SUPREME COURT OF QUEENSLAND

CITATION:	*GU v TO* [2005] QCA 480
PARTIES:	**GU** (applicant/appellant) **v** **TO** (respondent/respondent)
FILE NO/S:	Appeal No 4441 of 2005 SC No 3098 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	16 November 2005
JUDGES:	McMurdo P, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, McMurdo P and Jerrard JA concurring as to the orders made, Williams JA dissenting
ORDERS:	**1. Appeal allowed** **2. Appellant granted leave pursuant to s 18, s 43 and s 59(2)(b) of the *Personal Injuries Proceedings Act* 2002 (Qld) to proceed further with his claim against the respondent despite noncompliance with Part 1 of Chapter 2 of that Act and to start a proceeding in this Court for damages for personal injuries based on that claim, such leave being granted *nunc pro tunc* and with effect from 4 May 2005** **3. Declare that such proceedings will have effect between these parties and for the purposes of that Act as if started no later than 7 May 2005** **4. Respondent to pay the appellant's costs of and incidental to the appeal to be assessed on the standard basis**
CATCHWORDS:	LIMITATION OF ACTIONS – POSTPONEMENT OF THE BAR – EXTENSION OF PERIOD – CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES – EVIDENCE TO ESTABLISH RIGHT OF ACTION – appellant alleged a church curate had sexually abused him between 1974 and 1976 when he was 14-16 years of age – appellant applied

under s 43 of the *Personal Injuries Proceedings Act* 2002 (Qld) to obtain leave to bring an action despite noncompliance with the Act – appellant's now deceased mother made a statement to police in 2004 asserting that she had informed the church rector when she witnessed an incident of abuse – rector denies that the appellant's mother told him of the abuse – appellant alleges the church failed in its duty to take steps to stop the abuse once it knew of the situation – if leave obtained under s 43 appellant still needs to obtain an extension of time under s 31 of the *Limitation of Actions Act* 1974 (Qld) – whether judge erred in refusing leave to appellant on the basis that he did not have a reasonably arguable case for an extension of time – whether if leave granted by the Court of Appeal the orders can be made *nunc pro tunc*

Constitution of Queensland 2001 (Qld), s 58(1)
Evidence Act 1977 (Qld), s 92
Limitation of Actions Act 1974 (Qld), s 31
Personal Injuries Proceedings Act 2002 (Qld), s 18, s 43, s 59

Blacker v National Australia Bank Ltd [2000] NSWSC 805; (2000) 158 FLR 142, considered
DJL v Central Authority (2000) 201 CLR 226, considered
Elder v State of Qld (1997) 141 FLR 467; cited
Grove v Bestobell Industries Pty Ltd [1980] Qd R 12, cited
Haley v Roma Town Council [2005] QCA 3; [2005] 1 Qd R 478, cited
Holmes v Adnought Sheet Metal Fabrications Pty Ltd [2003] QSC 321; [2004] 1 Qd R 378, cited
R v Alexanderson [2001] QCA 400; CA Nos 155, 156, 196 and 197 of 2001, 24 September 2001, considered
R v Pettigrew [1996] QCA 235; [1997] 1 Qd R 601
Reid v Howard (1995) 184 CLR 1, considered
SG v State of Qld (No 2) [2004] QCA 461; Appeal Nos 6045, 6046, 6047, 6049, 6050 and 6051 of 2004, 3 December 2004, considered
Stubberfield v Paradise Grove Pty Ltd [2000] QCA 299; Appeal No 4796 of 2000, 28 July 2000, considered
Sutton v Warringah Shire Council (1985) 4 NSWLR 124, cited
Thomas v Transpacific Industries Pty Ltd [2002] QCA 160; [2003] 1 Qd R 328, cited
Wallworth v Holt (1841) 41 ER 238, considered

COUNSEL: R A I Myers for the appellant
K F Holyoak for the respondent

SOLICITORS: Shine Roche McGowan for the appellant
Minter Ellison for the respondent

[1] **McMURDO P:** I have had the benefit of reading the reasons for judgment of Jerrard JA and Williams JA where the facts and issues are comprehensively stated. I would only repeat, add to or vary these as necessary to briefly state my own reasons for allowing the appeal.

[2] The appellant brought an application before a judge of the Trial Division under s 43 *Personal Injuries Proceedings Act* 2002 (Qld) ("PIPA") for leave to commence an action for damages for personal injuries despite non-compliance with PIPA because there was an urgent need to start the proceeding. This is an appeal from the primary judge's refusal of that application.

[3] Section 43 PIPA relevantly provides:

> "**Need for urgent proceeding**
>
> (1) The court, on application by a claimant, may give leave to the claimant to start a proceeding in the court for damages based on a liability for personal injury despite noncompliance with this part if the court is satisfied there is an urgent need to start the proceeding.
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> (2) The order giving leave to start the proceeding may be made on conditions the court considers necessary or appropriate having regard to the particular circumstances of the case.
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> (3) However, if leave is given, the proceeding started by leave is stayed until the claimant complies with this part or the proceeding is discontinued or otherwise ends.
>
> … "

[4] Had the application been granted, the appellant's proceedings would have been stayed pending compliance with the pre-court procedures in Pt 1 of Ch 2 of PIPA.

[5] The learned primary judge recognized that the application was urgent in the sense that it was brought on 4 May 2005 and on 7 May 2005 the one year period under s 31(2) *Limitation of Actions Act* 1974 (Qld) ("the Limitation Act") from when the appellant claimed that a material fact of a decisive character relating to the appellant's right of action came within his means of knowledge would have expired. His Honour correctly identified that fact as when the appellant first became aware that his mother had witnessed an act of sexual abuse of him by the curate who had sexually abused the appellant between 1974 and 1976 when the appellant was aged between 14 and 16 years.

[6] The appellant had been an organist since 1972 when he was in about Year 7 at school. The curate who was attached to that church, was working on musical settings for the revised Holy Communion service being implemented in about 1973. The curate enlisted the appellant's help in providing the organ accompaniment and this required joint time and effort at the appellant's piano which was located in the appellant's bedroom at the rear of the family home. Acts of sexual abuse occurred there and in other places.

[7] The appellant's mother is now deceased but prior to her death she gave a statement to police which would be admissible in a trial under s 92 *Evidence Act* 1977 (Qld). She said that when the appellant was about 14 or 15 she entered his bedroom where the curate was also present and observed them in an act of sexual contact. She was shocked, did not know what to do and immediately walked out of the room and telephoned the rector of the parish. The appellant was attending high school when

the incident happened. As Jerrard JA demonstrates in his reasons, it seems likely that the incident witnessed by the appellant's mother occurred early in the period of the curate's sexual abuse of the appellant.

[8] The rector, whom the curate assisted, served at the relevant parish from 1971 until 1993 when he retired. He is now in his early 80s. He says he is very certain he did not have a conversation with the appellant's mother about her witnessing the curate sexually abusing the appellant. Had such a conversation occurred he would remember it. He is adamant that the conversation did not occur. He did, however, suffer a mild stroke in 1992 and a further mild stroke in 2002 which has affected his memory, although primarily his short-term memory.

[9] The appellant's proposed cause of action against the respondent is that the respondent breached its tortious and fiduciary duty to the appellant in failing to properly supervise both the curate and the appellant and, that once the respondent knew or ought to have known that the curate was abusing the appellant, it failed to take steps to protect the appellant from further injury or abuse and it failed to act on reports of abuse by the curate including reports from the appellant's mother. The appellant would claim that as a result of those breaches he failed to achieve his vocational aspirations and underwent physical, psychiatric and emotional injury claiming general damages, special damages and damages for economic loss.

[10] In determining the application under s 43 PIPA the primary judge considered that, consistent with the majority decision in *SG v State of Qld (No 2)*,[1] the appellant to succeed had to show a reasonably arguable case that time would be extended to 7 May 2005 in his application under s 31 of the Limitation Act. His Honour considered that a court hearing an application to extend time would be most likely to refuse such an application because the respondent would be inevitably prejudiced by the lapse of time and the death of crucial witnesses and also because there was no satisfactory evidence by which the appellant could establish his right of action to damages against the respondent. His Honour considered that there must be a real doubt about the likely prospects of success of the appellant's right of action based upon the respondent's failure to respond to the report made by the appellant's mother to the rector. His Honour also found that the appellant had not explained why he had not made an earlier inquiry of his parents or solicitors as to whether he had a cause of action against the respondent; had he directed the police to commence the investigation earlier it was likely that his mother would have been informed of the investigation earlier and the information said to be the crucial fact in the prospective application under the Limitation Act would have been discovered earlier. The cumulative effect of those three grounds persuaded the primary judge that the appellant had not demonstrated that he had a fairly arguable case for an extension of time under the Limitation Act and so had not demonstrated an urgent need to commence proceedings under s 43 PIPA.

[11] Special leave to appeal to the High Court of Australia has been granted in *SG v State of Qld (No 2)* and the appeal has been recently heard; the decision has been reserved.[2] It follows that the primary judge was right to determine the application on the basis that the majority view in *SG v State of Qld (No 2)* sets out the law, namely that to succeed in the application under s 43 PIPA the appellant had to show

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1 [2004] QCA 461; Appeal No 6405 of 2004, 3 December 2004.

2 Special leave was granted on 23 June 2005 and the appeal was heard 14 December 2005. See [2005] HCA Trans 456 (special leave) and [2005] HCA Trans 1006 (appeal).

a reasonably arguable case that time would be extended to 7 May 2005 in his anticipated application under s 31 Limitation Act. In determining that issue a judge must keep in mind that the purpose of s 43 PIPA is to provide that where urgent need to start proceedings is demonstrated, the proceedings can be commenced but are then stayed until there is compliance with the pre-court procedures under PIPA's Ch 2 Pt 1. An application under s 43 PIPA is not itself an application under s 31 Limitation Act. A judge hearing an application under s 43 PIPA should be cognizant of these factors and in applying *SG v State of Qld (No 2)* not set the bar as high as for an applicant under s 31 Limitation Act.

[12] As the learned primary judge recognized, and Williams JA identifies in his reasons, the appellant here faces real difficulties in succeeding in his s 31 Limitation Act application. I agree with Jerrard JA that the success of his application will turn largely on an assessment of the credibility of the rector's evidence that the appellant's mother did not tell the rector in about 1974 that she saw the curate sexually abusing the appellant. That can only be determined on an application under s 31 Limitation Act which, no doubt, would involve cross-examination of the rector and an assessment not only of his honesty but also of the accuracy of his recall in the light of his more recent health problems. The fact that this issue requires determination on an application under s 31 Limitation Act is sufficient to show a reasonably arguable case that time may be extended to 7 May 2005 in an application under s 31 Limitation Act. It follows that the learned primary judge erred in determining that the appellant had not shown a reasonably arguable case that time would be extended under s 31 Limitation Act to 7 May 2005. The appeal should be allowed.

[13] Here, the learned primary judge's refusal to grant the application under s 43 PIPA means that now the extended limitation period under s 31 Limitation Act has also expired. The respondent contends that this Court has no power to make the order sought before the learned primary judge effective from the date of his Honour's reasons, 4 May 2005. I have no doubt that in these circumstances the administration of justice requires, and both s 58(1) *Constitution of Queensland* 2001 (Qld) and this Court's inherent jurisdiction empower, this Court to make the order sought before the primary judge effective from the date of the original order, 4 May 2005. It seems implausible that the legislature could have otherwise intended. Any such intention affecting a litigant's common law rights would need to be stated in PIPA in the clearest of terms. It is not.

[14] I agree with Jerrard JA that it is prudent here to also make orders pertinent to s 18 and s 59(2)(b) PIPA. I agree with the orders proposed by Jerrard JA.

[15] **WILLIAMS JA:** This appeal again raises the tension between s 43 of the *Personal Injuries Proceedings Act* 2002 (Qld) ("PIPA") and statutory provisions (in particular s 30 and s 31 of the *Limitation of Actions Act* 1974 (Qld) ("the Act")) which enable the court to extend the normal three year limitation period for the bringing of an action for damages in respect of personal injury.

[16] Section 43 of PIPA is predicated on there being an "urgent need" for proceedings to be commenced although the pre-action procedures prescribed by PIPA have not been complied with. In most cases that urgency will be established by the fact that the applicable limitation period will expire before those pre-action procedures can be complied with or where, because of some consideration personal to the claimant

or a witness (for example, imminent death), it is necessary in the interests of justice that the proceeding be commenced notwithstanding that the pre-action procedures have not been complied with. Where the relevant limitation period has expired, and there is no basis for obtaining an extension, s 43 cannot avail the claimant. Where in the situations I have referred to (limitation period about to expire or imminent death of claimant or witness) the factors relevant to the exercise of the judicial discretion to make an order granting leave to start the proceedings will be obvious. If the problem is the imminent expiration of the limitation period, leave to start the proceedings can be granted but the proceeding can be stayed until there has been compliance with the pre-action requirements of PIPA. If the urgency is consequent upon the claimant suffering a terminal condition then the court's order may invoke sub-sections (4) and (5).

[17] In all of those circumstances s 43 meshes nicely with s 11 of the Act providing for a three year limitation period, or for the situation where that limitation period has been extended under s 31. It was against that background that I said in *SG v State of Queensland* [2004] QCA 215 that on "its proper construction s 43 can only operate where the original or extended limitation period has not expired." In other words a party could not seek to invoke s 43 where an application was contemplated under s 30 and s 31 of the Act, but no order extending the period had yet been obtained.

[18] However, that view cannot be maintained in the light of the subsequent decision of this Court in *SG v State of Queensland (No 2)* [2004] QCA 461; but the question remains of identifying the circumstances in which an order can be made under s 43 of PIPA where proceedings are merely contemplated under s 30 and s 31 of the Act.

[19] In such a case one cannot say that it is necessary to commence proceedings as a matter of urgency because a limitation period is about to expire. The relevant limitation period has expired. What a claimant has to prove is that there is an "urgent need" because, if the claimant is successful in obtaining an order extending the limitation period under s 30 and s 31 of the Act, that extended period will expire before the claimant has complied with the pre-action requirements of PIPA. Before making the order under s 43 the court must be "satisfied there is an urgent need to start the proceeding". That "urgent need" only exists if one assumes there is an extension of the limitation period and that extended period is about to expire. Given the reasoning in *SG v State of Queensland (No 2)* claimants will not establish "urgent need" merely by saying that it is proposed to make an application for an extension of the limitation period.

[20] In the first *SG v State of Queensland* case in this Court, Jerrard JA held that relevant urgency was established where "the applicant has an argument to advance for the extension of a limitation period". Muir J in that case agreed "generally" with the reasons of Jerrard JA but expressed "no views on the . . . ambit of operation of s 43". But in a later case at first instance he observed that he could see "no compelling reason why . . . s 43 should be construed restrictively".

[21] All of those observations were considered by this Court in *SG v State of Queensland (No 2)*. Therein the Chief Justice, with whom Chesterman J agreed, said at [22]: "I consider the requisite "urgency" could be demonstrated where, although an extension of the limitation period had not already been secured, the expiration of the 12 months period under s 31(2) was imminent and the applicant could demonstrate

a reasonably arguable case for the granting of an extension." That therefore is the test favoured by the majority.

[22] In her dissent the President said at [33]:

> ". . . the plain words of s 43 *PIPA*, which are remedial in effect and should be broadly construed, do not make success in an application under that section dependent also on demonstrating a reasonably arguable case for an application for an extension of the limitation period. On the other hand, if there are clearly no prospects of succeeding in any necessary application for an extension of the limitation period, then it would be futile to grant the application under s 43 *PIPA* and it should be refused. In my view it is sufficient for a court to give leave under s 43 *PIPA* to a claimant to start a proceeding despite non-compliance with Pt 1 Ch 2 *PIPA* if the court is satisfied there is an urgent need to start the proceeding, for example, that the expiration of the 12 month period under s 31(2) of the limitations statute is close and the claimant has some realistic, not merely fanciful, prospects of succeeding in an application for an extension of the limitation period.

[23] In many cases the result will be the same whether one asks has the applicant demonstrated a reasonably arguable case for granting an extension of the limitation period, or has the claimant some realistic, and not merely fanciful, prospects of succeeding in an application for an extension of the limitation period. Under either test the claimant would have to point to some matters supporting an extension of time and would have to overcome any factors which would generally be regarded as fatal to success on such an application. In my view it is not unrealistic, or in any way unfair, to ask an applicant in those circumstances to place before the court hearing the application under s 43 evidence demonstrating a reasonably arguable case for the granting of an extension of time. If the one year period referred to in s 31(2) of the Act is about to expire (and it must be if urgency is to be established) then that must mean that the claimant has been aware of the material fact of a decisive character relating to the right of action for approximately 12 months and yet has not brought an application under s 31. That in itself demonstrates a reason why the court ought not readily conclude that it is in the interests of justice that an order be made under s 43 in such circumstances. Particularly where the applicable limitation period expired more than a decade ago it is not unrealistic to expect that a claimant, on becoming aware of a material fact of a decisive character relating to a right of action, would take prompt steps to secure an extension of the limitation period under s 31.

[24] It is against that background that I turn to the relevant facts. The appellant was born on 2 June 1960. He alleges that he was regularly sexually abused from late 1974 until June 1976 (when he was aged 14 - 16 years) by the curate of a Brisbane parish, from 1973 until June 1976. The allegation is that the sexual abuse involved regular mutual masturbation, regular mutual oral sex, and on one occasion each sodomised the other. The alleged conduct ceased when the curate was transferred to Sydney in June 1976. The appellant thereafter took no steps with respect to that alleged abuse for some 28 years; about 23 of those years were after he turned 21 in 1981. The contention is that the appellant became aware on 7 May 2004 of a "material fact of a decisive character relating to [a] right of action" against the respondent. The first relevant step taken by the appellant thereafter was the giving of a Notice of Claim

for Damages pursuant to PIPA on 27 October 2004. Then nothing of relevance happened until 15 April 2005 when an originating application was filed seeking an order pursuant to s 43 of PIPA; the matter came on for hearing on 4 May 2005, some three days prior to the expiration of the one year period referred to in s 31(2) of the Act (on the basis that the appellant became aware of the "material fact of a decisive character" on 7 May 2004).

[25] The affidavit material can be taken as establishing that on 7 May 2004 the appellant's wife spoke to the appellant's mother about a pending police investigation relating to the abuse of the appellant. In the course of that conversation it is asserted that the appellant's mother informed the appellant's wife that she "witnessed an incident of abuse" and "telephoned … [the] rector of the Parish, and told him what she had seen". Later that day the appellant's wife communicated to him what she had been told by his mother.

[26] Relevantly for present purposes it is asserted that the appellant thus became aware for the first time that Church authorities had been made aware of the alleged abusive conduct and, as it continued thereafter, the assertion is made that the respondent was liable because it did not take adequate steps to prevent the continuation of the abuse. Because of that the focus at the hearing at first instance was on the question whether or not there was sufficient evidence that the respondent was made aware sometime between late 1974 and June 1976 of the alleged abuse so as to have a realistic opportunity of preventing its continuance, and whether or not given the delay, and other matters hereinafter set out, it was prejudiced in conducting a defence to a case that it failed to meet its obligation to the appellant.

[27] Before proceeding further it is necessary to set out some other undisputed facts. The appellant's mother died on 27 September 2004 and the only relevant statements signed by her are those given to the police on 22 and 25 May 2004. The appellant's father died in March 2000 and the material before the Court suggests that he left nothing in writing which could be admitted into evidence and which was relevant either to the present application or to a substantive claim for damages brought by the appellant. Further, Bishop Wicks died on 12 September 1997 and the Reverend Warner died on 28 July 1993; each of those persons will be referred to subsequently. Finally, the rector, now aged 81, suffered strokes in 1992 and 2002 which have had some affect on his memory; he has sworn an affidavit and given signed statements to the police dated 26 April 2004 and 3 June 2004 relevant to the matters in issue.

[28] According to the statement by the appellant's mother to the police, on an unspecified date she entered the appellant's bedroom without knocking and saw that the appellant "had his pants down" and the curate "was fondling him"; the statement specifically notes that the hand of the curate was touching her son's erect penis. Her statement goes on relevantly and critically:

> "I was shocked and didn't know what to do so I immediately walked out of the room and I telephoned [the rector]. I told him about it but I can't remember what I said exactly although [the rector] was sympathetic."

Her statement goes onto say that her son was attending high school when the incident happened, "but I am not sure what occurred after it or if [the curate] ever came to our house again but it is most likely that he didn't."

[29] It is clear from the appellant's statement that he was not aware until 7 May 2004 that his mother had witnessed such an event; obviously she never said anything to him about the incident. It is clear, at least by inference, that the appellant's mother never counselled him about his relationship with the curate or indicated to him that she had spoken to the rector. Inferentially, nothing was said by the appellant's mother to his father about what she saw or about her contact with the rector.

[30] The rector in his affidavit states that he is "very certain I did not ever have a conversation" with the appellant's mother about her witnessing her son being abused by the curate. He swears that if he had been informed by the appellant's mother that she had found her son with his pants down and the curate fondling his penis he would have remembered it. Those statements by the rector carry significant weight because of matters to which I will subsequently refer.

[31] Given the mother's death there can be no further particularisation of what she allegedly told the rector. One can only speculate what she meant in her statement when she said she told the rector "about it". Did she specify the conduct or did she, perhaps because of embarrassment, merely say something like that the relationship between her son and the curate was inappropriate. In order to establish sufficient knowledge in the respondent leading to the contention that it failed to act appropriately it would be necessary to establish precisely what was said by the appellant’s mother.

[32] Further, the timing of that alleged conversation is also of critical importance. Her statements to the police do not reveal even an approximation of the date. If, as the mother suggests in her statement, the curate did not visit the house again after that incident, it was more likely towards the end of the relationship. If the incident she refers to occurred close to June 1976 when the curate was transferred to Sydney and the alleged abuse ceased, it could not be contended that any failure by the respondent to respond appropriately to the information conveyed to it caused or aggravated any injury sustained by the appellant in consequence of the abuse.

[33] Both the appellant and the rector in their material refer to an occasion when the appellant's father spoke to the rector about the relationship between the appellant and the curate. In his statement to police dated 17 December 2003 the appellant says that "in August/September 1976" his father discovered a letter from the curate to himself "which made it clear that something untoward had been happening". No such letter has yet been produced, and in consequence it must be assumed that it is no longer available. According to the appellant in his statement the "matter" was then taken up by his father with the rector.

[34] That meeting is referred to by the rector in his affidavit and in his statements to the police. In his affidavit he says that as best as he can recall "the meeting occurred in 1977". In his statement dated 26 April 2004 he says he was contacted "about six months after the curate left the parish"; that would put the meeting about early 1977. In his affidavit the rector says that the appellant's father showed him a letter sent from the curate in Sydney to the appellant. He goes on: "I cannot recall the exact nature of the letter, however, it referred to a relationship. I felt certain at the time it was referring to a relationship of a sexual nature." He swears that he considered that the police should be involved and raised that with the appellant and his father. According to the rector the appellant's father said that "this would not be necessary and the matter could be dealt with within the Church." With the agreement of the

appellant's father the rector suggested that Bishop Ralph Wicks, who was acting in the capacity of Archbishop at the time, should be contacted. The appellant was present throughout and did not contradict anything said either by his father or the rector. Bishop Wicks was contacted and the Reverend James Warner was appointed to deal with the matter. Later the rector had a conversation with the appellant who then agreed to also attend the Reverend Warner for counselling with respect to the relationship with the curate.

[35] Relevantly the rector goes on to say in his affidavit:

> "I am very certain that the first indication I ever had that there was an improper relationship between [the curate] and [the appellant] was at the meeting when [the appellant's father] came to see me after intercepting the letter from [the curate] to [the appellant]."

It is significant in my view that the appellant does not challenge the rector's statement that it was he, the rector, who suggested the police be contacted, and that the appellant's father said that would not be necessary. Further it is extremely significant that the rector's immediate reaction on receiving the letter and complaint was to place the matter in the hands of Church authorities. Those matters lend credence to the rector's statement that he was not informed by the appellant's mother on a prior occasion that a sexual relationship existed between the appellant and the curate. Given his reaction when contacted by the appellant's father it is highly unlikely that he would not have taken similar action, and recalled what he did, if he had been expressly informed of the existence of such a relationship at an earlier time by the appellant's mother.

[36] It should also be noted that on all the evidence the meeting between the appellant's father and the rector occurred after the abuse ceased. Therefore the appellant cannot rely on that meeting as establishing knowledge in the respondent and thereafter negligent failure to take steps to prevent the continuation of the abuse.

[37] Finally on this aspect of the matter it must be remembered, as noted above, that the appellant's father, Wicks and Warner are all now dead.

[38] Material filed on behalf of the respondent indicates that the appellant made a complaint of sexual abuse by the curate by contacting the Anglican Church Grammar School. School authorities passed the information onto the respondent and the police who appear to have received it in about January 2002. There is then a suggestion that the police commenced their investigation but because the appellant decided not to make a formal complaint the police action ceased. That would appear to have been in about February 2002. Then on or about 17 December 2003 the appellant re-activated the matter with the police, and his principal statement annexed to his affidavit bears that date. The file which the respondent opened on the matter in early 2002 was closed in about June 2003 as nothing further had been heard from the appellant.

[39] In the light of all those matters the learned judge at first instance dismissed the application for an order pursuant to s 43 of PIPA.

[40] The case presented on behalf of the appellant at first instance was that prior to 7 May 2004 he knew that he had been molested and knew that the curate had been guilty of gross misconduct, but he did not know that the respondent might be held

liable for that misconduct. The learned judge at first instance, correctly in my view, approached the matter on the basis that in cases of this type "the court must be satisfied before it gives leave to commence the proceedings that there is a reasonably arguable case for an extension of time and that the applicant will be shut out forever from prosecuting the action if leave is not given to commence it." In determining whether there was a "reasonably arguable case" for an extension of the limitation period his Honour, correctly, considered issues such as prejudice to the respondent which would be relevant to the exercise of discretion under s 31 of the Act. In the light of that his Honour referred to the death of a number of important witnesses and the fact that the written statement by the appellant's mother may not be "fully accurate" in relation to her contact with the rector. In regard to the latter point the learned judge at first instance accepted the submission on behalf of the respondent that "there is no evidence as to what the late [appellant's mother] in fact said to the rector so that it is not possible to know what warning was given to the respondent." His Honour then went on to say:

> "It seems to me that the death of these people, one of whom is critical, and the other two of whom would appear to be important witnesses, is the loss of evidence which can only prejudice the fair trial of the action and the respondent's capacity to defend it."

[41] The learned judge at first instance also considered it significant that "no psychiatric evidence has been put in concerning the applicant's mental state despite the fact that his only damage is said to be that relating [to] psychiatric illness." There is no evidence as to the date on which such psychiatric illness first became manifest. His Honour also noted that there was no evidence establishing why the appellant was "unable to make earlier enquiries". Reference was made in that regard to the complaints in 2002. Therefore the learned judge was not satisfied the appellant could show that the "decisive fact" was not within his "means of knowledge" at an earlier point of time.

[42] His Honour also found that "there must be a real doubt about the applicant's right of action based upon the respondent's failure to respond to the warning" said to be contained in the statement of the appellant's mother to the rector.

[43] Considering all of those matters "cumulatively" the learned judge at first instance concluded that he was not persuaded that the appellant showed "an arguable or a fairly arguable case for an extension of time". He went on: "That being so, he has not demonstrated that there is an urgent need to commence the proceedings under s 43 . . . and I dismiss the application".

[44] In my view there was no error in the reasoning of the learned judge at first instance. He applied the correct test and did not have regard to any extraneous or irrelevant matter in coming to his decision. As a perusal of his reasons showed, he addressed his mind to all relevant considerations and concluded that the appellant had not made out a case for relief under s 43. "Urgent need" could only be established if the appellant had a reasonably arguable case for an extension of the limitation period, which extended period was about to expire. The appellant failed to satisfy the learned judge at first instance that such urgency existed and such a finding was clearly open on the evidence. To my mind the result would be the same even if the "realistic, not merely fanciful" test was applied.

[45] In the circumstances the appeal should be dismissed with costs.

[46] **JERRARD JA**: In this appeal I have had the advantage of reading the reasons for judgment of Williams JA, and the orders proposed by His Honour. I gratefully adopt His Honour's description of the relevant facts and his nomenclature.

***Personal Injuries Proceedings Act* ("PIPA") provisions**

[47] It is helpful to set out some of these relevant to this appeal. Section 9 relevantly provides:

> "**9 Notice of Claim**
> (1) Before starting a proceeding in a court based on a claim, 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.
> (1A) The approved form must provide for the notice to be in 2 parts, namely part 1 and part 2.
> …
> (3) Part 1 of the notice must be given within the period ending on the earlier of the following days –
>
> (a) the day 9 months after the day the incident giving rise to the personal injury happened or, if symptoms of the injury are not immediately apparent, the first appearance of symptoms for the injury;
>
> (b) the day 1 month after the day the claimant first instructs a lawyer to act on the person's behalf in seeking damages for the personal injury and the person against whom the proceeding is proposed to be started is identified.
>
> …
> (5) If part 1 of the notice is not given within the period prescribed under subsection (3) or section 9A(9)(b), the obligation to give the notice under subsection (1) continues and a reasonable excuse for the delay must be given in part 1 of the notice or by separate notice to the person against whom the proceedings is proposed to be started."

[48] Section 10 and s 12 provide for responses to that notice from a claimant, and (generally) a respondent is obliged to state within a month from receipt of the notice whether the respondent is satisfied the notice is a complying notice of claim (defined in the schedule to mean a notice "given as required"), and if not to identify the noncompliance or waive the noncompliance. Section 13 deems a respondent to be satisfied the notice is a complying notice if that respondent does not reply within the specified period.

[49] Section 18 provides:

> "**18 Claimant's failure to give part 1 of a notice of a claim**
> (1) A claimant's failure to give a complying part 1 notice of claim prevents the claimant from proceeding further with the claim unless –
>
> (a) the respondent to whom part 1 of a notice of a claim was purportedly given –
>
> (i) has stated that the respondent is satisfied part 1 of the notice has been given as required or the claimant has taken reasonable action to remedy the noncompliance; or

> (ii) is conclusively presumed to be satisfied it is a complying part 1 notice of claim under section 13; or
>
> (b) the respondent 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 the claimant to proceed further with the claim despite the noncompliance.
>
> (2) An order of the court under subsection (1)(c) may be made on conditions the court considers necessary or appropriate to minimise prejudice to a respondent from the claimant's failure to comply with the requirement."

[50] Section 20(1) allows a respondent who has received a complying notice of claim six months within which to take steps to inform that respondent further about that alleged event giving rise to the injury, and to give notice to the claimant advising whether liability is admitted or denied and the respondent's position on contributory negligence. The respondent is also obliged to make an offer of settlement. Section 20(2) provides:

> "(2) If part 1 of a notice of a claim is not a complying part 1 notice of claim, a respondent is taken to have been given a complying part 1 notice of claim when –
>
> (a) the respondent gives the claimant notice that 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; or
>
> (b) the court makes a declaration that the claimant is taken to have remedied the noncompliance, or authorises the claimant to proceed further with the claim despite the noncompliance."

[51] Section 36 prevents a claimant from starting a proceeding in a court based on a claim until a conference between the parties has been held, which conference can be called at any reasonable time once six months have passed since the claimant gave the respondent a complying notice of claim. If the claim is not settled at that conference mandatory final offers must be exchanged at its conclusion, which must remain open for 14 days, and no proceeding in court based on a claim can be started while the offer remains open (s 40(4)).

Where a complying notice is actually given

[52] The specific provisions of the PIPA under consideration on this appeal are to be understood against the background of that regime established by the PIPA, which prevents a claimant who has complied with its provisions from starting a proceeding in a court based on the claim until well after six months have passed since giving the s 9 notice. A claimant who had given a complying notice, say five months before the end of the ordinarily expiring limitation period, and who had still not had the compulsory conference as the limitation date loomed, could sensibly bring an application pursuant to s 43.

[53] Its provisions, relevant to this matter, read:

> "**43 Need for urgent proceeding**
>
> (1) The court, on application by a claimant, may give leave to the claimant to start a proceeding in the court for damages based on a liability for personal injury despite noncompliance with this part if the court is satisfied there is an urgent need to start the proceeding.
>
> (2) The order giving leave to start the proceeding may be made on conditions the court considers necessary or appropriate having regard to the particular circumstances of the case.
>
> (3) However, if leave is given, the proceeding started by leave is stayed until the claimant complies with this part or the proceeding is discontinued or otherwise ends."

A proceeding so started by leave would then be stayed until the conference was held.

Where a complying notice is taken to have been given

[54] Where a claimant has not delivered a complying notice of claim and the end of the ordinarily applying limitation period is fast approaching, an intending claimant would sensibly deliver a late and (on the construction of a similar provision in *Thomas v Transpacific Industries Pty Ltd* [2003] 1 Qd R 328 at 336, 337) accordingly noncomplying notice and ask for urgent orders pursuant to s 18 and s 43 of the PIPA. Section 20(2) would have the effect, if an order was made under s 18 authorising that claimant to proceed further with the claim despite noncompliance with Part 1 of Chapter 2, of making the (late and therefore noncomplying) notice into a complying one, given when the court made the s 18 order. An order under s 43, if also made in that claimant's favour, would allow that claimant to start a proceeding in the court, but that proceeding would then be stayed until that claimant had complied with the requirements of Part 1 of Chapter 2.

Extending the limitation period

[55] An order made under s 43 does not extend a limitation period. But s 59 has that effect, without any express order to that effect being necessary. It does work similar to that done by s 308 of the *WorkCover Queensland Act* 1996 (Qld), and s 302 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld). It applies where a complying Part 1 Notice of Claim has been given before the end of the original, or extended, period of limitation. Section 59 provides:

> "**59 Alteration of period of limitation**
>
> (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.
>
> (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.

> (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."

[56] Because of the previously described effect that s 20(2) has on an order made under s 18, a notice which is noncomplying because delivered late (or for other reasons), when given before the end of an original or extended period of limitation, and upon which s 20(2) has operation, then results – by virtue of s 59(1) – in that original or extended limitation period being further extended. That happens without the necessity for any order. Section 59(2) does not require that orders be made pursuant to that subsection; on a s 18 application a claimant could ask for an order for leave to start proceedings within a period longer than six months from the date of the s 18 order being made. However, simply because of the necessity the compulsory conference and mandatory offer regime creates, namely to wait more than six months after giving a complying notice before starting a proceeding in a court, any claimant giving a notice (whether actually compliant or taken to be compliant) six months or less before the expiration of the limitation period would have to seek a s 59(2)(b) extension of the limitation period. In *Haley v Roma Town Council* [2005] 1 Qd R 478 this Court held an application under s 59(2)(b) could be made after the limitation period had expired.

[57] The facts of this matter show one of the problems s 59 creates for a claimant who gives insufficient attention to it. The appellant's s 9 Notice of Claim was given on 27 October 2004, and if the construction in *Thomas v Transpacific Industries* applies, was accordingly noncomplying; yet while his application[3] to this Court asked for orders under s 43 and s 18, it omitted to ask for an order under s 59(2)(b), which would have been a sensible order to seek. That is because the six months described in that section would run out on or about 27 April 2005, and as it transpired the application was heard after that date.

Section 43, s 59 and an expired limitation period

[58] This appeal requires some consideration of the effect that s 43 and s 59 have where there is an as yet unextended limitation period which has (long ago) expired. An order under s 43, if made, allows a proceeding to be started which is then stayed, but that claimant must still pass the limitation hurdle in the *Limitation of Actions Act* 1974 ("the Act"). If that claimant does, and if that claimant has given a complying part 1 notice of claim before the end of that extended period of limitation – as permitted by s 59(4) – then the further extension of the limitation period effected by s 59(1) would apply to that extended limitation period. Translated, that means that before the end of that limitation period as extended, that claimant would need to have obtained an order under s 18 upon which s 20(2) could act; and the claimant could ask at any time for an order under s 59(2), to ensure that the further extension granted by s 59 was for longer than six months.

[59] Where the notionally extended limitation period is fast running out, and no application has yet been made under the Act to extend it, the effect of s 43 is that it adds to the circumstances in which a s 18 order can properly be made. Those include when there is an urgent need to start proceedings within a notionally extended limitation period, to achieve the equivalent of the position in *Grove v*

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[3] At AR 164-165

Bestobell Industries Pty Ltd [1980] Qd R 12. In that case Dunn J held that an application for an order extending a limitation period pursuant to s 31 of the Act could be made after starting the proceeding. If an order under s 43 and s 18 is made within that notionally extended limitation period, then a later, successful, application under s 31 of the Act would not be frustrated by the requirement in s 59(1) that a complying Part 1 Notice of Claim be given before the end of the period of limitation applicable. An order under s 43 does not extend the limitation period, but a s 18 order upon which s 20(2) can operate would allow a claimant to proceed further despite prior noncompliance, assuming that order is made within the notionally extended limitation period.

This matter

[60] The facts are described by Williams JA. There is one matter of analysis of them on which I respectfully disagree with His Honour, and that is the likely date when the appellant's mother said she saw the curate sexually abusing the appellant. That disagreement results in my reaching a different conclusion on the appeal. It appears clear enough from the appellant's own statement to the police made on 17 December 2003 that he has so far described only two occasions when the appellant was a child and the curate touched him indecently in the appellant's own home. The first occasion is described in paragraph 10 of that statement and the second in paragraph 15. On the first one the appellant was seated and playing at the piano, and the curate momentarily put his hand in the appellant's shorts. On the second occasion he could not recall precisely what led to the incident, but during it he was masturbated by the curate. On the first occasion – as described in paragraph 10 – there was no masturbation. He dates the second occasion, when there was the one act of masturbation which occurred in the home, as being in mid-1974, soon after he turned 14, and when he was in bed with influenza. The curate had visited him in his home on that occasion. The remainder of the appellant's statement is consistent with the curate not having visited the appellant's home after then. On that chronology, the appellant's mother witnessed the only occasion when there was unmistakable sexual abuse of the appellant in her home, and that was the first time that the curate actually explicitly sexually abused the appellant. It was therefore at the start of the sexual relationship between the curate and the appellant.

[61] Assuming then that the appellant's mother's statement to the police, read with the appellant's, asserts that she saw the one and only occasion of the curate masturbating the appellant in the appellant's household, the appellant would still face considerable problems on a s 31 application. Unless the rector's recollection significantly changes, his affidavit flatly contradicts the appellant's mother's statement (by one inference from its contents) that she told the rector in mid-1974 that the curate was sexually abusing her son. the appellant's claim against the respondent church would have no prospect of success unless a court was satisfied on the balance of probabilities that her sworn statement to the police was accurate and should be understood as meaning she told the rector what she had seen. The appellant is correct in treating his knowledge of his mother's witnessing the curate abusing him, and of her having promptly complained about the curate to the rector, as a material fact relating to his right of action. If accepted, that evidence would go toward establishing the degree of knowledge of misbehaviour by the curate which might make the respondent liable for the consequences of not doing anything to dissuade its curate from exploiting a child. The appellant would need to plead and

prove the very restricted circumstances in which a defendant would be liable for the criminal conduct of another.[4]

Likely outcome of a s 31 application

[62] As Williams JA points out in his reasons, there are particular difficulties with establishing and defending the claim the appellant wishes to advance, important on a s 31 application, because of the death and age-related incapacity of so many relevant witnesses. The appellant's mother is dead, and he can rely only on a favourable construction of her statement to the police, read with his. He did not file any affidavit material supporting his s 43 application and in which he described any occasions of sexual abuse other than those revealed in his statement to the police. That means any court ultimately hearing his claim, were his respective s 43 and s 31 applications successful, could find in his favour only by accepting his deceased mother's statutory declaration, over the rector's flat contradiction of it. As Williams JA also points out, the rector's prompt enough action, taken after the appellant's father spoke with him in 1977 about the sexual relationship between the curate and the appellant, would support the rector's claim not to have known of an improper relationship before the conversation between the appellant, his father, and the rector. That prompt action taken in 1977 by the rector would challenge the inference that the appellant must urge, namely that the rector was told of that relationship three years earlier by the appellant's mother, yet did nothing about it until told of it again by the appellant's father three years later.

[63] In those circumstances the appellant would succeed in establishing the material facts on a s 31 application only if the court hearing it rejected the rector's affidavit statement (assuming the respondent read the affidavit) that the appellant's mother did not unequivocally communicate to him the critical information in mid-1974 that the curate was abusing the appellant. However, that conclusion is possible, if it emerged from answers the rector gave in cross-examination. The learned judge hearing the s 43 application considered that the account given by the appellant's mother was extraordinary, because she had not spoken to her son or husband about what she had seen, and the judge doubted its accuracy. But it is possible the appellant's mother's statement could look better after evidence from the rector. If the conclusion reached on a s 31 application was that that information *was* conveyed in mid-1974, and that no steps were then taken to protect the appellant despite that knowledge, then the appellant would have reasonable grounds for contending that there was in truth no relevant prejudice to the respondent derived from any delay by him, because both parties would be in agreement that Reverend the rector did not act in 1974 on information given to him.

What test to apply?

[64] That is a speculative basis for a s 31 application, which could only be advanced in the knowledge that the rector had already specifically disagreed. But the purely speculative possibility of a conclusion in his favour (that his mother's statement was correct) does give the appellant an argument to advance for the extension of a limitation period, and for that reason I would allow this appeal. I put the applicable

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[4] Discussed in *Ashrafi Persian Trading Co Pty Ltd v Ashrafinia* (2002) Aust Torts Reports 81-636 by Heydon JA, as he then was, at 68,335-68,337. The respondent argued on this appeal that the appellant could not establish liability in it, on any view of the facts; that is more a matter for later assessment

test as I do solely because special leave to appeal was granted in *SG v State of Queensland (No 2)*[5], some six weeks after the decision by the learned trial judge in this matter. The issue on which leave was granted was whether an applicant in the appellant's position was obliged to demonstrate a reasonably arguable case for a s 31 extension of the limitation period, or whether some other, lesser, requirement was apt. Pending the outcome of that appeal, it is appropriate to exercise the power given by r 765(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) to hear this appeal (from other than a final decision) by way of rehearing and apply the law as it is now, not as it was at the time the learned trial judge dealt with the matter.[6] Applying the law as it is now when giving the judgment which "ought to be given if the case came (only now) before the court at first instance"[7] requires recognition that the applicable law is under consideration in the High Court. In those circumstances it is appropriate to place the bar for applicants as low as possible on a s 43 application, until a decision in *SG*.

***Nunc pro tunc* orders**

[65] When an application under s 43 (and s 18) heard just before the end of a notionally extended limitation period is later held on appeal to have been refused on a basis on which it is no longer safe to rely, this Court can make remedial orders on that appeal. It can make orders *nunc pro tunc* under s 18 and s 43 and *UCPR* 660(3), granting leave both to proceed further with the claim, and to start a proceeding in a court on the date the application was heard i.e. taking effect on an earlier date and before the end of the notionally extended limitation period. The reasoning in *Holmes v Adnought Sheet Metal Fabrications Pty Ltd*,[8] approved by a majority in *Haley v Roma Town Council*, does not contradict that conclusion, because those orders being made later now *could* properly have been made then,[9] which is the critical difference between the orders in this matter and those sought in *Holmes v Adnought*.

When could proceedings begin?

[66] On this appeal the respondent's counsel urged that, even so, making such orders now would be pointless, because no claim was filed before 7 May 2005. The respondent argued that if the appellant's appeal succeeded and so too did his s 31 application (based on whatever material facts he put forward), orders made in this appeal or on that application could not result in the appellant being taken to have started, before 7 May 2005, any proceeding he actually began only after this appeal succeeded. In reply Mr Myers, for the appellant, argued that by reason of its jurisdiction declared in s 58(1) of the *Constitution of Queensland* 2001 (Qld), namely all jurisdiction necessary for the administration of justice in Queensland, this Court could declare in this appeal that proceedings begun pursuant to its orders on appeal have effect between the parties for the purpose of the *PIPA* as if begun before the end of the period of limitation ending on 7 May 2005. He argued that to

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5 [2004] QCA 461; special leave was granted in No B83 of 2004, on 23 June 2005, and it was argued on 14 December 2005

6 *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73 at 107 per Dixon J; *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619-620, per Mason J

7 Per Jessel Mr in *Quilter v Mapleson* (1882) 9 QBD 672 at 676, cited by Dixon J in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* at 46 CLR 107

8 [2004] 1 Qd R 378

9 *Emanuele v Australian Securities Commission* (1997) 188 CLR 114 at 132

hold otherwise would risk denying justice because of what might be errors in fact and law.

[67] That submission had something of the flavour of an argument of last resort, because other attempts to rely on s 58(1) or its equivalent, originally enacted as s 9(1) of the *Supreme Court of Queensland Act* 1991 (Qld), and later renumbered as s 8(1), have not been conspicuously successful. Mr Skase was unable to rely on it in *R v Skase* [1994] QCA 28; but both the applicant and the respondent State of Queensland fared better in *Elder v State of Queensland* (1997) 141 FLR 467. In the latter decision Ambrose J cited, with apparent approval, from the judgment of Young J in *Sutton v Warringah Shire Council* (1985) 4 NSWLR 124 at 123, when Young J was considering the effects to be given to the similarly worded s 23 of the *Supreme Court Act* 1970 (NSW). Young J's description in *Sutton* of the effect of the section was that, in a case in which there may have been doubt "under the former law" (as to a plaintiff's standing to sue), the Court "would be bound to hear the case because of its duty to do justice in all matters for the good of the people of New South Wales". The like duty would apply in this State, Mr Myers might suggest.

[68] In *R v Pettigrew* [1997] 1 Qd R 601, the majority of this Court considered that the equivalent section (then) in the *Supreme Court of Queensland Act* 1991 empowered this Court to set aside its own earlier judgment dismissing an application for leave to appeal against sentence, grant leave to appeal against that sentence, and make orders on that sentence appeal. Despite that decision, in *Stubberfield v Paradise Grove Pty Ltd* [2000] QCA 299 this Court held its earlier decision in *Pettigrew* could not be taken as meaning the section gave any wider charter for the re-opening of judgments in civil matters than had been expressed by the High Court in *DJL v Central Authority* (2000) 74 ALJR 706. In the latter decision the High Court restated the position declared by Barwick CJ in *Bailey v Marinoff* (1971) 125 CLR 529 at 530. Subsequently, in *R v Alexanderson* [2001] QCA 400 Williams JA, with whom the other judges agreed, noted that in each of *R v Lowrie* [1998] 2 Qd R 579 and in *Re Robert Paul Long* [2001] QCA 318 a majority of this Court had held that s 8 (now s 58(1) of the *Constitution of Queensland* 2001) of the *Supreme Court of Queensland Act* 1991 did not confer a criminal appellate jurisdiction on this Court not already conferred by Chapter 67 of the *Criminal Code*; and remarked that *Pettigrew* could be regarded as a decision essentially involving an application of the slip rule. He considered that in *Pettigrew* this Court had acted in error when it heard the first appeal, and had later acted to correct that error.

[69] Those decisions emphasise that the jurisdiction enacted by s 58(1) is, as Fitzgerald P wrote in *Pettigrew* (his view was the minority view on that point in that case but – since *Alexanderson* – is now to be accorded more weight) given where the section falls for consideration as one element of a complex system which includes other legislative provisions dealing directly and specifically with the prosecution of offences and giving and qualifying rights of appeal; Parliament could not be taken to have intended that (subsection) set at naught all such matters. Fitzgerald P wrote that it was not a power that had been granted at large, citing *Reid v Howard* (1995) 69 ALJR 863 at 871. Recognising the limiting effect required by the judgments cited on the construction of s 58(1), as applied to civil and criminal appeals, the point also made by Fitzgerald P, that a restrictive construction of legislation plainly intended to have a beneficial effect is not called for, still remains valid.

[70] In *Reid v Howard* the joint judgment in the High Court held, in respect of the jurisdiction conferred by s 23 of the *Supreme Court Act* 1970 (NSW) that, like the inherent power of a superior court, it was not at large, and could not authorise the making of orders excusing compliance with obligations or preventing the exercise of authority deriving from statute. The High Court was there referring to orders purporting to exclude noncompliance with search warrants or subpoenas. The High Court also observed that the jurisdiction conferred by s 23 was to be exercised only as necessary for the administration of justice. I consider that while the orders sought by Mr Myers do excuse the appellant from compliance with obligations, there is an existing statutory authority to grant leave to do that; and the orders asked for do not prevent the exercise of any authority deriving from statute. Finally, returning to later remarks of Young J in *Blacker v National Australia Bank Ltd* [2000] NSWSC 805 at [15]–[21], I agree with His Honour that it is appropriate to keep in mind what he described as Lord Cottenham's "Golden Rule". That term described a statement by His Lordship in *Wallworth v Holt* (1841) 41 ER 238 at 244, where he wrote:

> "I think it is the duty of this Court to adapt its practice and course of proceeding to the existing rules of society, and not, by too strict an adherence, to decline to administer justice and to enforce rights for which there is no other remedy. This has always been the principle of this Court though not at all times sufficiently attended to."

Young J also wrote that Lord Cottenham's Golden Rule was reinforced by s 23 of the New South Wales Act, which operated so that the New South Wales Supreme Court might give justice untrammelled by procedural rules, when necessary.

[71] To bind the parties to a particular position in the manner suggested by Mr Myers does not exceed what is necessary for the administration of justice. It exercises the jurisdiction for the purpose for which it was granted and within those boundaries.[10] The appellant would still have to file his claim and succeed on a s 31 application.

[72] Accordingly, I would:

(a) order that the appeal be allowed;

(b) order that the appellant have leave pursuant to s 18, s 43, and s 59(2)(b) of the *Personal Injuries Proceedings Act* 2002 (Qld) to proceed further with his claim against the respondent despite noncompliance with Part 1 of Chapter 2 of that Act and to start a proceeding in this Court for damages for personal injuries based on that claim such leave being granted *nunc pro tunc* and with effect from 4 May 2005;

(c) declare such proceedings will have effect between these parties and for the purposes of that Act as if started no later than 7 May 2005;

(d) order the respondent pay the appellant's costs of and incidental to the appeal assessed on the standard basis.

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[10] *Emanuel v Australian Securities Commission* (1996-1997) 188 CLR 114 at 132