

SUPREME COURT OF QUEENSLAND

CITATION: *Aitken v Suncorp Metway Insurance Ltd* [2007] QSC 280

PARTIES: **SHEM AITKEN**
(applicant)
v
SUNCORP METWAY INSURANCE LIMITED
(respondent)

FILE NO/S: BS 5874 of 2007

DIVISION: Trial Division

PROCEEDING: Originating Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 12 October 2007

DELIVERED AT: Brisbane

HEARING DATE: 23 July 2007

JUDGE: Mackenzie J

ORDER: **1. Leave to bring a proceeding is granted**
2. The parties are directed to confer with a view to agreeing on an appropriate form of order, including any costs order
3. Failing agreement, the parties are at liberty to make written submissions within 10 days of the delivery of these reasons.

CATCHWORDS: LIMITATIONS OF ACTIONS – CONTRACTS, TORTS AND PERSONAL ACTIONS – APPLICATION OF THE STATUTES TO PARTICULAR CAUSES OF ACTION – MOTOR VEHICLE INSURANCE – where applicant applies for leave to commence proceedings outside the limitation period – where respondent admitted liability but not quantum – where procedures established by the *Motor Accident Insurance Act 1994* (Qld) were initially complied with – where admissions were made subject to reservation of right to rely on the *Limitations of Acts Act 1974* (Qld) – where respondent asserts delay on behalf of the applicant in providing evidence as requested – where parties were to agree on joint medical reports – where applicant's request for past sample reports was unanswered – where applicant was not personally responsible for the delay – whether the compliance failure was the result of inaction – whether the discretion to grant leave to commence proceedings should be exercised

Limitation of Actions Act 1974 (Qld)
Motor Accident Insurance Act 1994 (Qld) s 57 (2)(a), s 57
 (2)(b)

Brisbane South Regional Health Authority v Taylor (1996)
 186 CLR 541; [\[1995\] QCA 093](#), cited
Morrison-Gardiner v Car Choice Pty Ltd [2005] 1 Qd R 378;
[\[2004\] QCA 480](#), cited
Winters v Doyle [2006] 2 Qd R 285; [\[2006\] QCA 110](#), cited

COUNSEL: R A Myers for the applicant
 S C Williams QC for the respondent

SOLICITORS: deVere Lawyers for the applicant
 Quinlan Miller & Treston for the respondent

- [1] **MACKENZIE J:** This is an application for leave to bring proceedings based on a motor vehicle accident claim, pursuant to s 57(2)(a) of the *Motor Accident Insurance Act 1994 (Qld)*, or alternatively, pursuant to s 57(2)(b) of the Act. The applicant sustained personal injuries as a passenger in a motor vehicle due, it is alleged, to the negligence of the driver who died in the accident. The applicant was rendered paraplegic in the accident which happened on 16 May 2004.
- [2] On 3 June 2004, solicitors were consulted. On 1 July 2004, a notice of accident claim (not accompanied by a medical certificate) was given to the respondent. When the medical certificate was received on 13 July 2004 it was sent to the respondent, which conceded, on 22 July 2004 compliance with s 37 of the Act. On 7 January 2005, based on the information presently available, liability (but not quantum) was admitted in full with the reservation that the admission was made for the purpose of the obligation under the Act and therefore not intended to bind the parties. The letter also reserved the right to rely on the *Limitation of Actions Act 1974 (Qld)* should the applicant not commence an action within the limitation period.
- [3] It is sufficient to say that thereafter, rehabilitation and other assistance envisaged by the Act were rendered by the respondent and discussions proceeded between the applicant's solicitors and the respondent's solicitors. There was no apparent reason for the applicant personally to think the claim was not proceeding appropriately.
- [4] The focal point of the present application is that the action was not commenced within the limitation period. Relief under s 57 is therefore sought. This is opposed by the respondent because, it is said, firstly, the applicant's solicitor was aware of the express reservation of the right to rely on the limitation point, secondly, that nothing subsequent to that reservation would have led her to believe otherwise, and thirdly, that there was delay on the applicant's behalf in providing information requested by the respondent and in assembling the medical evidence necessary to advance the claim.
- [5] It was accepted by the respondent that the discretion under s 57(2) is unfettered (*Morrison-Gardiner v Car Choice Pty Ltd* [2005] 1 Qd R 378; [\[2004\] QCA 480](#)). It was not suggested that there is any identified prejudice beyond the kind of disadvantage referred to in *Brisbane South Regional Health Authority v Taylor*

(1996) 186 CLR 541. However it was submitted that the applicant had not discharged the onus of establishing that the delay was occasioned by a conscientious effort to comply with the pre-litigation procedures of the Act (*Winters v Doyle* [2006] 2 Qd R 285; [2006] QCA 110). The full passage in Keane JA's reasons is as follows:

“It can be seen that each member of this Court in *Morrison-Gardiner v Car Choice Pty Ltd* identified, as a consideration of central relevance to the proper exercise of the discretion conferred by s 57(2)(b) of the MAI Act, the relationship between the delay which has occasioned the need to seek relief from the operation of the statutory time bar and the plaintiff's attempts to comply with the requirements of the MAI Act. A plaintiff will usually be able to show good reason for the favourable exercise of the discretion conferred by s 57(2)(b) only if he or she can show that the delay which occurred was occasioned by a ‘conscientious effort to comply’ with the MAI Act.”

- [6] However, from paragraph [32] and following of his reasons the relevance of an explanation by the applicant personally of the circumstances of the matter, including reliance on his solicitor and lack of personal responsibility for the delay that has occurred can be discerned. A connection between the requirements of the Act and the delay ought to be apparent in the evidence.
- [7] It was submitted that the evidence established that the applicant had made no effort or at least no conscientious effort to comply with the requirements of the Act. The limited advances in preparation of the claim that did occur were prompted by and resulted from the respondent's repeated attempts to get the applicant to assemble the necessary evidence. It was submitted that the compliance failures were entirely the result of the applicant's solicitor's procrastination and inaction.
- [8] One other factual matter should be mentioned, since it became the subject of cross-examination of the solicitor with carriage of the matter for the respondent. It is that there was correspondence in the latter part of 2006 about the respondent funding certain medico-legal reports the applicant wished to obtain. The respondent's position was that it would not do so but would agree to joint reports from a urologist and an occupational therapist chosen from a panel notified to the applicant's solicitors. On 19 January 2007, the applicant's solicitors took the somewhat bold step of asking for samples of the specialists' past reports so that counsel could review them. Unfortunately that letter was overlooked in the respondent's solicitor's office. It is uncontroversial that by the time the limitation period expired on 16 May 2007, there had been neither a response from the respondent nor any follow up letter or verbal communication from the applicant to remind the respondent that the request was still outstanding. The letter reviving the issue was received by the respondents on 23 May 2007.
- [9] There was then correspondence in which it was established that the proceedings had not been commenced within the limitation period. On 26 June 2007, it was asserted on the applicant's behalf, presumably with an eye to the authorities and in damage control mode, that there was, “no doubt that (the applicant) has been conscientiously endeavouring to comply with the requirements of the *Motor Accident Insurance Act* and such efforts have been thwarted by your delay to respond to our reasonable request”. Perhaps with a degree of overstatement, since a sense of urgency seems to

have developed only after the limitation period had expired, it was also asserted that the applicant's solicitors had been "pressing" the respondent to provide sample reports since 21 January 2007.

- [10] There were also differences as to the content of certain conversations between the solicitors on matters that are somewhat peripheral to the main issues. There are file notes only from the respondent's side, which form the basis of the respondent's evidence of the conversations. One concerned the degree of familiarity the applicant's solicitor had with claims of this nature which, on any view, was slight since, at the highest, such claims were outside her usual area. It is unnecessary to try to definitively resolve or rationalise these issues to decide the matter.
- [11] There were two affidavits from the applicant, one filed with the application and the other filed by leave at the hearing. The latter, which is more specifically directed to relevant issues demonstrates his knowledge of the progressive steps in gathering and providing information for his claim. There is no evidence of any dilatory conduct on his part, and he was not required for cross-examination to suggest otherwise. He believed he was complying with the respondent's requests and assumed, that, in the end, his claim would resolve. He was unaware of the limitation period. He also deposes as to ongoing rehabilitative procedures extending, it would seem, beyond the limitation period.
- [12] I am satisfied that the criteria for exercising the discretion under s 57 in the applicant's favour have been satisfied. An extension of time will therefore be given to bring a proceeding but because the practicalities of the case will probably influence the form of order, I will direct the parties to confer with a view to agreeing on an appropriate form of order, including any costs order. Failing agreement, the parties are at liberty to make written submissions within 10 days of the delivery of these reasons.