SUPREME COURT OF QUEENSLAND

CITATION:	*Haley & Anor v Roma Town Council; McDonald v Romijay P/L & Ors* [2005] QCA 3
PARTIES:	**ALEXANDER JOHN HALEY** **(first applicant/first respondent)** **BENTILLI PTY LTD** ACN 071 279 153 **(second applicant/second respondent)** **v** **ROMA TOWN COUNCIL** **(respondent/applicant)** **BRIAN MERVYN MCDONALD** **(applicant/respondent)** **v** **ROMIJAY PTY LTD** ACN 085 245 370 **(first respondent/first applicant)** **PHILIP USHER CONSTRUCTIONS PTY LTD** ACN 011 008 101 **(second respondent/second applicant)** **TRIMCROFT PTY LTD** ACN 011 008 763 **(third respondent/third applicant)**
FILE NO/S:	Appeal No 7876 of 2004 Appeal No 7103 of 2004 DC No 2647 of 2004 DC No 2254 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	4 February 2005
DELIVERED AT:	Brisbane
HEARING DATE:	5 November 2004
JUDGES:	McMurdo P, Jerrard JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**In each of the appeals no 7876 of 2004 and 7103 of 2004:** **1. Application for leave to appeal granted but limited to the grounds of appeal concerning interpretation of the**

***Personal Injuries Proceedings Act* 2002 (Qld)**

2. Appeal refused with costs to be assessed

CATCHWORDS: LIMITATION OF ACTIONS – POSTPONEMENT OF THE BAR – EXTENSION OF PERIOD – CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES – GENERAL MATTERS – interpretation of *Personal Injuries Proceedings Act* 2002 (Qld) – where both respondents sustained personal injuries in separate circumstances – where both respondents issued complying notices of claim within the limitation period – where both respondents commenced proceedings without complying with the necessary pre-litigation steps required under the Act – whether a "complying notice of claim" in s 59(1) is limited to a claim complying with time frames in s 9(3) – whether an application under s 59 is required to be made within the limitation period – whether s 59(2)(b) gives the Court an unfettered discretion to allow the commencement of proceedings after the expiry of the limitation period where a complying notice of claim has been given within the limitation period – whether the Court can make an order under s 59(2)(b) where s 77D is applicable

Personal Injuries Proceedings Act 2002 (Qld), s 59(1), s 59(2)(a), s 59(2)(b), s 59(3), s 77D

Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541, cited
Holmes v Adnought Sheet Metal Fabrications Pty Ltd [2004] 1 Qd R 378, cited
Kash v SM & TJ Cedergren Builders [2004] 1 Qd R 643, discussed
Morrison-Gardiner v Car Choice Pty Ltd & Anor; Crain and Crocker & Anor; O'Dare v Vitanza & Ors [2004] QCA 480; Appeal No 5494 of 2004, Appeal No 5576 of 2004, Appeal No 7409 of 2004, 17 December 2004, discussed

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SOLICITORS: Barry & Nilsson for the applicant in Appeal No 7876 of 2004
Murphy Schmidt for the respondents in Appeal No 7876 of 2004
Barry & Nilsson for the applicants in Appeal No 7103 of 2004
Wellners Lawyers for the respondent in Appeal No 7103 of 2004

[1] **McMURDO P:** These applications are both for leave to appeal under s 118(3) *District Court of Queensland Act* 1967 (Qld) from orders of District Court judges granting leave to the respondents to these applications, Mr McDonald and Mr Haley and a company with which he is connected, under s 59 *Personal Injuries Proceedings Act* 2002 (Qld) ("the Act") to institute proceedings against the respective applicants for damages for personal injuries.

[2] The applicants, whom I shall call "the appellants" in an attempt to limit confusion, argue that s 59 of the Act does not confer an unfettered discretion to allow a claimant to commence proceedings once the limitation period has expired. They further contend that a court has no power to make an order under s 59(2)(b) of the Act where, as here, the transitional provisions set out in s 77D of the Act apply. Their final contention is that if s 59 of the Act gives the court such an unfettered discretion, in each case the primary judge erred in the exercise of it.

The relevant facts and the decisions at first instance

(a) Mr McDonald

[3] Mr McDonald is a 48 year old concreter who claims he was injured on 18 April 2000 whilst working on a construction site at Kangaroo Point; he tripped backwards and fell into an unguarded stairwell and was unable to work for lengthy periods. In early 2002 he first consulted a solicitor who advised him to commence proceedings. Because his claim included economic loss he was asked and constantly reminded by both his family and his solicitor to provide copies of relevant income tax returns. He did not finally provide this material to his solicitor until March 2003. Meanwhile, the Act commenced on 18 June 2002 and retrospectively applied to his injury from 29 August 2002. The notice of claim was sworn and served on the appellants on 9 April 2003. His solicitor commenced actions in the District Court on 17 and 18 April 2003, overlooking the need to comply with the pre-litigation steps required under the Act before commencing proceedings and wrongly believing Mr McDonald was entitled to commence proceedings because of s 77D of the Act. The three year limitation period expired on 18 April 2003.

[4] The learned primary judge found that Mr McDonald gave the appellants a complying notice of claim under the Act on 9 April 2003, before the expiration of the limitation period. The learned judge found that he had power under s 59 of the Act to grant Mr McDonald leave to start a proceeding even though the limitation period had expired, following a recent decision of the Trial Division of this Court in *Kash v SM & TJ Cedergren Builders*.[1] His Honour noted that the application before him was filed on 25 June 2004, only two days after the appellants obtained an order to strike out the proceedings commenced on 17 April 2003. His Honour considered that there had been some delay since the incident, since Mr McDonald first consulted his solicitor and since the s 9 notice of claim was given; this delay could cause some prejudice to the appellants, limiting their ability to obtain detail both about the incident and as to whether Mr McDonald's symptoms resulted from it. At least one appellant first became aware of the incident only two days after Mr McDonald claimed it occurred and the notice of claim was given within the limitation period. Any prejudice which might flow from the difficulty in disentangling the cause of symptoms is not so significant as to exercise the discretion against Mr McDonald, because to do so would forever prevent him from pursuing his action, which has at least some reasonably based prospects of success.

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1 [2004] 1 Qd R 643.

(b) Mr Haley

[5] Mr Haley claims that he was injured in a pedestrian area in Roma at or soon after midnight on 30 or 31 October 2000. He consulted his interstate solicitor the next day. In October 2001 his solicitor engaged a Brisbane lawyer as town agent. The Act came into force on 18 June 2002 and applied retrospectively to his injury on 29 August 2002. On 18 December 2002, Mr Haley and his family company, which claimed to suffer economic loss because of Mr Haley's reduced capacity to work, prepared a notice of claim under s 9 of the Act. The appellant received it on 2 January 2003. On 18 June 2003 Mr Haley filed a claim and statement of claim in the District Court without leave, thinking this would protect his rights. On 2 July 2003 the appellant's solicitor gave notice under s 20 of the Act, so that it was not contended at first instance that the notice was anything other than a complying notice of claim under the Act. On 10 May 2004 the appellant's solicitors wrote to Mr Haley's solicitors advising that the claim was statute barred, the limitation period having expired on 30 October 2003.

[6] The learned primary judge found that Mr Haley's delay in filing the application under s 59 of the Act on 26 July 2004 was because his solicitor mistakenly believed Mr Haley and his company were entitled to institute proceedings under s 77D without complying with the pre-litigation procedures required by the Act; the solicitor only became aware of the true position on 14 June 2004. It was common ground before his Honour that Mr Haley and his company were not entitled to start the proceedings because they had not complied with the Act; s 77D(2) applies only when a period of limitation has ended and the proceedings were commenced within the limitation period; the proceedings were therefore void and of no effect: see *Holmes v Adnought Sheet Metal Fabrications Pty Ltd*.[2]

[7] The appellant did not contend it had suffered any prejudice because of the delay. His Honour noted that if there was a discretion under s 59 of the Act to allow Mr Haley and his family company to commence proceedings it should clearly be exercised in their favour: their solicitor made a mistake about legislation which is notoriously difficult to follow and the appellant's solicitor at first appeared to acquiesce in this and suffered no prejudice; information was provided to the appellant in the complying notice of claim within the limitation period and an independent examination and report had been prepared; on the other hand to refuse the application would cause substantial prejudice to Mr Haley and his company.

[8] His Honour interpreted s 59 consistent with *Kash's* case but observed that in his view s 77D, a special transitional provision dealing with a certain group of cases of which this was one, meant that s 59 could not apply. However his Honour deferred to and followed the contrary view expressed in *Kash's* case and granted Mr Haley and his company leave under s 59 of the Act to institute proceedings against the appellant in court.

The Scheme of the Act

[9] It is useful to look at the overall scheme of the Act in interpreting the meaning of and interaction between s 59 and s 77D.

[10] The Act, which commenced on 18 June 2002,[3] applies in relation to all personal injuries arising out of an incident happening before, on or after 18 June 2002.[4] The

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2 [2004] 1 Qd R 378.

3 Section 2.

purpose of the Act is, relevantly, to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury[5] by providing a procedure for the speedy resolution of claims for damages for personal injury;[6] promoting settlement of claims at an early stage;[7] ensuring that a proceeding in a court based on a claim is not started without the claimant being fully prepared for resolution of the claim by settlement or trial;[8] putting reasonable limits on awards of damages;[9] and minimising the costs of claims.[10]

[11] Chapter 2 of the Act deals with claims. Part 1 of that Chapter concerns pre-court procedures. Chapter 2, Pt 1, Div 1 (Claims procedures) commences with s 9 of the Act, which requires that before starting a proceeding in a court based on a claim for personal injuries, a claimant must give written notice of the claim in the approved form to the person against whom the proceeding is proposed to be started;[11] the notice must be given by the earlier of either nine months after the day the incident giving rise to the personal injury happened[12] or one month after the day the claimant first consults a lawyer about seeking damages for the personal injury and the person against whom the proceeding is proposed to be started is identified.[13] If such notice is not given, the obligation to give it continues and the claimant must provide a reasonable excuse for the delay when giving the notice.[14]

[12] Once notice is given, the recipient must respond within one month[15] after receiving it, if the recipient considers the recipient is a proper respondent.[16] Otherwise the recipient must advise the claimant of the further information needed to decide that issue[17] or why the recipient considers the recipient is not a proper respondent to the claim and any information that may help the claimant identify the proper respondent.[18] Under s 12 the respondent must then, within one month, inform the claimant whether the respondent is satisfied the notice is a complying notice of claim,[19] or, if not satisfied, identify the noncompliance and state whether the respondent waives compliance.[20] If the respondent does not waive compliance it must give the claimant a reasonable specified period of at least one month either to satisfy the respondent that the claimant has complied with the requirements or to take reasonable specified action to remedy the noncompliance.[21] Under s 13, if the recipient of the notice does not respond to the notice of claim within the period prescribed in s 12(4), the recipient is presumed to be satisfied the notice is a complying notice of claim.

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4 See Section 6(1) and (7), other than certain exempted personal injuries set out in s 6(2)-6(5).
5 Section 4(1).
6 Section 4(2)(a).
7 Section 4(2)(b).
8 Section 4(2)(c).
9 Section 4(2)(d).
10 Section 4(2)(e).
11 Section 9(1).
12 Or if symptoms of the injury are not immediately apparent, nine months after the first appearance of those symptoms: s 9(3)(a).
13 Section 9(3)(b).
14 Section 9(5).
15 Or other prescribed period under a regulation.
16 Section 10(1)(a).
17 Section 10(1)(b).
18 Section 10(1)(c).
19 Section 12(2)(a).
20 Section 12(2)(b).
21 Section 12(3).

[13] Section 18 of the Act relevantly provides that a claimant's failure to give a complying notice of claim prevents the claimant from proceeding further with the claim unless either the respondent states satisfaction that the notice has been given as required or the claimant has taken reasonable action to remedy the noncompliance;[22] or the respondent is presumed to be satisfied the notice has been given as required;[23] or the respondent has waived compliance with the requirement;[24] or the court, on the claimant's application, declares that the claimant has remedied the noncompliance[25] or authorises the claimant to proceed further with the claim despite the noncompliance.[26] Of course, a court considering such an application will also be cognisant of the requirements of Ch 1, Pt 1, Div 4, discussed below, which require compulsory conferences and associated steps to be completed before a claimant can commence a proceeding in court.[27]

[14] The term "complying notice of claim"[28] is defined in the dictionary as meaning "a notice of claim given under section 9[29] or 14[30] that is given as required under chapter 2, part 1, division 1".[31] Under s 20(2) a notice of claim which is not a complying notice of claim under the Act is nevertheless taken to be a complying notice of claim when the respondent waives compliance with the requirement that has not been complied with or is satisfied the claimant has taken reasonable action to remedy the noncompliance[32] or the court declares that the claimant is taken to have remedied the noncompliance or authorises the claimant to proceed further with the claim despite the noncompliance.[33]

[15] Within six months after a respondent receives a complying notice, the respondent must take reasonable steps to investigate the incident alleged to give rise to the personal injury[34] and must give the claimant written notice stating whether liability is admitted or denied[35] and if contributory negligence is claimed the degree of contributory negligence expressed as a percentage[36] and must either deal with the claimant's offer of settlement or invite the claimant to make a written offer of settlement,[37] make a reasonable estimate of damages to which the claimant would be entitled[38] and make a written offer or counteroffer of settlement setting out in detail the basis on which it is made.[39] Offers or counteroffers must be accompanied

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22 Section 18(1)(a)(i).
23 Section 18(1)(a)(ii); that is, the presumption under s 13.
24 Section 18(1)(b); that is, waiver under s 12.
25 Section 18(1)(c)(i).
26 Section 18(1)(c)(ii).
27 The interaction between comparable provisions to s 18(1)(c)(ii) and Ch 1, Pt 1, Div 4 of the Act in the *Motor Accident Insurance Act* 1994 (Qld) ("MAIA") is discussed in *Morrison-Gardiner v Car Choice Pty Ltd & Anor; Crain v Crocker & Anor; O'Dare v Vitanza & Ors* [2004] QCA 480; Appeal No 5494 of 2004, Appeal No 5576 of 2004, Appeal No 7409 of 2004, 17 December 2004.
28 Since 9 April 2003 the dictionary refers to a "complying part 1 notice of claim": Amending Act No 16 of 2003.
29 Section 9 sets out the requirements of the notice of claim; see para [11] of these reasons.
30 To this effect s 14 allows a claimant to add other respondents by giving a notice of claim under s 9 within a prescribed time.
31 Sections 9 to 20 inclusive.
32 Section 20(2)(a).
33 Section 20(2)(b).
34 Section 20(1)(a).
35 Section 20(1)(b)(i).
36 Section 20(1)(b)(ii).
37 Section 20(1)(c).
38 Section 20(1)(d).
39 Section 20(1)(e).

by medical and other reports and all material and documents relevant to assessing economic loss in the offeror's possession that may help the offeree properly assess the offer.[40] The offeree must respond to any offer within a period either prescribed by regulation or three months of receipt of the offer.[41]

[16] Chapter 2, Pt 1, Div 2 of the Act is to ensure the parties have sufficient information to fairly assess liability and quantum in relation to a claim.[42] It places obligations on a claimant to provide documents and information to the respondent.[43] It provides for a respondent and claimant to jointly arrange for an expert report;[44] the examination of a claimant by a medical expert in the absence of agreement between the parties;[45] a respondent to give documents and information to a claimant[46] and to any contributor.[47] It is an offence not to disclose material required to be disclosed under this division[48] and any document not disclosed cannot be used by the party in a subsequent court proceeding based on the claim unless the court orders otherwise.[49]

[17] Chapter 2, Pt 1, Div 3 allows a party to apply to the court for an order that another party who has failed to comply with Div 1 (Claims procedures) or Div 2 (Obligations of the parties), take specified action to remedy the default within a specified time.[50]

[18] Chapter 2, Pt 1, Div 4 requires the parties to hold a compulsory conference before starting a proceeding in a court based on a claim[51] six months after the claimant gives the respondent a complying notice of claim.[52] Parties may for good reason dispense with the compulsory conference or the signing of a certificate of readiness by agreement.[53] The court may on application by a party fix the time and place for the compulsory conference, or dispense with it for good reason, or dispense with the requirement to sign a certificate of readiness in cases of complexity and may make any other orders appropriate,[54] taking into account the extent of the parties' compliance with their obligations[55] and the purpose of the Act.[56] Seven days before the compulsory conference is held, each party must give the other copies of documents not yet given but required under the Act,[57] a statement signed by the party or the party's lawyer verifying that all relevant documents in possession of the party required to be given under the Act have been given,[58] and a certificate of

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40 Section 20(3).
41 Section 20(4).
42 Section 21.
43 Section 22.
44 Section 23.
45 Section 25.
46 Section 27.
47 Section 28.
48 Section 31.
49 Section 32(2).
50 Section 35.
51 Section 36(1).
52 Section 36(3)(a).
53 Section 36(4).
54 Section 36(5).
55 Section 36(6)(a).
56 Section 36(6)(b), esp having regard to s 4(2)(a)-(e).
57 Section 37(1)(a).
58 Section 37(1)(b).

readiness.[59] A lawyer who without reasonable excuse signs a certificate of readiness knowing it is false or misleading commits unprofessional conduct or practice.[60] If the party is legally represented the certificate of readiness must also contain a costs statement.[61] If the claim is not settled at the compulsory conference the parties are required to exchange mandatory final offers at the conference, or if the conference is dispensed with, within 14 days of the dispensation.[62] A court may on application by a party dispense with the obligation to make mandatory final offers.[63] A proceeding in a court based on a claim should be started within 60 days after the conclusion of the compulsory conference[64] or within a further period agreed by the parties within that 60 day period[65] or fixed by the court on the claimant's application within that 60 day period.[66]

[19] Chapter 2, Pt 1, Div 5 (s 43) provides for the court on application by a claimant to give leave to start a proceeding in the court for damages, despite noncompliance with Ch 2, Pt 1 (Pre-court Procedures) if satisfied there is an urgent need.[67] The proceeding is then stayed until the claimant complies with the pre-court requirements,[68] subject to very limited exceptions.[69]

[20] Chapter 2, Pt 3 contains provisions dealing with the proceedings in court based on a claim. Relevantly, s 59 provides:

> "**59 Alteration of period of limitation**
>
> **(1)** If a complying notice of claim[70] 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 notice[71] is given or leave to start the proceeding is granted; or
>
> (b) a longer period allowed by the court.
>
> **(3)** Also, if a proceeding is started under subsection (2) without the claimant having complied with part 1, the proceeding is stayed until the claimant complies with the part or the proceeding otherwise ends.
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> **(4)** If a period of limitation is extended under the *Limitation of Actions Act 1974*, part 3, this section applies to the period of limitation as extended under that part."

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59 Section 37(1)(d).
60 Section 37(3).
61 Section 37(2)(e) and (4).
62 Section 39(1).
63 Section 40(9).
64 Section 42(1)(a).
65 Section 42(1)(b)(i).
66 Section 42(1)(b)(ii).
67 Section 43(1).
68 Section 43(3).
69 Section 43(4).
70 Since 9 April 2003 this subsection refers to a "complying part 1 notice of claim": Amending Act No 16 of 2003.
71 Since 9 April 2003 this subsection refers to "the complying part 1 notice": Amending Act No 16 of 2003.

[21] Chapter 3, Pt 1 restricts advertising of personal injury services and touting.[72] Part 3 is a miscellaneous provision providing penalties for matters such as fraud[73] or for providing false or misleading information or documents.[74]

[22] Chapter 4 of the Act was introduced by amendment in 2002[75] and contains transitional provisions when the Act became retrospective to apply to personal injury arising out of incidents happening before 18 June 2002. Of relevance here is s 77D which provides:

> "**77D Alteration of limitation period for personal injury arising out of an incident happening before 18 June 2002**[76]
>
> **(1)** This section applies in relation to a personal injury arising out of an incident happening before 18 June 2002 if –
>
> (a) the period of limitation for a proceeding based on a claim for the personal injury ends during the period starting 18 June 2002 and ending at the end of 18 December 2003; and
>
> (b) a proceeding based on the claim has not been started in a court, including in a court outside Queensland or Australia.
>
> **(2)** If the period of limitation has ended, the claimant may start a proceeding in a court based on the claim –
>
> (a) if a complying notice of claim is given before 18 June 2003;[77] or
>
> (b) at a later time, not more than 6 months after the complying notice of claim is given and not later than the end of 18 December 2003, with the court's leave.
>
> **(3)** If a proceeding is started under subsection (2) without the claimant having complied with chapter 2, part 1,[78] the proceeding is stayed until the claimant complies with the part or the proceeding otherwise ends.
>
> **(4)** This section does not limit section 43."

Should leave to appeal be given?

[23] The construction of s 59 of the Act is a matter of considerable importance to many claimants under this and related statutory schemes. The construction of the Act has caused uncertainty, confusion and anxiety not only to claimants, their families and friends but also to the legal profession and, indeed, judges. It is an appropriate matter in which to grant leave to appeal.

Does s 59 of the Act empower a court to order that a claimant have leave to start proceedings in court after the limitation period has expired?

[24] The appellants concede that Mr Haley and Mr McDonald each gave a complying notice of claim under Ch 2, Pt 1, Div 1 of the Act but, as I apprehend it, now

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72 See s 4(2)(f).

73 Section 72.

74 Section 73.

75 See s 12 *Personal Injuries Proceedings Amendment Act* 2002 (Qld), operational 29 August 2002.

76 This section was amended by Act No 16 of 2003.

77 Since 9 April 2003 this subsection refers to "before 18 June 2003 – before or on 18 June 2003": Amending Act No 16 of 2003.

78 Claims procedures.

contend that under s 59(1) the phrase "a complying notice of claim" is limited to a claim given within the time frames specified in s 9(3) of the Act.[79] The definition of "complying notice of claim" in the dictionary of the Act[80] makes plain that "a complying notice of claim" under s 59(1) is not limited to a notice of claim specifically within s 9 but includes one which is deemed compliant with Ch 2 Pt 1 Div 1 of the Act, for example, where the notice may not initially meet the mandatory requirements of s 9 but where it is presumed to comply under s 13 because the respondent does not respond within the prescribed period or where the respondent waives compliance or is satisfied the claimant has taken reasonable steps to remedy the noncompliance under s 20(2)(a) or the court makes a declaration under s 20(2)(b).

[25] The appellants' primary submission is that an application to a court for an order under s 59(2)(b) of the Act must be made before the limitation period expires, not afterwards, as here. They contend that the interpretation adopted by the learned primary judges and in *Kash* is inconsistent with the purposes and scheme of the Act, especially emphasising that even if each claimant has given a complying notice of claim before the expiration of the limitation period, the claimant will not have complied with the provisions of the Act requiring the claimant to have a compulsory conference with the respondent before starting a proceeding in a court based on the claim.[81]

[26] The appellants concede that there are no material differences between the wording and practical application of s 59 of the Act and s 57 *Motor Accident Insurance Act* 1994 (Qld) ("MAIA"). The limitation contended for by the appellants does not appear in the words of either s 59 of the Act or s 57 MAIA. Holmes J in *Morrison-Gardiner v Car Choice Pty Ltd & Anor*[82] rejected that contention in respect of s 57 MAIA. Her Honour's decision has very recently been considered and upheld by this Court when other appellants embraced arguments as to the interpretation of s 57 MAIA similar to those the present appellants have adopted as to the interpretation of s 59 of the Act: see *Morrison-Gardiner v Car Choice Pty Ltd & Anor; Crain v Crocker & Anor; O'Dare v Vitanza & Ors.*[83]

[27] The ordinary meaning of the words of s 59(1) of the Act is that, subject to s 59(2), it empowers a claimant who has, before the end of the period of limitation, given a complying notice of claim under the Act to start a proceeding in a court based on the claim, after the limitation period has expired. Mr McDonald and Mr Haley and his company were such claimants.

[28] The ordinary meaning of the words of s 59(2)(a) is that claimants within s 59(1) of the Act, like Mr McDonald and Mr Haley and his company, may bring proceedings in court as a right within six months of the notice being given or leave being granted.[84] This will generally not be useful to a claimant unless the respondent completes the obligations under the Act more quickly than the Act requires. Ordinarily it can be expected that the many steps necessary for parties to comply

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79 Section 9(3) is summarised in para [11] of these reasons.

80 Set out at para [14] of these reasons.

81 See Ch 2, Pt 1, Div 4, s 36 to s 42 of the Act.

82 [2004] QSC 124; SC No 1183 of 2004, 11 June 2004.

83 [2004] QCA 480; Appeal No 5494 of 2004, Appeal No 5576 of 2004, Appeal No 7409 of 2004, 17 December 2004.

84 That is, under s 18(1)(c)(ii) of the Act.

with the Act will take more than six months from the date the claimant gives the notice of claim.

[29] The plain meaning of the words in s 59(2)(b) of the Act gives the court a general discretion to extend the necessary time for a claimant, who is within s 59(1) but who is not assisted by s 59(2)(a), to bring a proceeding in court after the expiration of the limitation period.

[30] There is nothing in s 59 or elsewhere in the Act to require that an application under s 59 be made within the limitation period or to require interpreting s 59 as having other than its ordinary meaning. The appellants' concern that Mr McDonald and Mr Haley and his company have not complied with the provisions of Ch 2 Pt 1 Div 4 of the Act, (compulsory conferences), is allayed by s 59(3), which stays the court proceeding until compliance. This interpretation of s 59 is consistent with the purposes of the Act and the heading to the section.[85] Before the Act came into force a claimant was entitled to start proceedings in court within the limitation period. Once the Act commenced, claimants were prevented from commencing litigation before complying with its provisions. It makes sense that in enacting s 59, the legislature intended to empower courts with a wide discretion to make orders to prevent injustice by enabling a claimant who has given a complying notice of claim to the respondent within the limitation period to commence proceedings outside the limitation period. In exercising that discretion a court must be cognisant of the purpose of the Act and of the general considerations apposite to any extension of the limitation period as discussed by McHugh J in *Brisbane South Regional Health Authority v Taylor*.[86]

[31] Contrary to the appellants' contention, this interpretation of s 59 is consistent with s 43 of the Act, which empowers a court with a general discretion to give leave to a claimant to start a proceeding in court for damages despite non-compliance with Ch 2, Pt 1 where there is an urgent need. Unlike s 59, s 43 does not require a claimant to give a complying notice of claim before applying for leave and nor does it empower the court to order the start of proceedings after the end of the limitation period. The two sections have different functions and sit harmoniously within the scheme of the Act.

[32] Mr McDonald and Mr Haley and his company were not prohibited from making an application under s 59 after the expiry of their limitation periods.

The relationship between s 59 and s 77D of the Act

[33] The appellants contend that Mr Haley and his company and Mr McDonald cannot in any case make an application under s 59 of the Act because they allege their accidents occurred before 18 June 2002 and that consequently any application to effectively alter the limitation period can only be made under s 77D and not s 59.

[34] The clear legislative intent in enacting the transitional provision of s 77D was to address the potential unfairness to those claimants prejudiced when the Act first took effect retrospectively on 29 August 2002 to apply to injuries arising out of incidents before 18 June 2002. A remedial provision like this will not be interpreted against the interests of those it is intended to help unless that is the very plain intention of the legislature. There is nothing in the Act to suggest such a legislative

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85 See s 14(2), *Acts Interpretation Act* 1954 (Qld).

86 (1996) 186 CLR 541, 551-554.

intent. Section 59 and s 77D operate independently of each other and may serve different purposes. As the latest date at which a claimant could start a proceeding in a court based on the claim under s 77D was 18 December 2003, s 77D has no prospective effect; on the other hand, s 59 continues to apply. For s 77D to apply, it was not necessary that the complying notice of claim be given within the period of limitation; an application under s 59 can only be made if a complying notice of claim has been given within the limitation period. Unless irreconcilable and repugnant to each other, the fact that two or more sections of an Act are capable of simultaneous application in a particular case does not mean that there is a conflict between the sections requiring one to have no effect: see the observations of Windeyer J in *Butler v Attorney-General (Vict)*[87] and of Gaudron J in *Saraswati v The Queen*.[88] There is no such irreconcilability between s 59 and s 77D: see *Kash v SM & TJ Cedergren Builders*.[89]

[35] Mr Haley and his company and Mr McDonald are not prevented by s 77D from making an application under s 59.

The primary judges' exercise of discretion under s 59(2)(b) of the Act

[36] Where there is a right of appeal from a judicial exercise of discretion, it is not lightly overturned, even if another judge may have exercised the discretion differently: *House v The King*.[90] Here, there is no right of appeal so that the appellants have the additional hurdle of showing why they should be given leave to appeal from the primary judges' exercises of discretion. They have not demonstrated any reason to justify in either case the granting of leave to appeal from those exercises of discretion under s 59 of the Act. I would refuse leave to appeal on this ground.

Conclusion

[37] I would grant the application for leave to appeal in each case, but limited to the grounds of appeal only insofar as they concern the interpretation of the Act. I would, however, for the reasons given, refuse the appeal with costs to be assessed.

Orders

1. Application for leave to appeal granted but limited to the grounds of appeal concerning the interpretation of the *Personal Injuries Proceedings Act* 2002 (Qld).

2. Appeal refused with costs to be assessed.

[38] **JERRARD JA:** In these applications I have had the benefit of reading the reasons for judgment of McMurdo P, and respectfully agree with those and the orders proposed by Her Honour. I add the following comments.

"**Complying Notice**"

[39] In the appeal in *Haley v Roma Town Council*, those respondents had given a notice of claim pursuant to s 9 of the *PIPA* on 2 January 2003, to which that appellant's solicitors had responded on 31 January 2003 pursuant to s 12(2)(a) of the *PIPA*, advising that the appellant was satisfied that the relevant notices of claim complied with the Act. Thereafter the correspondence from the appellant's solicitors, and the

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87 (1961) 106 CLR 268, Windeyer J, 290.
88 (1991) 172 CLR 1, 17.
89 [2004] 1 Qd R 643.
90 (1936) 55 CLR 499, 507.

submissions to the learned trial judge and this Court on the appeal, expressly asserted that declaration of satisfaction resulted in the notice being a complying notice. Mr K Wilson, of senior counsel, for the appellants contended that even where there were matters to which objection could be taken, but about which a recipient[91] chose not to complain, and, rather than identifying non-compliance and announcing waiver under s 12(2)(b), responded instead under s 12(2)(a) with the statement that the recipient was satisfied that part 1 of the notice was a complying part 1 notice of claim, the result was the notice was complying and the claimant could then proceed to the next stage of the pre-litigation steps. That submission advantages claimants, and should be accepted on this appeal, in which leave to appeal is allowed because of the importance of construing some parts of the *PIPA*. Mr Wilson submitted that there was no need for such a claimant to apply under s 18 for any leave.

[40] As the President observed in [14], the effect of s 20(2) of the *PIPA* is that where part 1 of a notice of claim is not a complying part 1 notice of claim, a recipient is nevertheless taken to have been given a complying part 1 notice when the recipient gives the claimant notice that the recipient waives compliance (under s 12(2)(b) or s 12(3)(a)); or is satisfied the claimant has taken reasonable action to remedy the non-compliance (pursuant to s 12(2)(c) and s 12(3)(a)); or the court declares the claimant has remedied the non-compliance (under s 18(1)(c)(i)); or authorises the claimant to proceed further despite that non-compliance (s 18(1)(c)(ii)). That authorisation could be given where no part 1 notice of claim was given; the sub-section is wide enough in its terms.

[41] Section 20(2) results in the qualifying condition in s 59(1) applying in each of those situations identified in s 20(2). That is, where s 20(2) has effect on a step taken before the end of the limitation period, then "a complying part 1 notice of claim is given before the end of the period of limitation applying to the claim". Section 20(2) can thus convert a non-complying notice, or no notice at all, to the equivalent of a notice deemed to be a complying part 1 notice. Section 20(2) is silent as to the effect of a recipient's reply under s 12(2)(a), stating satisfaction that a part 1 notice is a complying part 1 notice, but Mr Wilson's submissions on the appeal propose and accept that that is thereby a complying notice too, irrespective of the accuracy of the recipient's reply.

[42] A more important situation on which s 20(2) is silent is where a claimant's s 9 notice is given late, that is, outside the nine month or other period specified, but is accompanied by a reasonable excuse for the delay, and is otherwise a complying notice. Mr Wilson submitted that in that situation, a claimant who did not satisfy s 18(1)(a) or s 18(1)(b) could not proceed further, unless that claimant obtained the appropriate declaration or authorisation pursuant to s 18(1)(c) of the Act. Only then would that claimant satisfy the qualifying condition in s 59(1). It is unnecessary in these appeals to decide if that submission is correct. If it is, a claimant would need to obtain the relevant declaration or authorisation within the limitation period.

[43] In the appeal in *McDonald v Romijay Pty Ltd and Ors*, the three recipients of the notices of claim delivered by Mr McDonald all failed to respond within the prescribed period permitted under s 12, and by reason of s 13 were conclusively

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[91] I am using the term "recipient" to avoid confusion; the appellants were the recipients of the notices in all appeals.

presumed to be satisfied the notices given were complying part 1 notices. Mr Wilson's submission was that the presumption of satisfaction had the same effect as an actual expression of satisfaction pursuant to s 12(2)(a), namely that the relevant notice was a complying notice. That submission too advantages claimants in that position, and should be accepted.

[44] Mr Wilson agreed that the effect of s 20(2) was that s 59(1), which in his submission was primarily directed to those cases where an otherwise compliant notice was given late, would operate – where there has been the relevant waiver of compliance, satisfaction with action taken to remedy non-compliance, or a declaration or authorisation by a court – in those claims to which s 20(2) applies, long after the expiration of the nine months or other time limits provided by s 9. My remarks in *SG & Ors v State of Queensland* [2004] QCA 215 at [26] accordingly overlooked the effect of s 20(2).

[45] I also observe that the definition of "complying part 1 notice of claim" in the Dictionary in the Act was changed by Act No 16 of 2003 (the *Civil Liability Act* 2003), in force from 9 April 2003, to mean "part 1 of a notice of a claim complying with section 9 and, if a respondent is added under section 14, section 14 that is given as required under chapter 2, part 1, division 1." That was the applicable definition on the day Mr McDonald gave his notice. It is unnecessary to decide if it satisfied that definition, the notice having been given nearly three years after the relevant injury on 18 April 2000. This is because it was deemed to be a complying part 1 notice by reason of s 13.

Construction of s 59

[46] Mr Wilson agreed that, putting aside the transitional provisions in ch 4, the various pre-litigation requirements of the Act include that one month elapse in which a recipient can respond to a notice of claim, six months can thereafter elapse pursuant to s 36 before a compulsory conference is held, (and which must be held before starting a proceeding in a court based on a claim), and a mandatory final offer made at that conference must remain open for 14 days. Thus at least seven and a half months can be expected to elapse, if ordinary time limits are used, between the date of giving a complying part 1 notice and the earliest date on which a claimant can start proceeding in court. An obvious enough consequence of that is that the six months provided for in s 59(2)(a) would be illusory, if the section is not read as a whole and s 59(3) applied so that a proceeding may be started under s 59(2)(a) before compliance with, for example, the Ch 2 Pt 1 Div 4 requirements of a compulsory conference. In such cases the proceedings are stayed until compliance with the requirement for a compulsory conference and mandatory final offer. Mr Wilson agreed that construction was necessary to avoid rendering s 59(2)(a) pointless or irrelevant.

[47] Mr Wilson's central submission, namely that an application for leave for a longer period within which to start a proceeding than the six months allowed by s 59(2)(a) must itself be made before the end of the period of limitation, would mean that s 59(2)(b) should be construed as if its concluding words read "a longer period allowed by the court, upon application made within the limitation period". He contended that this construction was necessary to satisfy the objects of the Act, and that it was a sensible one because a claimant would always be aware before the limitation period expired of the looming need to make the application. This

awareness would result from the obvious incapacity to satisfy the various pre-litigation steps within a six month period.

[48] I respectfully disagree with those submissions, particularly because, as McMurdo J wrote in *Kash v SM & TJ Cedergren Builders* [2004] 1 Qd R 643 at 648-9, in a passage approved by Chesterman J (with whom the other members of the Court relevantly agreed) in *Crain v Croker & Anor* [2004] QCA 480 at [87] – [88], a respondent to a complying notice of claim given within the limitation period will usually have been given extensive information. *Crain v Croker* dealt with an identically worded section in the *Motor Accident Insurance Act* 1994 (s 57(2)(b)), and the relevant information under the *PIPA* is that specified in Pt 2 of the *Personal Injuries Proceedings Regulation* 2002. Provision of that extensive information within the limitation period (or extended limitation period – s 59(4)) satisfies the main purpose of the Act and the manner in which it is to be achieved generally, declared in s 4. Where a court acting under s 18(1)(c) authorises a claimant to proceed further without first delivering a complying notice, the court can impose conditions, and these would usually be likely to include the prompt provision of all available information required by a complying notice. Mr Wilson's construction of s 59 requires words to be read into it which do not appear and which, if they did, would not further advance achievement of the declared purpose of the Act, which is to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury. What Mr Wilson's construction would do would be to exclude any applicant who did not first make an application to a court within the limitation period. That result would contradict what s 59(2)(a) expressly allows, namely a proceeding in a court to be started without leave after the end of a period of limitation; and there is no declaration in s 4 that the main purpose is to be achieved by excluding claims in which litigation is not commenced within the limitation period.

[49] There is also the point made by the respondents' counsel, that whereas s 59(1) expressly refers to a notice being given before the end of the period of limitation, no such qualification appears in s 59(2). Since the appellant's construction would not advance the purpose of the Act and requires a construction significantly amending the text of s 59(2), I agree with the President that it should be rejected. I also respectfully agree with and adopt the remarks and reasoning of the President in *Crain v Croker* at [12]-[14], and of Chesterman J in that case at [76]-[78].

Transitional Provisions in Chapter 4

[50] Both Mr Haley and Mr McDonald had started their original proceedings in court within the respective limitation period, and accordingly s 77D(2) did not apply to their proceedings when commenced. Each gave a complying notice before 18 June 2003. Mr Haley did that on 2 January 2003, and his limitation period expired on 30 October 2003. Accordingly, the six months after giving that notice, provided for in s 77D(2)(b), ran out on 2 July 2003, and before the end of his period of limitation. Therefore s 77D(2) did not apply to him. Nevertheless, Mr Wilson submitted, s 77D(1) did, because the period of limitation ended during the period starting 18 June 2002 and ending 18 December 2003. Accordingly, so the submission ran, Mr Haley could and should have waited until his period of limitation had ended, namely 31 October 2003, and then applied for leave pursuant to s 77D(2)(b) for leave to start a proceeding. That application needed to be made between 31 October 2003 and 18 December 2003.

[51] Mr Wilson's submission was founded on the argument that any proceedings to which s 77D(1) could apply were ones to which only Ch 4 could apply, and to which s 59 could not. On that issue I respectfully agree with the judgment of McMurdo J in *Kash*, and that of the President in this appeal. I agree with McMurdo J that s 77D is concerned with the potential unfairness to a claimant against whom time had already started to run when the Act was retrospectively applied to accidents happening before 18 June 2002. It seems an absurdity to suggest that the purpose of the Act is better achieved if a claimant in Mr Haley's position delays giving prompt notice to a respondent insurer, and instead to require that claimant to wait until a limitation period has expired, in order to gain the limited benefit offered by s 77D(2), as the appellant argues Mr Haley should have. That delay would defeat the purpose of the provisions of the Act requiring notice as promptly as possible. To construe s 77D as the appellant requires, and hold that it excludes the application or operation of s 59 to any case to which s 77D applies, would result in the transitional provision intended to protect claimants operating in restrictive and obscure ways that would disadvantage both claimants and respondents.

[52] Mr McDonald's case provides yet another example. His notice was given on 9 April 2003, before the end of the limitation period applying to him, which expired on 18 April 2003. The appellant submitted that had he waited until 19 April 2003 to start his proceeding in court, the day after the limitation period expired, then s 77D(2) would have applied. In the period between 19 April and 18 June 2003 he could have started a proceeding as of right; or by leave until 9 October 2003. His error, the appellant submitted, was beginning two days early and within the limitation period.

[53] That too seems a very odd consequence, which again demands that claimants deliberately let a limitation period run out and then apply for leave to start a proceeding. Legal advisors to many claimants would rightly consider that the submissions advanced on their client's behalf, that leave should be granted because they had deliberately let the three years expire, might be dangerously unpersuasive.

[54] An examination of the consequences of the appellants' submissions satisfied me that the merits lie elsewhere, and I respectfully agree with the reasons, conclusions, and orders proposed by the President.

[55] **MULLINS J:** I agree with the reasons for judgment of McMurdo P and the orders her Honour proposes for each matter.