), s 7, s 72, s 119
Appeal Costs Fund Act 1973 (Qld), s 15

Jacob v Roberts [2002] QCA 87, applied
Australian Iron and Steel Ltd v Hoogland (1962) 108 CLR 471, cited
Maxwell v Murphy (1957) 96 CLR 261, cited
Kentlee Pty Ltd v Prince Consort Pty Ltd [1998] 1 Qd R 162, considered
Director of Public Works v Ho Po Sang [1961] AC 901, considered

COUNSEL: D A Skennar for the applicants
R G Marsh for the first respondents
M D Hinson SC for the second respondent

SOLICITORS: Carter Capner Lawyers for the applicants
The Crown Solicitor for the first respondents
The Crown Solicitor for the second respondent

[1] **WILSON J:** These two applications for prerogative orders under part 5 of the *Judicial Review Act* 1991 (Qld) were heard together. In each proceeding the applicants ("the Hewitts" and "the Hoskings" respectively) seek an order in the nature of certiorari quashing a decision of the Property Agents and Motor Dealers Tribunal that they are not entitled to bring a claim in an amount exceeding $7,500 against the claim fund established pursuant to s 408 of the *Property Agents and Motor Dealers Act* 2000 (Qld) ("the *PAMD Act*"). The applicants also seek an order in the nature of mandamus directing the Tribunal to hear and determine the application according to law.

[2] The Hewitts and the Hoskings claim to have been victims of what has been colloquially described as "two tier marketing schemes" in relation to investment properties on the Gold Coast. They claim that false representations were made about the value of the properties in which they invested, and that they suffered pecuniary losses in consequence of their investments. They claim that the representations were made in breach of s 72 of the *Auctioneers and Agents Act* 1971 (Qld) ("the *A & A Act*").

[3] Under the *A & A Act* there was a fund created which was to be held and applied (inter alia) in reimbursing persons who suffered pecuniary losses because of breaches of s 72. So far as relevant, s 119 of the *A & A Act* provided –

> "**Application of fund**
>
> **119.1(1)** Subject to this Act, the fund shall be held and applied for the purpose of reimbursing persons who may suffer pecuniary loss because of –
>
> (a) the contravention of any provision of section … 72 … by a prescribed person;
>
> **(4A)** A person may claim against the fund by giving the registrar written notice of the substance of the claim.

> **(5)** The notice must be given within –
>
> (a) 6 months after the person becomes aware that the person has suffered pecuniary loss; or
> (b) 3 years after the commission of the breach that caused the person's pecuniary loss;
>
> whichever occurs sooner.
>
> **(6)** However, if, within the period (mentioned in subsection 5(a) or 5(b)) otherwise applicable to the making of a claim, the claimant commences an action in a court of competent jurisdiction for the recovery of the claimant's pecuniary loss, the claimant may, within a period of 3 months after the action concludes or is terminated, make a claim against the fund by notifying the registrar in writing of the substance of the claim.
>
> **(6A)** Despite subsection (5), for a claim of the relevant limit or less, the registrar may accept a notice after the time that would otherwise apply under subsection (5) if the committee consents to considering the claim.
>
> **(9)** In this section –
>
> **"relevant limit"** means the larger of the following amounts –
>
> (a) $7,500;
>
> (b) an amount prescribed under a regulation."

Subsection (5) was amended and subsections (4A), (6A) and 9 were inserted with effect from 27 June 2000. Previously subsection (5) provided –

> "(5) No person shall have a claim against the fund unless the person notifies the registrar in writing of the substance of the claim within a period of –
> … [as above]."

[4] The *A & A Act* was repealed and replaced by the *PAMD Act* as from 1 July 2001.

[5] A new fund described as the "claim fund" was created by the *PAMD Act*. It consists of the amount standing to the credit of the fund established under the *A & A Act* at the time of its repeal, amounts payable to the new fund under the *PAMD Act* and other amounts transferred to it by the Treasurer: s 408. It must be used "to pay the

amount of all claims allowed against the fund": s 409(1). Such claims are dealt with in ss 470 - 495. In essence they are claims for financial loss suffered because of contraventions of the *PAMD Act*. Claims other than minor claims are determined by the Property Agents and Motor Dealers Tribunal: ss 485 - 488.

[6] By an amendment made in December 2002,

> "a person who suffers financial loss because of, or arising out of, a marketeering contravention in relation to the purchase by the person of a residential property (other than a non-investment residential property)"

cannot make a claim against the claim fund: s 471(2)(h). A "marketeering contravention" is defined as a contravention by a relevant person of any one of certain provisions of the *PAMD Act* or certain provisions of the *A & A Act* including s 72. The properties in which the Hoskings and the Hewitts invested come within the description "residential property (other than a non-investment residential property)."

[7] The principal issues arising on these applications are the Hoskings' and the Hewitts' entitlement to make claims against the new claim fund, including the effect of the amendments made in December 2002 on any rights they may have had.

[8] The Hoskings' contract settled on 10 March 1998, and they became aware that they had suffered pecuniary loss in February 2001. Under the legislative scheme created by s 119 of the *A & A Act* they had until 11 March 2001 in which to make a claim against the fund. They did not do so. On 30 January 2002 they made a claim in the amount of $121,936.50 against the fund established under the *PAMD Act*, and on 21 March 2002 they commenced an action in the District Court against persons alleged to have made the representations.

[9] The Hewitts' contract settled on 22 October 1998, and they became aware that they had suffered pecuniary loss in February 2001. But for the repeal of the *A & A Act* they would have had until August 2001 in which to make a claim against the fund. On 31 January 2002 they made a claim in the amount of $80,266.75 against the fund established under the *PAMD Act*.

[10] Section 604 of the *PAMD Act* provides –

> **"604 Former fund**
>
> **(1)** The rights and liabilities of the former fund are taken to be the rights and liabilities of the claim fund.
>
> **(2)** A claim that has been made against the former fund, and not finished before the commencement, continues as if it were a claim against the claim fund.
>
> **(3)** If, before the commencement, a person could have made a claim against the former fund but did not make the claim, the person may make the claim against the claim fund.
>
> .....
>
> **(7)** For applying subsection (3) and this Act, a contravention, stealing or fraudulent misappropriation or misapplication mentioned in section 119(1) of the repealed Act in relation to which the claim arose is taken to be an event mentioned in section 470(1)."

Subsection (7) was inserted in December 2002.

[11] By s 604(3) a person who could have made a claim against the former fund may make the claim against the new claim fund. It is the same claim as might have been brought under the *A & A Act*, and not a new species of claim under the *PAMD Act*. The question is whether immediately before the repeal of the *A & A Act* and the commencement of the *PAMD Act* the claimant could have made a claim under the *A & A Act*.

[12] Section 119 of the *A & A Act* created a new right in a person who had suffered pecuniary loss because of certain conduct (subsections (1) and (4)) and provided a time limit within which a claim must be made (subsection (5)). It went on to provide that the registrar (of the Auctioneers and Agent Committee which was the body charged with adjudicating upon claims) might accept a notice of claim outside the relevant time limit if the Committee consented to considering the claim (subsection (6A)).

[13] Whether a relevant time limit is an element of a cause of action or whether its expiration merely bars the remedy is a question of statutory interpretation. In *Jacob v Roberts* [2002] QCA 87 the Court of Appeal considered a similar question arising under the *Criminal Offence Victims Act* 1995 (Qld). As Davies JA noted at paragraph [11], such a question is often a finely balanced one. He went on -

> "It is sufficient to say that the fact that a statute both creates a right and provides for a time limitation upon that right or its exercise is some indication of an intention to make the limitation a condition of the existence of the right or its exercise."

See *Australian Iron and Steel Ltd v Hoogland* (1962) 108 CLR 471 at 488 - 489. In *Jacob v Roberts* another factor leading to the conclusion that the right conferred was conditional upon compliance with the limitation was that the right conferred was not a right to compensation but a right to apply for such compensation, and it was the right to apply which was, by the section, made subject to the time limitation. See *Maxwell v Murphy* (1957) 96 CLR 261 at 268. Both of those factors were present in the *A & A Act*.

[14] What of subsection (6A)? That created a mere right to apply for a discretionary benefit, namely the Committee's consent to a consideration of the claim - a right which ceased to exist when the legislation creating it was repealed: see *Kentlee Pty Ltd v Prince Consort Pty Ltd* [1998] 1 Qd R 162 at 177 and 187; *Director of Public*

Works v Ho Po Sang [1961] AC 901. Even if that were not so, the claims made by the Hoskings and the Hewitts were not within the terms of s 6A, as they were not claims of the relevant limit or less, and it was not within the Committee's powers to treat them as claims for the relevant limit or less.

[15] I conclude that the time limits within subsection (5) were of the essence of the right created by the section.

[16] It follows, then, that the Hoskings had lost their right to make a claim against the former fund before the commencement of the *PAMD Act*, and so they had no right to make that (or some other) claim against the new claim fund pursuant to s 604(3) of the *PAMD Act.*

[17] In the Hewitts' case the time limit under s 119(5) of the *A & A Act* had not expired when that Act was repealed and replaced by the *PAMD Act*. However, it expired before they made a claim. When the *PAMD Act* commenced their right to make the claim which had arisen under *A & A Act* remained extant. The time limit under subsection (5) of s 119 being of the essence of the right, it continued to apply. New time limits created under s 472 of the *PAMD Act* and applicable to claims arising under that Act were irrelevant.

[18] In any event neither the Hoskings' claim nor the Hewitts' claim can succeed because of s 471(2)(h) which excludes as a claimant a person who suffered financial loss because of a marketeering contravention in relation to the purchase of an investment residential property. I do not accept the submission of counsel for the applicants that the exclusion would affect only the making of a claim after 13 December 2002 (when s 471(2)(h) commenced) and not the prosecution of a claim already made. Section 634 provides -

> **"634 Application of amendments to claims**
>
> **(1)** The amendment chapter 14, part 2 applies to claims made against the fund at any time –
>
> (a) whether before or after the commencement of the amendments of the previous chapter 14, part 2 made by the amending Act; and
> (b) irrespective of when any circumstance relating to them happened.
>
> …
>
> **(3)** To remove any doubt, it is declared that this section applies to –
>
> (a) a claim mentioned in section 604 made against the former fund; and
> (b) a claim that could have been made against the former fund."

The new provision (which is in chapter 14 part 2) has retrospective effect. In other words, the Hoskings and the Hewitts are to be treated as never having had rights to claim against the claim fund.

[19] Prior to its repeal on 27 June 2000 s 7 of the *A & A Act* provided for a regulation to exempt a person from a provision of that act. I reject the submission that the applicants had rights to seek exemption from s 119(5) which were saved by s 20 of the *Acts Interpretation Act* 1954 (Qld) when s 7 of the *A & A Act* was repealed. They had no more than a hope or expectation that, if asked (which he was not), the Governor in Council would make such a regulation. See *Kentlee Pty Ltd v Prince Consort Pty Ltd.*

[20] In each case the Tribunal was ultimately correct in its conclusion that the claims were extinguished when the relevant time limit in s 119(5) of the *A & A Act* expired. However, it erred in holding that it could nevertheless consent to considering the claims, limited in amount to $7,500, pursuant to subsection (6A). In each case the Tribunal's decision should be quashed and it should be declared that the applicants

do not have a valid and enforceable claim against the claim fund established under the *PAMD Act*.

[21] Mr Hinson of senior counsel represented the second respondent, the Chief Executive, Department of Tourism, Racing and Fair Trading. When the decision was announced in Court, he informed the Court that his instructions were not to seek an order for costs in favour of his client, but rather to ask the Court to order that each party bear its own costs. He said that the Chief Executive had taken the view that it was in the public interest that the interpretation of these provisions be the subject of a judicial determination. Accordingly, I shall order in each case that there be no order as to costs.