

SUPREME COURT OF QUEENSLAND

CITATION: *Morrison-Gardiner v Car Choice P/L & Anor* [2004] QSC 124

PARTIES: **JANE MORRISON-GARDINER**
(applicant)
v
CAR CHOICE PTY LTD
(first respondent)
ALLIANZ AUSTRALIA INSURANCE LIMITED ACN 15 000 122 850
(second respondent)

FILE NO/S: SC No 1183 of 2004

DIVISION: Trial Division

PROCEEDING: Application – Leave to Commence Proceedings

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 11 June 2004

DELIVERED AT: Brisbane

HEARING DATE: 16 March 2004

JUDGE: Holmes J

ORDERS:

- 1. pursuant to s 57(2)(b) of the Motor Accident Insurance Act 1994, the time within which the applicant may bring proceedings in respect of a claim for personal injury sustained in a motor vehicle collision on 21 November 2000 be extended to a time not later than 60 days after the date on which a compulsory conference is held pursuant to the Act;**
- 2. that the compulsory conference referred to in Order 1 be held within 30 days of this order or any decision of the Court of Appeal dismissing an appeal from this order, whichever is the later.**

CATCHWORDS: LIMITATION OF ACTIONS – CONTRACTS, TORTS AND PERSONAL ACTIONS – APPLICATION OF THE STATUTES TO PARTICULAR CAUSES OF ACTIONS – MOTOR VEHICLE INSURANCE – where the applicant sustains injury in motor vehicle accident and a notice of claim

is served in accordance with Division 3 of the *Motor Vehicle Insurance Act 1994* – where the limitation period has since expired – whether leave to bring a proceeding can be given pursuant to s 57(2)(b) of the *Motor Accident Insurance Act 1994*

Motor Accident Insurance Amendment Act 2000, s 3
Motor Vehicle Insurance Act 1994, s 34, s 37, s 39, s 41, s 45, s 47, s 51A, s 51C, s 51D, s 57
Personal Injuries Proceeding Act 2002, 59

Aydar v Pashen [2003] 1 Qd R 601
Birmingham v Priest [2003] 1 Qd R 623
Horinack v Suncorp Metway Insurance Ltd [2001] 2 Qd R 266
Kash v SM & TJ Cedergren Builders & Ors [2003] QSC 426
Perdis v Nominal Defendant [2003] QCA 555
Re Tonks [1999] 2 Qd R 671

COUNSEL: G Mullins SC for the applicant
 K Holyoak for the respondents

SOLICITORS: Maurice Blackburn Cashman for the applicant
 McInnes Wilson for the respondents

Background

- [1] The applicant was injured in a motor vehicle accident on 21 November 2000. On 21 May 2001, her then solicitors served a notice of claim on the second respondent pursuant to s 37 of the *Motor Accident Insurance Act 1994*. On 28 May 2001, the second respondent admitted liability and acknowledged that the notice of claim complied with the requirements of the Act. It seems that the applicant then changed solicitors and there was some delay while the file was transferred. On 29 October 2003 a claim and statement of claim was filed, and it was served the following day. However, s 51A(1) of the *Motor Accident Insurance Act* requires that a compulsory conference be held before any action for damages for personal injury arising out of a motor vehicle accident can be brought. That step had not been taken in this case, and it is accepted that the claim and statement of claim filed are of no effect. By an application filed on 4 February 2004, the applicant seeks an order under s 57(2)(b) of the Act that the time for commencing proceedings be extended to a date 60 days after the holding of a compulsory conference pursuant to the Act.
- [2] The relevant parts of s 57 of the Act are 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 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.
- [3] The applicant argued that s 57(2)(b) gave the court a discretion to allow a claimant to bring a proceeding at any time, notwithstanding the end of the limitation period. The respondents, on the other hand, contended that s 57(2) permitted an extension of time for proceeding only where the limitation period ended during the six months after the giving of the notice; it was that six month period which might be extended. But if, as here, the period of six months from the giving of the notice had expired well within the limitation period, there was no scope for s 57(2) to operate at all.

Scheme of the Act

- [4] Both parties referred to the scheme of the Act, past and present, in making their submissions. (Parts of the Act relevant to the issues here were introduced or substantially altered by the *Motor Accident Insurance Amendment Act 2000*, with effect from October 2000.) In arguing that the power to extend the limitation period was not open-ended, the respondents relied on s 3 of the Act, which includes among the legislation's objects:
- (aa) to establish a basis for assessing the affordability of insurance under the statutory insurance scheme and to keep the costs of insurance at a level the average motorist can afford; and ...
 - (c) to encourage the speedy resolution of personal injury claims resulting from motor vehicle accidents ...

Those objects emphasised, the respondents said, the importance of speedy resolution, which was also manifest in Division 3 of Part 4 of the Act, dealing with claims procedures.

- [5] Section 37 requires notice to be given of the motor vehicle accident claim within 9 months of the accident or the first appearance of symptoms¹; or, where a lawyer is consulted, within one month of that consultation.² After the notice is given, s 39(1) gives the insurer 14 days to indicate that it is satisfied that the notice is properly given³ or to give notice identifying any non compliance, and either stating that it is waived,⁴ or giving a reasonable period to attend to it,⁵ with a further notice at the end of that period stating the insurer's position.⁶ If the insurer fails to respond as required to the notice of motor vehicle accident claim it is presumed to be satisfied that it was given as required.⁷

¹ s 37(2)(b) (i)
² s 37(2)(b) (ii)
³ s 39(1) (a) (i)
⁴ s 39(1) (a) (ii)
⁵ s 39(1) (a) (iii)
⁶ s 39(1) (b)
⁷ s 39(3)

- [6] Under s 39(5), failure to give notice of the motor vehicle accident claim prevents the claimant from proceeding further with the claim unless the insurer has stated that it is satisfied as to notice or as to reasonable action to remedy non-compliance⁸; or unless the insurer is presumed to be satisfied or the insurer has waived compliance with the requirement⁹; or unless the court either declares that the claimant has remedied the non-compliance or authorises further proceedings based on the claim despite the non-compliance.¹⁰ When such a declaration is made or leave to bring a proceeding based on the claim is given, the insurer is taken at that time to receive the notice, by virtue of s 41(3)(b).
- [7] Section 39(5) was changed significantly, for the purposes of considering the issues here, by the 2000 amendment. In its earlier form, s 39(5)(a)(i) constituted the sole bar in the Act to the institution of proceedings: it precluded a claimant from bringing proceedings before the lapse of six months after giving notice of claim, or waiver of compliance with the notice requirements, unless the insurer had denied or disputed the extent of its liability. That time period corresponded with s 41, which required (and still requires) the insurer to investigate and advise whether liability is admitted within six months and to make an offer of settlement as soon as practicable.
- [8] Section 39(5)(c)(ii), which enables the court to authorise “further proceedings based on the claim”, also reflects a change: prior to the amendment, the court had a discretion to give “leave to bring the proceeding despite non-compliance”. Counsel on this application submitted that the removal of the latter expression meant that it was no longer possible for the court to give leave to bring the proceeding; so that references to applications for or the granting of such leave in s 41(3)(b) and s 57(2)(a) were now rendered meaningless. It is not necessary for the purposes of this application to determine whether that is so.
- [9] Sections 45 and 47 of the Act require, as they did before amendment, exchange of material. Division 5A, containing ss 51A-51D and dealing with compulsory conferences, is a new and important feature of the Act, post-amendment. Section 51A, as already noted, requires the holding of a conference, and proscribes the bringing of proceedings until it has taken place.¹¹ The time and place for the conference may be agreed by the parties at any time, although if six months have passed since the giving of the notice of claim either party may propose the time for it.¹² The conference may, however, be dispensed with by agreement of the parties or by order of the court.¹³ Section 51B deals with procedure leading up to and for the conference itself, including the exchange of certain material, while s 51C requires the exchange of final offers¹⁴; proceedings must not be started during the 14 days for which such offers must remain open.¹⁵ Section 51D dictates the bringing of proceedings within certain specified times after conclusion of the compulsory conference or dispensation with it, generally turning on a 60 day

⁸ s 39(5) (a) (i)

⁹ s 39(5) (b)

¹⁰ s 39(5) (c)

¹¹ s 51A(1)

¹² s 51A(2) & (3)

¹³ s 51A(4) & (5)

¹⁴ s 51C(1)

¹⁵ s 51C(6)

period.¹⁶ Failure to comply is not a bar to commencement, but it can result in a costs order or an order setting a time limit for commencement¹⁷; failure to comply with an order of the latter kind results in the claim being barred.¹⁸

The respondents' contentions

- [10] The combined effect of those provisions, Mr Holyoak for the respondents argued, was to put in place a pre-proceeding phase during which litigation could not be commenced. It was in light of that preliminary period, during which the claimant was prevented from commencing litigation, that the legislature had seen fit to enable the extension of the limitation period under s 57, within certain constraints. The first six month period of grace, which s57(2)(a) allowed, corresponded with the six months that s 41 allowed the insurer for investigation and resolution of the claim. What s 57 (2)(b) addressed was the situation in which the pre-litigation period would extend beyond the limitation period, it having been put out of the claimant's power to start his or her proceedings before the limitation period's end; that is to say, where the six month period following the giving of notice of claim overlapped with the end of the limitation period. It was not conceivable, given the nature of the scheme created by the Act, that s 57 was intended to confer a power at large to permit a claimant to proceed so long as he or she had given the original notice or made application before the end of the period of limitation.
- [11] Section 57(2) was amended with effect from 1 October 2000. Prior to that date, the commencing sub-sections had read as follows:
- (1) If notice of a motor vehicle accident claim is given under Division 3 (Claims procedures), 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 six months after the day on which the notice is given or leave to bring the proceeding is granted.

The explanatory notes say, in relation to the amendment:

“This clause is amended to allow for the six month period to be extended by the Court. This alleviates an anxiety that some of the legal profession have concerning the effect of the current provision.”

- [12] Mr Holyoak relied on the note as indicating that the relevant period for extension is the six months period. Where otherwise the extension under s 57(2)(a) would be limited to the six month period after notice of claim, that period may now be extended by exercise of the s 57(2)(b) discretion; but it has no relevance if the six month period from the notice of claim does not end after the end of the limitation period. In practical terms, the construction advocated by the respondents would come to this: no proceeding may be started after the end of the limitation period

¹⁶ s 51D (1) (2) & (3)

¹⁷ s 51D (4)

¹⁸ s 51D (5)

unless the notice of claim has been given no longer than 5 months and 30 days before the limitation date (assuming a 31 day month), so that the six month period extends beyond that date, if only by a day. Then there is an automatic extension for six months, which may be further extended by the Court.

- [13] The proper course for the applicant here, Mr Holyoak said, was to apply to the court under s 51A(5) for dispensation with the compulsory conference. To conclude otherwise would allow applicants to avoid the effects of the limitation period and also the requirement for timely completion of the pre-litigation phase.
- [14] In the alternative, Mr Holyoak argued, s 57(2)(b) required any application to be made within the six month period referred to in s 57(2)(a). If it were not so, the application could be made years later, and the effect of the limitation period would be destroyed. Insurers could never close off any claim in which they had received a complying s 37 notice.

The applicant's contentions

- [15] Mr Mullins, for the applicant, argued that the uncertainty introduced by the insertion of Division 5A in the Act explained the simultaneous amendment of s 57(2) to give the court an unconstrained power to remedy injustice. In support of his argument that the discretion under s 57(2)(a) was open-ended, he referred to the decision of McMurdo J in *Kash v SM & TJ Cedergren Builders & Ors*¹⁹ in relation to s 59(1) and (2) of the *Personal Injuries Proceeding Act 2002*, which are in virtually identical terms to the two subsections here:
- (1) If a complying part 1 notice of claim is given before the end of the period of limitation applying to the claim, the claimant may start a proceeding in a court based on the claim even though the period of limitation has ended.
 - (2) However, the proceeding may be started after the end of the period of limitation only if it is started within –
 - (a) 6 months after the complying part 1 notice is given or leave to start the proceeding is granted; or
 - (b) a longer period allowed by the court.

To a large extent McMurdo J's judgment was concerned with whether the powers conferred by s 59 were displaced by another section of the Act, s 77D, which made particular provision for the circumstances in that case. His Honour found, however, that s 59 did apply and enabled the court to extend the period of limitation.

- [16] In the course of his judgment, McMurdo J made some observations which might equally be made of the application of s 57 of the *Motor Accident Insurance Act*. The only statutory limit on the exercise of the power was the requirement that a complying notice of the claim be given; that requirement, he noted, overcame much of the difficulty in late commencement of actions which was the rationale for setting limitation periods. He characterised the section as recognising “the extra burden of bringing proceedings within a limitation period, as a result of the claimant having to take the presuit steps required by this Act, and therefore [allowing] a claimant extra time where a respondent has had the benefit of a complying notice within the limitation period”. In *Kash*, as here, the notice of claim was served more than six

¹⁹ [2003] QSC 426.

months before the end of the ordinary limitation period, but no point was taken by counsel as to that affecting the discretion. Instead, it was argued, unsuccessfully, that the application for an order had to be made within the ordinary limitation period, or, alternatively, within the limitation period as extended by the six months provided for in s 59(2)(a); a submission which, if accepted, would, his Honour observed, render the section virtually ineffective. There was no such constraint expressed in the section, and he declined to imply it. Questions of the extent of the delay and prejudice to either party were properly dealt with, he said, as part of the process of exercising the discretion.

- [17] Mr Mullins argued that the effect of the section contended for by the respondents would produce arbitrary results. If a notice was filed six months before the end of the limitation period, the court had no power to extend time; whereas if it were filed one day later the applicant would have the benefit of the six months provided for in s 57(2)(a), with the capacity in the court to extend time further. Rather, he contended, the legislation had by amendment added an open discretion, in the exercise of which one took into account the usual factors relevant to the extension of time. The provision was designed to preserve negotiations, so that any party who in good faith went through the processes entailed in the Act and found the limitation period expired could get leave to commence proceedings nonetheless.

Pre-amendment decisions on s 57

- [18] In its form prior to the 2000 amendment, s 57 received a good deal of judicial consideration. In *Horinack v Suncorp Metway Insurance Ltd*²⁰ White J, with whom the other members of the Court of Appeal agreed, described the scheme of Division 3 of the Act as envisaging that an insurer was to have six months from the receipt of the notice of claim to deal with it by way of investigation and any offer of settlement. That six month period was reflected both in s 39(5)(a)(i), which precluded a claimant from bringing proceedings before the lapse of six months after giving notice of claim or waiver of compliance with the notice requirements, and in s 57(2), which extended the limitation period by six months.
- [19] But the coincidence of the six month period in s 57(2) and s 39(5)(i) caused practical difficulties once the end of the ordinary period of limitation was reached: on the one hand, the claimant was precluded from bringing proceedings within six months of the notice; on the other hand, s 57(2) appeared to limit its benefit to cases where the proceeding was brought within six months of the notice. That conflict was resolved in *Bermingham v Priest*²¹ by the conclusion that in such cases the appropriate course was to bring an application for leave to bring a proceeding before the end of the period of limitation, so that the second alternative recognised in s 57(2) was available.²²
- [20] In *Bermingham v Priest*, Williams JA considered the construction of s 57 at some length. He regarded s 57(1) as providing for an extension of the limitation period where either a notice of claim was given or there was an application for leave to bring a proceeding under s 39(5) before the end of the ordinary period of limitation; and s 57(2) as fixing the duration of that extension. Section 57(2) did not provide

²⁰ [2001] 2 Qd R 266 at 272.

²¹ [2003] 1 Qd R 623.

²² see also *Aydar v Pashen* [2003] 1 Qd R 601.

an independent power to grant leave to commence an action. That remained the position, Mr Holyoak said, in relation to the section as amended.

Conclusions on construction

- [21] The symmetry perceived in *Horinack*, between the six month waiting period after giving the notice of claim and the extension of the limitation period by six months, no longer exists, disrupted by the amendment to s 39(5), the introduction of Division 5A, and the adding of the discretion in s 57(2)(b). The bars to commencement are no longer clearly framed in temporal terms: there is no six month waiting period once the notice of claim is given; instead a great deal turns on the timing of the compulsory conference, which may take place at any time, but may be delayed by either party for six months.
- [22] But Williams JA's analysis in *Bermingham* of the structure of the section still applies. Section 57(1) remains the sub-section which has the effect of extending the limitation period, permitting the proceeding notwithstanding its end. There is no doubt that the plaintiff here falls within one of the two criteria by which she may qualify for the application of the section to her. Sub-section (2) then sets the time frames within which that benefit may be exercised; that is, within six months after the giving of the notice or leave to bring the proceeding is granted, or the longer period allowed by the court. And that is where the discretion to enlarge the time frame, not available when *Bermingham* was decided, comes in.
- [23] That longer period allowed by subsection (2)(b), plainly enough, is a longer period than the six months from the giving of the notice of claim provided for in subsection (2)(a); so (2)(a) and (2)(b) are related, at least to that extent. But to say that the longer period must not commence any earlier than the six month period could, that is to say any earlier than 5 months and 30 days before the limitation date, is to add a gloss to the section which is not warranted by anything in it. That the six month period prescribed in (2)(a) can commence no earlier is a practical consequence of the fact that it must start within the limitation period for the sub-section to apply, and must end after it for any limitation question to arise, but it is not a prescription. It is the giving of the notice of claim which sets the six month period running; the limitation date plays no part in fixing it. Similarly, if a longer period is allowed, it must be a longer period which commences from the giving of the notice of claim, and is not fixed by reference to the limitation date, although the expiry of the latter at some point during the period is, in practical terms, the reason for the application.
- [24] Section 57 is, plainly enough, designed to alleviate claimants' difficulties in meeting the limitation period, caused by the procedural hurdles that the Act puts in their way. It is difficult to see why a claimant who is prompt in giving her notice of claim, but falls at later hurdles, should be in a worse position in seeking indulgence than a claimant who does not manage to clear even the first hurdle, the giving of notice, until the limitation period is close to its end.
- [25] Nor do I think there is any warrant for requiring that the application to extend the period for commencing proceedings be made within six months of the giving of notice. There is no such constraint to be found in the section. It would be easy enough, one would think, to make such a requirement if it were intended.

- [26] I conclude that the giving of the notice of claim within the limitation period is the only condition (putting aside questions of leave to bring proceedings) which must be met to enliven the discretion under s57(2)(b) to extend the time within which the proceeding may be brought. That construction is not absurd or unreasonable; as Mc Murdo J noted in *Kash*, it applies to a context in which the insurer is informed within the limitation period of the nature of the claim and the particulars of the motor vehicle accident relevant to its liability, and the discretion of the court still falls to be exercised by reference to considerations of delay and prejudice. I do not think there is any need for recourse to extrinsic material such as the explanatory note for the purposes of construing the section; but I do not, in any case, think it inconsistent.

The exercise of the discretion

- [27] It was submitted for the respondents that, should I arrive at this construction of s 57(2), I should not in any event exercise my discretion to extend the time within which the proceedings may be brought. There had been no explanation as to why the plaintiff had sought to embark on proceedings without dispensation from the need for a compulsory conference; or why the application to extend the limitation period was not made earlier, before its end. The accruing of the limitation defence itself was a reason to refuse to exercise the discretion in the applicant's favour; the mere absence of prejudice could not justify an extension of time.
- [28] As already noted, the notice of claim was served on, and liability admitted by, the second respondent in May 2001. The applicant's solicitor Ms Neil deposes, rather vaguely, that subsequently investigations into quantum and gathering of supporting evidence took place. There is a list in Ms Neil's affidavit of reports obtained by the applicant, including a number received between May 2001 and November 2003. She received instructions from the applicant to take over the conduct of her file from her former solicitors on 20 September 2002. It was not received until 18 July 2003, although some reports seem to have been received in the intervening period. The second respondent had at some unspecified time requested an additional information form pursuant to s 37A of the Act, and that was forwarded on 25 September 2003. A month later, on 29 October 2003, there was the fruitless attempt at filing a claim and statement of claim; and on 28 November (one week after the expiry of the limitation period) the second respondent's solicitors advised the applicant's solicitors of their opinion that the claim and statement of claim were null and void. Ms Neil deposes that when the proceedings were filed, she was acting under the mistaken belief that leave was not required and did not realise her error until after the limitation period expired. The applicant had not in any case been in a position to proceed with a compulsory conference until the final report of a psychiatrist was received in November 2003.
- [29] The present application was made not quite three months after the end of the limitation period. It seems clear enough that no application was made before the end of the limitation period because the applicant's solicitor was oblivious to the need to do so; by the time she got the second respondent's advice, that time was past. Delay resulting from a solicitor's negligence is not to be ascribed to the plaintiff.²³ The applicant should not be barred from seeking relief in circumstances where her proceeding would have been commenced within the limitation period but for a

²³ *Perdis v Nominal Defendant* [2003] QCA 555; *Re Tonks* [1999] 2 Qd R 671.

remaining procedural requirement and her solicitor's mistake about it. The respondents have not at any stage been left in doubt as to the nature of her claim.

[30] This is, in my view, a proper case for an extension of time. The parties were agreed on the proposed orders, except as to costs. Accordingly, I order that:

1. pursuant to s 57(2)(b) of the Motor Accident Insurance Act 1994, the time within which the applicant may bring proceedings in respect of a claim for personal injury sustained in a motor vehicle collision on 21 November 2000 be extended to a time not later than 60 days after the date on which a compulsory conference is held pursuant to the Act;
2. that the compulsory conference referred to in Order 1 be held within 30 days of this order or any decision of the Court of Appeal dismissing an appeal from this order, whichever is the later.

[31] I will hear the parties as to costs.