SUPREME COURT OF QUEENSLAND

CITATION:	*Miller v Nominal Defendant* [2003] QCA 558
PARTIES:	**HARRY ROBERT MILLER** (applicant/respondent/cross-appellant) v **THE NOMINAL DEFENDANT** (respondent/appellant/cross-respondent)
FILE NO/S:	Appeal No 4398 of 2003 SC No 10485 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	21 October 2003
JUDGES:	Davies and Williams JJA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal allowed** **2. Cross-appeal dismissed** **3. Set aside orders made by the learned primary judge** **4. In lieu, dismiss application dated 18 November 2002**
CATCHWORDS:	INSURANCE - MOTOR VEHICLES - COMPULSORY INSURANCE LEGISLATION - WHERE IDENTITY OF VEHICLE CANNOT BE ESTABLISHED - QUEENSLAND - EXTENSION OF TIME - where claimant injured in motor vehicle accident with unidentified vehicle - where claimant consulted solicitor - where notice of accident received by the Nominal Defendant outside three month period prescribed by s 37(2) *Motor Accident Insurance Act* 1994 (Qld) - where no excuse for delay given as required by s 37(3) - where reason for delay was solicitor's misunderstanding of notice requirements in respect of claims against the Nominal Defendant - whether delay caused by solicitor's conduct can be attributed to claimant STATUTES - ACTS OF PARLIAMENT - INTERPRETATION - PARTICULAR WORDS AND PHRASES - SPECIFIC INTERPRETATIONS - where, by time matter came before learned primary judge, claimant had

given notice of claim to the Nominal Defendant - where notice given outside three month period - where claimant had not given a reasonable excuse for delay - where nine month period provided for in s 37(3) *Motor Accident Insurance Act* 1994 (Qld) expired - whether reasonable excuse for the delay must be given within nine months or whether only notice of accident must be given within nine months

INSURANCE - MOTOR VEHICLES - COMPULSORY INSURANCE - WHERE IDENTITY OF VEHICLE CANNOT BE ESTABLISHED - QUEENSLAND - EXTENSION OF TIME - where notice of motor vehicle accident not given to the Nominal Defendant within nine months - where application for leave to bring proceedings was made within nine months of accident - where s 39(8) *Motor Accident Insurance Act* 1994 (Qld) provides that if claimant failed to give notice to the Nominal Defendant within nine months court can not give leave to commence proceedings despite non-compliance - whether court can give leave to proceed despite non-compliance with notice requirements

Motor Accident Insurance Act 1994 (Qld) s 37, s 39, s 57

Australian Iron & Steel Ltd v Hoogland (1962) 108 CLR 471, applied
Brannigan v Nominal Defendant [2000] 2 QdR 116, cited
Commonwealth v Mewett (1997) 191 CLR 471, cited
Horinack v Suncorp Metway Insurance Ltd [2001] 2 QdR 266, cited
McKain v R W Miller & Co (SA) Pty Ltd (1991) 174 CLR 1, applied
Thomas v Transpacific Industries Pty Ltd [2003] 1 QdR 328, cited

COUNSEL: K N Wilson SC, with K F Holyoak, for the appellant/cross-respondent
R J Douglas SC, with R W Morgan, for the respondent/cross-appellant

SOLICITORS: O'Shea Corser & Wadley for the appellant/cross-respondent
Irish Bentley for the respondent/cross-appellant

[1] **DAVIES JA:** This is an appeal by the Nominal Defendant against the following orders made, it seems, under s 39(5)(c)(ii) of the *Motor Accident Insurance Act* 1994 (Qld) ("the Act"):

1. the claimant be authorized to bring further proceedings based on his claim, subject to:
   (a) on or before 20 May 2003, the claimant providing by way of statutory declaration a reasonable excuse for the delay in submitting the Notice of Claim to the Nominal Defendant between 18 May 2002 and 10 July 2002; and

(b) compliance with Part 4 Division 5A of the Act;

2. the respondent's costs be its costs in the cause provided that if the claimant did not commence proceedings in relation to his claim the respondent could recover its costs against the claimant.

[2] The Nominal Defendant claims that the application by the claimant should have been dismissed. The respondent cross-appeals against those orders claiming, in substance, that its application should have been allowed.

[3] This appeal and cross-appeal raise two principal questions. The first is that which this Court has decided today in *Perdis v Nominal Defendant*; whether in deciding whether a reasonable excuse has been given, for the purposes of s 37(3) of the Act, it is necessary to consider only whether the claimant's own personal actions were reasonably excusable in the light of what occurred or whether, in circumstances where the claimant retained a solicitor in connection with the giving of the notice, it is also necessary for the actions of the solicitor, in so far as they contributed to the delay, to be reasonably excused.

[4] The second point is whether any such reasonable excuse must be given within the period of nine months specified in s 37(3) of the Act. The learned primary judge expressed the view that it did not need to be given within that period; hence the condition imposed in par 1(a) of the above order.

[5] A third question also arises, albeit not from the terms of the appeal or cross-appeal. That is whether, if reasonable excuse must be given within nine months of the motor vehicle accident, this Court can nevertheless thereafter authorize further proceedings based on the claim despite that non-compliance.

[6] The relevant facts are as follows. The claimant alleges that he was injured on 18 February 2002 when he says he was forced to take evasive action so that the bus which he was driving in the course of his employment avoided colliding with a vehicle at the intersection of Ann and George Streets Brisbane. There was no collision and the other vehicle allegedly involved remains unidentified. There do not appear to have been any witnesses. The claimant claims to have suffered an injury to his left shoulder. He completed a workers' compensation claim in respect of such injury on 19 February.

[7] On 23 May 2002 the claimant first consulted a solicitor, Mr Bentley of his present solicitors. He saw Mr Bentley for a short consultation after working hours on that day. His purpose was to discuss the cessation of his WorkCover benefits. However he did tell Mr Bentley on that occasion that he injured his shoulder during an incident which occurred whilst driving his bus, that there were no witnesses as the bus was empty and that the offending vehicle had left the scene. He said that the incident did not involve a collision with any other vehicle, that accordingly there were no marks on the bus and that in consequence there was some scepticism about the incident at his work place.

[8] As it is necessary to see the further facts in the context of s 37 and s 39 of the Act, it is convenient to set these out before proceeding to relate those facts. Section 37 relevantly provides:

> "(1) Before bringing an action in a court for damages for personal injury arising out of a motor vehicle accident, a claimant must give written notice of the motor vehicle accident claim to the

insurer or 1 of the insurers, against which the action is to be brought -

…

(2) The notice must be given -

(a) if it is to be given to the Nominal Defendant because the motor vehicle can not be identified - within 3 months after the motor vehicle accident;

…

(3) If notice of a motor vehicle accident claim is not given within the time fixed by this section, the obligation to give the notice continues and a reasonable excuse for the delay must be given in the notice or by separate notice to the insurer but, if a motor vehicle can not be identified and the notice is not given to the Nominal Defendant within 9 months after the motor vehicle accident, the claim against the Nominal Defendant is barred.

… "

[9] Section 39 is relevantly as follows:

"…

(5) A claimant's failure to give notice of a motor vehicle accident claim as required under this division prevents the claimant from proceeding further with the claim unless -

(a) the insurer -

(i) has stated that the insurer is satisfied notice has been given as required under this division or the claimant has taken reasonable action to remedy the noncompliance; or

(ii) is presumed to be satisfied notice has been given as required under this division; or

(b) the insurer has waived compliance with the requirement; or

(c) the court, on application by the claimant -

(i) declares that the claimant has remedied the noncompliance; or

(ii) authorises further proceedings based on the claim despite the noncompliance.

…

(8) If a claim against the Nominal Defendant is barred because the claim relates to personal injury caused by, through or in connection with a motor vehicle that can not be identified and the claimant failed to give notice of claim under this division within 9 months after the motor vehicle accident, the Nominal Defendant can not waive compliance with the requirement to give notice within the time allowed by this division, nor can the court give leave to bring a proceeding in a court despite the noncompliance."

[10] It is of some significance, it seems to me, that Mr Bentley provided the claimant with a form of notice under s 37 of the Act to fill out, and says that he told him to fill it out as best he could so that when he saw one of the lawyers in the firm who specialized in personal injuries they would have all the relevant information. It is also relevant that the notice, signed by the claimant and received by the Nominal Defendant only on 11 July 2002, was signed by the claimant on 23 May 2002 and states that his first consultation with the solicitors was on 22 May 2002. This may

have been a telephone conversation, to which Mr Bentley refers, in which the meeting on 23 May was arranged. The learned primary judge held, rightly in my opinion, that the possibility of a claim against the Nominal Defendant was discussed at that meeting.

[11] It appears from his Honour's judgment that the claimant, and perhaps some other witnesses, gave oral evidence in this application but none of that was before this Court. His Honour expressed some reservations about the reliability of the claimant's evidence and I shall return to that later. He did not express any opinion about the reliability of the evidence of Mr Bentley or of that of Ms Leszczuk, a paralegal. For the reason just mentioned, this Court is not aware whether either gave oral evidence. However his Honour did express concern about the possibility of conflict of interest between the claimant and the solicitors, presumably because of the likelihood, as his Honour found, that some of the delay was caused by their incompetence. This is of relevance in the assessment of the claimant's conduct.

[12] It seems plain that it was the claimant's intention on 23 May to retain those solicitors generally in respect of his injury and they sent him various documents including a retainer agreement on 6 June. The claimant attended at those solicitors' office on 18 June when Mr Bentley discussed with him the retainer agreement and he signed it. There was a further consultation with Mr Bentley on 26 June in which the latter explained the process in pursuing a WorkCover claim.

[13] During June the solicitors' firm was experiencing staff problems. Two employed solicitors apparently left. It also seems that both Mr Bentley, an employed solicitor Ms Sulman, and Ms Leszczuk who was appointed to handle his matter, were mistaken as to the time within which a notice was required to be given under s 37(2)(a). The claimant was calling constantly during this period but it appears that very little if any attention was given to his matter. It was not until 11 July 2002 that the solicitors gave to the Nominal Defendant the written notice of his motor vehicle accident claim in purported compliance with s 37 of the Act.

[14] By the time this notice was given nearly five months had expired since the alleged accident. However neither in the notice or concurrently with it did the claimant give any excuse for the delay as required by s 37(3). The Nominal Defendant wrote to the claimant's solicitors on 16 July notifying them of that omission.

[15] The first attempt to provide an excuse for the delay is contained in the solicitors' letter to the Nominal Defendant of 15 August. It said:

> "Due to a changeover in staff, it is unclear how the S37 Notice came to be given outside the prescribed time limit."

Of course that provided no excuse at all or even an explanation for the delay. The delay from 18 May 2002 to 23 May 2002 when the claimant first consulted his solicitor was not caused by anyone other than the claimant himself. But because it was short, Mr Wilson SC for the Nominal Defendant was able to suggest, as the only reason why, if a notice had been given on 23 May 2002, an order would not then have been made pursuant to s 39(5)(c)(ii) authorizing further proceedings based on the claim despite the non-compliance with s 37(2)(a), that the claimant had given inconsistent explanations for that delay.

[16] As to the delay after 23 May, the above quoted statement, it seems to me, conceals the real reason; the misunderstanding by Mr Bentley, whose client the claimant

believed himself to be, his employed solicitor Ms Sulman and his paralegal Ms Leszczuk, as to the notice requirements under the Act in respect of a claim against the Nominal Defendant. It is necessary to view the claimant's statutory declarations, to which I am about to refer, in that light.

[17] In a statutory declaration of 11 September 2002, faxed to the Nominal Defendant on 17 September, the claimant said:

> "5. Indeed during this time (between 18th February 2002 - 22nd May 2002), as advised by my doctor I concentrated all my efforts into recuperating and getting myself back on my feet.
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> 6. It was my understanding, from my very limited knowledge of law, and the information I obtained from friends and family that I had nine months in which to lodge a Notice of Accident Claim Form. I was not aware that I had other obligations under the Act."

[18] Then in a further statutory declaration undated but signed apparently in October and faxed by his solicitors to the Nominal Defendant on 23 October 2002 he swore:

> "3. I am advised that further particulars are requested with respect to why I did not lodge my Section 37 within 3 months of the accident, I advise as follows:
>
> (a) Before the 18th day of May 2002, a friend advised me that they had searched the internet, in particular the Motor Accident Insurance Commission web site, and the information on that web site stipulated that I had either 3 months in which to notify the Nominal Defendant or alternatively 1 month from consultation with a solicitor.
>
> (b) Accordingly I ensured that my Section 37 Notice was lodged within 1 month of first consulting my solicitor.
>
> (c) I confirm that I relied on this information which was obtained from a government web site."

[19] Three points may be made about these statutory declarations. The first is that it seems that the claimant is a Dutch migrant who says he has little knowledge of written English. Secondly the claimant's misapprehension as to the notice requirements expressed in the statutory declarations appear to have been the same misapprehensions as those under which Mr Bentley and his employees were suffering. And thirdly, obviously, the solicitors drafted each of the statutory declarations.

[20] His Honour found the claimant's evidence unsatisfactory. He thought it vague and at times evasive. His Honour said that he did not mean by this that he was a wholly unreliable witness; simply that his evidence on this point, the explanation for the delay, was unsatisfactory. There is no reason to doubt the correctness of his Honour's conclusion and I would accept it. But it appears that those in the solicitor's firm were also relying for the law, not on the terms of s 37, but on the Nominal Defendant's website. It is unnecessary to consider whether or not that website accurately stated the law. It is plain that the solicitors misapprehended the law and it is, to say the least, a remarkable coincidence that their misapprehension was the same as that which the claimant swore were his and that, like that of the claimant's, it was said to emanate from the Nominal Defendant's website.

[21] His Honour concluded that nothing said by the solicitors or in the above statutory declarations was a reasonable excuse for the delay from 18 May to 11 July 2002. I agree with that conclusion.

[22] His Honour then appears to have concluded, or at least his findings were consistent with the conclusion that the failure to give a reasonable excuse for the delay from 23 May was the fault of the solicitor. His Honour's findings in that respect were:

> "The delay from 23 May until 10 July is unexplained, but may be due to Mr Miller's solicitors rather than to him …"

and

> "Nowhere in the material filed on behalf of Mr Miller do his solicitors expressly admit to having misapprehended the requirements of s 37 or accept responsibility for failing properly to lodge the notice of reasonable excuse. Nonetheless it seems to me more likely than not that it was their neglect which led to this omission."

[23] His Honour went on to say that he was content to follow the decision of White J in *Re Tonks*[1] "and not attribute Mr Miller's failure to file a notice giving reasonable excuse to him personally". For the reasons which I gave in *Perdis v The Nominal Defendant*, in my opinion his Honour was correct in concluding that the delay which occurred after 23 May 2002 when the claimant first consulted his solicitor, cannot be attributed to the claimant. Not only did he leave in the hands of his solicitor the question of any claim which he might have in respect of his injury, but he followed that up with that solicitor and another person in the firm to whom the solicitor referred him. Given the claimant's limited education and sophistication I think that from 23 May 2002 he acted reasonably in leaving in the hands of his solicitor the doing of whatever was reasonably necessary to pursue a claim in respect of his injury; and that includes a claim against the Nominal Defendant. The claimant was therefore responsible only for the delay from 18 May 2002 to 23 May 2002, a period of five days. He would have given a reasonable excuse for his delay in giving notice of claim after 23 May by saying, as was the case, that he had on that day entrusted the matter to his solicitors.

[24] By the time the matter came on before his Honour the claimant had, of course, given a form of notice of his claim, but not a reasonable excuse for delay, on 11 July 2002. The application before his Honour was filed on 18 November 2002 and heard by him on 13 December 2002. His Honour gave judgment on 22 April 2003. In order to determine what were the consequences, if any, of that sequence of events, in particular whether it had the effect that the claimant could no longer pursue his claim against the Nominal Defendant, it is necessary to consider the meaning and application to the facts of this case, as I have stated them, of s 37, s 39 and s 57 of the Act.

[25] I have already set out the relevant provisions of s 37 and s 39. Section 57 provides relevantly as follows:

> "(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

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1 [1999] 2 QdR 671 at 678.

> 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.
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> (2) However, the proceeding may only be brought after the end of the period of limitation if it is brought within -
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> (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."

[26] The learned primary judge was of opinion that "notice" where it last appears in s 37(3), means only the notice of motor vehicle accident claim given under that section whether or not it contains a reasonable excuse. Consequently his Honour held that, even though the notice of claim must be given within nine months a reasonable excuse for delay may be given at any time.

[27] There are, in my opinion, a number of difficulties in that interpretation although I accept that it is open on the literal meaning of the section. In the first place it seems odd that if the reasonable excuse happens to be given in the notice, that notice containing the reasonable excuse must be given within nine months, but if the claimant chooses to give no explanation in the notice or an unreasonable one, he or she has, prima facie, an unlimited time within which to give a notice containing a reasonable excuse.

[28] Secondly, it seems inconsistent with the mandatory requirement that a notice giving a reasonable excuse must be given that, prima facie, it can be given at any time in the future; it may be questioned whether that would be consistent with any meaningful obligation.

[29] Thirdly, such an interpretation appears inconsistent with what appears to have been the purpose of the amendment made in 2000 to s 37 permitting reasonable excuse to be given otherwise than contained in the notice of claim, namely that the requirement in the former s 37(4) that the notice, when given, "contain" an explanation for the delay, excluded a reasonable excuse given at the same time as the notice of claim but in a separate document except where that document in some way formed part of the notice of claim; to avoid the possibility that compliance with that provision might depend on whether it was "attached by a paper clip rather than by means of a staple".[2]

[30] And fourthly, to construe s 37(3) in such a way as to permit reasonable excuse to be given even after the expiry of the period of limitation appears to be inconsistent with the stated object of the speedy resolution of disputes,[3] the "stricter regime" in respect of claims involving unidentified motor vehicles[4] and the underlying policy of suppression of fraudulent claims.[5]

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2 *Brannigan v Nominal Defendant* [2000] 2 QdR 116; *Horinack v Suncorp Metway Insurance Ltd* [2001] 2 QdR 266 at [2].

3 Section 3(c).

4 *Brannigan* at [15]. And see below as to the effect of s 37(3), s 39(8) and s 57(1).

5 *Brannigan* at [26].

[31] I would therefore construe s 37(3) so that "notice" where it last appears in that section means the notice of claim where the reasonable excuse is given in the notice or the notice of claim and the separate notice of reasonable excuse where the reasonable excuse is given in a separate notice.

[32] It is plain on the above facts that, on the above interpretation of s 37(3), no notice was given to the Nominal Defendant within nine months after the motor vehicle accident. Subject to the possible application, to the facts of this case, of s 57, therefore, the claim against the Nominal Defendant was barred: s 39(8).

[33] An application for leave to bring a proceeding based on the motor vehicle accident claim was made, in my opinion, before the end of the period of nine months specified in s 37(3) because that application was filed on the last day of that period.[6] However s 39(8) provides that if a claim against the Nominal Defendant is barred in a case such as this because the claimant failed to give notice of claim under the Division within nine months after the motor vehicle accident, the court may not thereafter give leave to bring a proceeding in a court despite the non-compliance. Prima facie, therefore, notwithstanding that the application was made before the expiry of the nine month period, the court cannot, thereafter, give leave pursuant to s 39(5)(c)(ii).

[34] Whether s 57(1) applies to permit a contrary result depends on whether, on the correct construction of that provision, the period of nine months specified in s 37(3) and s 39(8) is a "period of limitation applying to the claim" against the Nominal Defendant. To answer that question affirmatively would give s 57(1) an effect inconsistent with the clear statutory prohibition in s 39(8).

[35] There is, in the Act, an essential difference between an action against an owner of a motor vehicle for damages for personal injury arising out of a motor vehicle accident and a claim of a similar kind against the Nominal Defendant. In the first case, s 52(1) provides that if an action is brought in a court for damages for personal injury arising out of a motor vehicle accident, the action must be brought against the insured person and the insurer as joint defendants. The Act assumes the existence of such a cause of action and mandates against whom the action based on that cause of action must be brought. The cause of action remains one at common law though substantially modified by the Act. The limitation period applying to such an action is that contained in the *Limitation of Actions Act* 1974 (Qld), s 11.[7]

[36] On the other hand the Act both creates the right to sue the Nominal Defendant,[8] the cause of action against it, and bars any claim based on that right unless notice is given to the Nominal Defendant within nine months after the motor vehicle accident.[9] The question is whether, in this case, the limitation period of nine months is "annexed by statute to a right which it creates so as to be of the essence of

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6 *Thomas v Transpacific Industries* [2003] 1 QdR 328 at fn 18.

7 The same would also be true even if s 52 of the Act were construed as creating a statutory cause of action.

8 Section 16(1), s 18, s 31(1)(d), s 33, s 52(1), s 52(2)(a).

9 Section 37(3), s 39(8).

that right".[10] The distinction between such a provision and one which merely denies a remedy for an existing right is explained in the following passages.

[37] In *Australian Iron & Steel Ltd v Hoogland*[11] Windeyer J said:[12]

> "It may be that there is a distinction between Statutes of Limitation, properly so called, which operate to prevent the enforcement of rights of action independently existing, and limitation provisions annexed by a statute to a right newly created by it. In the latter case the limitation does not bar an existing cause of action. It imposes a condition which is of the essence of a new right …
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> …
>
> It seems that, under the common law system of pleading, when a limitation is annexed by a particular statute to a right it creates, the plaintiff should allege in his declaration that the action was brought within time. On the other hand it is for the defendant to plead the *Statute of Limitations* as a defence to an action on a common law cause of action, as if he does not it is assumed that he intends to waive it: …
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> …
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> However, when issue is joined on a plea of the Statute, the burden of proving that the action is within time is on the plaintiff: …
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> …
>
> And, even when a time limit is imposed by the statute that creates a new cause of action or right, it may be so expressed that it is regarded as having a purely procedural character, as a condition of the remedy rather than an element in the right; and in such cases it can, it seems, be waived, either expressly or in some cases by estoppel … "

[38] In *McKain v R W Miller & Co (SA) Pty Ltd*[13] Mason CJ, after referring to part of the above passage of the judgment of Windeyer J, said:[14]

> "A distinction is generally drawn between those statutes which are said to take away the remedy available to a party without touching that party's underlying right and those statutes or limitation provisions which expressly or impliedly extinguish an underlying right. …
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> …
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> Statutes of limitation which operate to prevent the enforcement of independently existing rights of action, whether known at common law or, in some circumstances, created by statute, are typically described as denying a remedy while not destroying or extinguishing an underlying right. …

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10 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 535.

11 (1962) 108 CLR 471.

12 At 488.

13 (1991) 174 CLR 1.

14 At 18 - 19.

> …
> Not all statutes of limitation, however, operate simply to deny a party a remedy while leaving a right in existence. Limitation provisions which can be seen as incidents of rights created, whether by the same or another related statute, have been typically construed as extinguishing those rights after the effluxion of the nominated period of time. As Windeyer J put it in *Hoogland* when describing such limitation provisions, 'the limitation does not bar an existing cause of action, it imposes a condition which is of the essence of a new right'.
> …
> In some cases, a limitation provision will, by its express terms, extinguish the right of a person having a cause of action. In other cases, the conclusion that that limitation provision operates to extinguish a right will turn on the process of statutory construction."

[39] Here both the creation of the right to sue the Nominal Defendant and the barring of the right or any claim based on that right are contained in the same Act. There are, moreover, two other indications that, so far as claims against the Nominal Defendant are concerned, it was the intention of the Act to terminate the right to make any such claim if notice is not given within nine months after the motor vehicle accident.

[40] The first of these is that s 37(3), in terms, bars not just the action[15] but the claim on which it is based. And the second, even stronger indication, is that, as mentioned earlier,[16] s 39(8) provides that, unless such notice is given within nine months after the motor vehicle accident, the Nominal Defendant cannot waive compliance with the requirement to give notice within that time, nor can the court give leave to bring a proceeding in a court despite the non-compliance. These provisions appear to be intended not merely to bar an existing right of action but to impose a condition which is of the essence of the right, created by the Act, to sue the Nominal Defendant. Reading s 37(3) with s 39(5) and s 39(8) that alternative condition, it seems to me, is that a notice is given within nine months of the motor vehicle accident, or that, within that period, compliance with the requirement for giving such notice is waived or the court gives leave to bring a proceeding despite the non-compliance. It follows that s 57(1), in my opinion, has no application.

[41] None of these alternative conditions were complied with in the present case. It follows that, in my opinion, his Honour could not have made an order, conditional or otherwise, when he did so and this Court cannot make any such order. However as this was not argued by the Nominal Defendant, either before the learned primary judge or this Court - indeed the contrary was conceded - I would not be inclined to make any order as to costs.

Orders

1. Allow the appeal.
2. Dismiss the cross-appeal.
3. Set aside the orders made by the learned primary judge.
4. In lieu, dismiss the application dated 18 November 2002.

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15 As in s 11 of the *Limitation of Actions Act* 1974.

16 At [33].

[42] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Davies JA and, subject to one matter, I agree with all that he has said therein and with the orders proposed.

[43] Again this appeal raises questions as to the application to the essential facts of s 37, s 39 and s 57 of the *Motor Accident Insurance Act* 1994 (Reprint 4B is the relevant version for present purposes).

[44] It is inherent in the reasoning of Davies JA (see in particular the paragraph [15] of his reasons) that the delay referred to in s 37(3) refers to the period after the expiration of the three month period referred to in s 37(2)(a). His Honour expressly says that in his reasons for judgment in the matter of *Perdis* which was heard contemporaneous with this matter.

[45] For the reasons I have given in *Perdis* it is my view that the delay for purposes of s 37(3) is the lapse of time from the date of the accident to the date on which a notice with accompanying explanation or excuse for the delay is given. On that issue I adhere to what I have written in *Perdis*.

[46] The orders should be as indicated in the reasons for judgment of Davies JA.

[47] **MACKENZIE J:** The facts of this matter are set out in the reasons for judgment of Davies JA. Except with regard to the meaning of "delay" discussed in my reasons in *Perdis v Nominal Defendant* I generally agree with the reasons of Davies JA. I wish only to add the following observations.

[48] The incident upon which the claim is based allegedly happened on 18 February 2002. The three month period for giving notice of claim expired on 18 May 2002. The notice of claim, not accompanied by any excuse for the delay was given on 11 July 2002.

[49] The excuses relied on were given on 15 August 2002, 11 September 2002 and 23 October 2002. The first was not really an excuse except to the extent that it implied default of the solicitors. The second and third, while not wholly consistent, suggested that the appellant was aware that there were time limits but was misinformed about them by friends and relations and subsequently by his solicitors.

[50] On 18 November 2002 an originating application seeking, in the alternative, an order that the excuse provided was reasonable within the meaning of s 37(3) of the Act or that the applicant be granted leave to file proceedings notwithstanding non-compliance with the Act was filed. The first aspect of the application was disposed of by a finding of fact by the learned trial judge that reasonable excuse had not been given by the claimant. The claimant's credibility was a factor in the finding. The order actually made is set out in paragraph [1] of Davies JA reasons for judgment.

[51] There was a cross appeal on the ground that the learned trial judge's finding on the first ground in the application was erroneous, but no reason was demonstrated why it should be disturbed. There was an appeal by the Nominal Defendant against the order on a number of grounds.

[52] I agree for reasons given by Davies JA in paragraphs [26] to [32] of his reasons for judgment that reasonable excuse must be given within the period of nine months of the incident upon which the claim is based. For reasons given in *Perdis* the ground

of appeal alleging that the learned trial judge acted on a wrong principle in saying that the claimant should not be held responsible for the default of his solicitor fails.

[53] I also agree for reasons given by Davies JA in paragraphs [33] to [41] of his reasons for judgment with his analysis of the relationship between s 37(3), s 39(8) and s 57(1) of the Act.

[54] The present appeal is one which turns on the power of the court to authorise further proceedings, based on a claim despite non-compliance, after a period of nine months has elapsed from the accident. The bar imposed by s 39(8) applies to cases where "notice", which includes reasonable excuse, has not been given. In a case where no such "notice" has been given and s 39(5)(c)(ii) is relied on, the order must be made within nine months. That is to be distinguished from the situation where s 39(5)(c)(i) is relied on in a case where the dispute is whether an excuse given is reasonable. In such a case the quality of the excuse as reasonable or not reasonable has become fixed at the time at which it was given. A determination that the excuse given within time is reasonable may be made outside the period of nine months.

[55] I agree with the orders proposed by Davies JA.