SUPREME COURT OF QUEENSLAND

CITATION:	*Blundstone v Johnson & Anor* [2010] QCA 148
PARTIES:	**WARWICK CHARLES BLUNDSTONE** (applicant/respondent) **v** **WAYNE PHILLIP JOHNSON** (first respondent/first applicant) **ALLIANZ AUSTRALIA INSURANCE LTD** ACN 000 122 850 (second respondent/second applicant)
FILE NO/S:	Appeal No 14429 of 2009 DC No 2365 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	15 June 2010
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2010
JUDGES:	Holmes and Chesterman JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal is refused with costs**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – IN GENERAL – WHAT IS A JUDGMENT OR ORDER – where a consent order was made extending the limitation period for the bringing of a personal injuries action in relation to a motor vehicle accident – where respondent failed to proceed with the action within the time allowed under the consent order – where respondent sought a further extension of the limitation period – where applicant argued that the consent order amounted to a contract – where applicant argued that the existence of the contract was an important factor in the exercise of the court's discretion in deciding whether to grant a further extension – where applicant argued that the existence of the contract warranted a rejection of the respondent's application to further extend the limitation period – whether primary judge erred in granting a further extension of the limitation period LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES

MATTERS – PRINCIPLES UPON WHICH DISCRETION EXERCISED – where primary judge exercised the discretion available under s 57(2)(b) of the *Motor Accidents Insurance Act* 1994 (Qld) to extend, for a second time, the limitation period for the bringing of a personal injuries action in relation to a motor vehicle accident – whether primary judge properly exercised the discretion having regard to its statutory purpose

Limitation of Actions Act 1974 (Qld), s11
Motor Accidents Insurance Act 1994 (Qld), s 51D, s 57(2)(b)

Blundstone v Johnson & Anor [2009] QDC 351, approved
Brisbane South Regional Health Authority v Taylor (1996) 186 CLR 541; [1996] HCA 25, cited
Chavez v Moreton Bay Regional Council [2009] QCA 348, distinguished
Fylas Pty Ltd v Vynal Pty Ltd [1992] 2 Qd R 593, distinguished
Moga v Australian Associated Motor Insurers Ltd [2008] QCA 79, considered
Morrison-Gardiner v Car Choice Pty Ltd [2005] 1 Qd R 378; [2004] QCA 480, cited
Paino v Hofbauer (1988) 13 NSWLR 193, cited
Paterson v Leigh & Anor [2008] QSC 277, approved
Siebe Gorman & Co Ltd v Pneupac Ltd [1982] 1 WLR 185, cited
Spencer v Nominal Defendant [2008] 2 Qd R 64; [2007] QCA 254, distinguished
Venz v Moreton Bay Regional Council (formerly Caboolture Shire Council) [2009] QCA 224, followed
Ward v Wiltshire Australia P/L & Anor [2008] QCA 93, cited

COUNSEL: D B Fraser QC for the applicant
W Campbell for the respondent

SOLICITORS: McInnes Wilson Lawyers for the applicant
K M Splatt & Associates for the respondent

[1] **HOLMES JA:** Pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld), the applicants seek leave to appeal a District Court judge's decision to further extend the limitation period for the bringing of a personal injuries action in relation to a motor vehicle accident. The extension was granted in circumstances where the limitation period had already been once extended pursuant to s 57(2)(b) of the *Motor Accident Insurance Act* 1994 (Qld). It was agreed that in the event leave were granted, the argument on the application for leave should be treated as the argument on the substantive appeal.

The extensions of the limitation period

[2] The relevant parts of s 57 are as follows:

> "**57 Alteration of period of limitation**
> (1) If notice of a motor vehicle accident claim is given under division 3, or an application for leave to bring a proceeding based

on a motor vehicle accident claim is made under division 3, before the end of the period of limitation applying to the claim, the claimant may bring a proceeding in court based on the claim even though the period of limitation has ended.

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

(a) 6 months after the notice is given or leave to bring the proceeding is granted; or

(b) a longer period allowed by the court.

...

(5) If a period of limitation is extended under part 3 of the *Limitation of Actions Act 1974*, this section applies to the period of limitation as extended under the part."

[3] The motor vehicle accident in question happened on 2 September 2005. The respondent promptly gave notice of a claim for damages in accordance with the requirements of the Act. The relevant limitation period would, of course, have expired on 2 September 2008, but the parties agreed to its extension. On 1 September 2008, the Registrar made a consent order in the following terms:

"BY CONSENT, THE ORDER OF THE COURT IS THAT:

1. Pursuant to section 57(2)(b) of the *Motor Accident Insurance Act (as amended)* ('the Act') the Applicant be granted leave to commence proceedings within 60 days of one of the following events occurring:-

   (a) A conference being held pursuant to section 51A and 51B of the Act and mandatory final offers being exchanged in accordance with section 51C of the Act; or

   (b) The date of agreement, if the parties dispense with the compulsory conference by agreement pursuant to section 51A(4) of the Act; or

   (c) In the event of the Court making an order to dispense with (a) above pursuant to s51A(5)(b) of the Act, the date of such order.

2. That each party have liberty to apply by giving three (3) business days notice in writing to the other party.

3. That there be no order as to costs."

[4] In the event, mandatory final offers were exchanged on 17 June 2009, with the result that the 60 day period prescribed in Paragraph 1 of the order expired on 17 August 2009. However, the respondent did not commence his action until 24 August 2009, seven days late. That was the result of an error on the part of an articled clerk in the respondent's solicitor's employ, in calculating the number of weeks left for filing after the exchange of offers. On 13 October 2009, the respondent's solicitor applied for another extension of time under s 57(2)(b), to 24 August 2009, for the issuing of proceedings.

[5] At first instance, the applicants argued that the court had no power to grant the application because it was functus officio, there already having been an extension of time. That argument was unsuccessful and is not persisted with here. The learned primary judge also rejected the applicant's next set of contentions: that the discretion under s 57(2)(b) was intended to be exercised for the benefit of claimants experiencing difficulty in complying with the pre-proceedings requirements of the Act; that it should not be exercised for any other reason; and that there was no evidence to show that the respondent had experienced any difficulty in complying with the Act's requirements. Finally, the learned judge rejected a submission that the consent order operated as a contract between the parties, with implications for the exercise of the s 57(2)(b) discretion. He distinguished *Spencer v Nominal Defendant*,[1] on which the applicants relied for that argument.

Whether the consent order was a contract

[6] It was the last argument which loomed largest in this court. The applicants submitted that the learned primary judge erred in not finding that the consent order amounted to a contract. Their submissions shifted in the course of argument, however, as to what constituted the terms of the purported contract. Originally it was said to be an agreement that the respondent, if he wished to institute proceedings, would do so within 60 days of whichever of the relevant specified events occurred. That was somewhat amended, to a contended agreement that the respondent could issue his proceedings within 60 days and that the applicants would not plead the limitation period if he did so. The applicants did not contend that if the consent order were an agreement the court could not vary it by further order. Instead, the argument was that the existence of the agreement was an important factor in the exercise of the discretion.

[7] The applicants said that the learned primary judge had erred in not following *Spencer v Nominal Defendant,* which involved an application for leave to appeal against a District Court judge's refusal to further extend time under s 57(2)(b) where an earlier consent order had been made. The nature of that consent order is described in the judgment in *Spencer*:

> "On 14 July 2006, a consent order was made which dispensed with a compulsory conference and the exchange of final written offers of settlement. This order also provided for an action for damages to be started by the applicant in respect of the claim no later than 14 July 2006, with that action, if started, to be stayed until the holding of a compulsory conference and the exchange of final offers of settlement."[2]

Keane JA, with whom the other members of the court agreed, regarded the consent order as operating as a contract because the Nominal Defendant had

> "… agreed to facilitate the commencement of the action by dispensing with requirements of the Act on the basis that the claim was to be started no later than 14 July 2006."[3]

No ground had been identified, Keane JA said, which would render that contract void or voidable or entitle the applicant to equitable relief against it. To accede to the application under s 57(2)(b) would be to deprive the Nominal Defendant of the

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1 [2007] QCA 254.
2 At [3].
3 At [13].

benefit of the contract underlying the consent order. Even if s 57(2)(b) gave the court power to destroy the contractual rights embodied in a consent order, that power should be exercised

> "only for the most compelling reasons because of the prejudice which it will inflict on the other party."[4]

[8] The applicants also relied on *Chavez v Moreton Bay Regional Council*,[5] another judgment of this court concerning the significance of a consent order. Under that order, the plaintiff, Mr Chavez, was given leave to take a step in the proceeding and agreed to provide security for costs, in default of which the proceedings were to be struck out for want of prosecution. When he failed to do so, the defendant obtained an order striking the action out. Mr Chavez then sought an extension of time with which to comply with the consent order. Keane JA, with whom the other members of the court agreed, adopted the approach of McHugh and Clarke JJA in *Paino v Hofbauer*:[6] the discretion to extend time in favour of a party to a consent order of the kind to which Mr Chavez had agreed should be exercised

> "… only in cases where there is good reason for depriving the other party of the benefit of a free and voluntary agreement."[7]

In *Chavez*, the grant of an extension was refused; it would have deprived the defendant of its complete defence to the claim (the limitation period having expired) consequent upon the exercise of its rights under the consent order.

[9] Also in this context, the applicants referred to *Fylas Pty Ltd v Vynal Pty Ltd*.[8] In that case, the legal representatives of the parties, after extensive negotiations, reduced their agreement to the form of a written consent order, embodying undertakings and cross-undertakings. McPherson SPJ described the undertakings as either the result of, or forming the terms of, an agreement between the parties. The court had no general power to vary or determine the parties' agreement; accordingly, he refused an application to vary a particular undertaking.

[10] The learned primary judge here considered the consent order agreed by the applicants and the respondent, and distinguished it from that in *Spencer*. It was, he said, more like an order of the court made with the consent of the parties than an order embodying a compromise. Its making required an exercise of discretion; it was more akin to the consent order under consideration in *Venz v Moreton Bay Regional Council (formerly Caboolture Shire Council)*.[9] In any event, his Honour went on to say,

> "If the Court's order embodied an agreement, it was that the insurer consented to leave being granted at the time calculable under the order. The applicant did not commence proceedings within that time. This was a breach of the asserted agreement and the insurer would be no longer bound by it. The applicant did not agree that should he breach the asserted agreement he would not apply under s 57."

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4 At [13].
5 [2009] QCA 348.
6 (1988) 13 NSWLR 193.
7 At [39].
8 [1992] 2 Qd R 593.
9 [2009] QCA 224.

[11] In *Venz v Moreton Bay Regional Council*, a District Court judge had dismissed an application for leave to start proceedings pursuant to s 43 of the *Personal Injuries Proceedings Act* 2002 (Qld) on the ground that no compelling reasons had been demonstrated which justified the destruction of contractual rights embodied in a consent order. The terms of the relevant order were that the appellant was granted leave to initiate proceedings, with those proceedings to be commenced on or before a specified date in the District Court at Brisbane. Muir JA, with the agreement of the other members of the court, doubted that the consent order embodied an agreement; in that regard it was relevant, he said, that the order was interlocutory, required the exercise of a discretion and gave the parties liberty to apply. Even if it did, it meant no more than, having failed to file on or before the specified date, the applicant no longer had any continuing consent to the granting of leave and had to make a fresh application, which the respondent was free to oppose. If there were to be implied some obligation to file the proceedings by the stipulated date, any breach of it gave the respondent the right to claim damages; it did not preclude the applicant from bringing another application for leave. The granting of leave did not destroy any contractual right possessed by the respondent.

[12] The learned judge was, in my view, correct in distinguishing the consent order in this case from that in *Spencer*. The type of analysis Muir JA undertook in *Venz* commends itself here. One could infer from the terms of the order that the applicants agreed that they would consent to the granting of leave to commence proceedings within 60 days of one of the stipulated events. Nothing on the order's face, however, indicates an agreement by the applicants not to plead a limitation defence during the specified period; their inability to do so in that period was simply a practical consequence of the order. And one cannot infer from the order any agreement on the part of the respondent to do anything. There was no undertaking to commence in the 60 day period. Any obligation in that regard was purely statutory,[10] not contractual.

[13] Even if there were any such agreement as that posited by the applicants, it had, in my view, been performed once the period contemplated by the order had expired. Once that occurred, the applicants regained their right to plead the limitation period, subject to any further order of the court. Such a further order would not amount to any variation of the contract, it having been performed; nor could it operate to deprive the applicants of any contractual benefit. In summary, in my view, there is no agreement to be implied from, much less expressed on the face of, the order; and if there were, it was irrelevant at the point at which the learned judge came to consider his exercise of discretion.

[14] It is worth mentioning the distinction identified by Atkinson J in *Moga v Australian Associated Motor Insurers Ltd*,[11] between

> "… a consent order which embodies the terms of a contract between the parties and a consent order based on the parties' willingness to submit to an order on certain terms,"[12]

a distinction explained by Lord Denning MR in *Siebe Gorman & Co Ltd v Pneupac Ltd*.[13] That distinction, in my respectful view, is a valid and useful one; and in the present case the facts, as the learned primary judge found, fall within the latter class.

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10 *Motor Accidents Insurance Act* 1994 (Qld), s 51D.

11 [2008] QCA 79.

12 At [44].

The exercise of discretion

[15] The applicants contended that the learned primary judge had erred in proceeding on the premise that the discretion under s 57(2)(b) was unfettered. Their basis for that contention was his Honour's adoption of a summary of principles as to the application of s 57(2)(b), taken from the decision of McMeekin J in *Paterson v Leigh*,[14] of which it is only necessary to set out the first four:

> "(a) The discretion to be exercised in respect of an application pursuant to s 57(2)(b) of the Act is unfettered;
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> (b) The onus lies on the applicant to show good reason why the discretion ought to be exercised in his or her favour;
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> (c) Where an applicant is able to show that the delay which has occurred was occasioned by a 'conscientious effort to comply' with the Act then that would normally be good reason for the favourable exercise of the discretion but is not a 'dominating consideration'. Conversely, claimants who ignore the obligations imposed on them by the Act or who make no conscientious effort to comply with them may have difficulty obtaining a favourable exercise of the discretion;
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> (d) Where an applicant is not able to show that the delay was occasioned by 'a conscientious effort to comply' with the Act that is not fatal to the application;" (citations omitted)

[16] The discretion was not unfettered, the applicants said; it fell to be exercised on the basis that an extension was an exception to the operation of the three year limitation period for an action for damages for negligence contained in s 11 of the *Limitation of Actions Act* 1974 (Qld), and was to be exercised with regard to the purpose for which s 57(2)(b) conferred it.[15] As to that purpose, the applicants relied again on Keane JA's judgment in *Spencer v Nominal Defendant*, in which his Honour said this on the topic:

> "Section 57(2)(b) of the Act cannot be regarded as standing free of the considerations which explain its presence in the Act. These considerations serve to inform the proper exercise of the discretion. If a person who seeks the exercise of the discretion conferred by s 57(2)(b) of the Act were not required to show good reason why that should occur in terms of the exigencies of the Act, the limitations upon the grant of an extension of the limitation period contained in Pt 3 of the *Limitation of Actions Act* would be written out of the law in any case of a motor vehicle claim where a notice of claim was given under the Act. That is not an intention which can sensibly be attributed to the legislature."[16]

The learned primary judge had erred too, the applicants said, in his characterisation of the respondent's delay in instituting proceedings. His Honour had spoken of the delay occurring "in the context of a timeline set by reference to an order of the

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13 [1982] 1 WLR 185 at 189.

14 [2008] QSC 277.

15 *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 per McHugh J at 551.

16 At [11].

Court made under the Act", but the reason for the delay had nothing to do with the requirements of the Act.

[17] The principles which McMeekin J set out in *Paterson v Leigh* were, as he made clear, a distillation of the case law in relation to the s 57(2)(b) discretion. His description of the discretion in the first of those principles as "unfettered" derived from its characterisation as such in *Morrison-Gardiner v Car Choice Pty Ltd*;[17] that is, as a discretion not subject to express statutory qualification. The principles immediately following in the extract from McMeekin J's judgment at [15] above make it abundantly clear that the discretion is to be exercised with regard to its statutory purpose. And it is plain that the learned judge in the present case did not ignore either the statutory purpose of the discretion or its effect on the limitation defence. His Honour's reasons for exercising the discretion in favour of the respondent were as follows:

> "The period of delay in bringing the proceedings in court is short. The applicant has co-operated with the insurer throughout the intervening period, making disclosure, subjecting himself to examination by specialists, attending the compulsory conference and giving instructions regarding the mandatory final offer. The applicant and his solicitor have deposed to the applicant's steady and conscientious efforts to comply with the requirements of the *MAIA* and co-operate with the insurer. The delay is explained. The applicant was not personally at fault. In the particular circumstances of this case that is very material. He retained a solicitor early and did everything reasonably required of him. This may not be a case where the delay was obviously caused by a conscientious effort to comply with the Act, but the delay occurred in the context of a timeline set by reference to an order of the Court made under the Act. Given the early notice of the claim, the short period of delay and the full disclosure regarding the only issue – quantum – one can be confident a fair trial can be had. These matters outweigh, in this case, the prejudice to the insurer of the loss of the defence afforded by the statutory time bar.
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> It could not be said the claim had been let go to sleep. The insurer does not assert loss of evidence. The applicant has not, but for his solicitors' 7 day lapse, failed to prosecute his claim."[18] (Citations omitted.)

[18] The learned judge correctly characterised the context in which the delay occurred. While the existence of a relationship between the delay involved and the plaintiff's attempt to apply with the Act's requirements is an important consideration, it is not indispensable to the favourable exercise of the discretion under s 57(2)(b).[19] In fact, there was such a connection here: the failure to commence in time was the direct result of an error in calculating the time prescribed for filing upon completion of the pre-proceedings steps. The other matters identified by the learned judge – that the respondent had endeavoured to comply with the requirements of the Act, the early notice of the claim, the very short period of the delay, the fact that it was

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17 [2005] 1 Qd R 378 at 401.

18 *Blundstone v Johnson & Anor* [2009] QDC 351 at [15]-[16].

19 *Ward v Wiltshire Australia P/L & Anor* [2008] QCA 93 at [3], [66]-[67], [103].

not attributable to any personal fault on the respondent's part and the full disclosure in relation to quantum (the only live issue in considering the question of prejudice) – were all relevant considerations in the larger context of the Act's aim of speedy resolution of personal injuries actions, and the more immediate context of s 57(2)(b)'s intent, to alleviate the difficulties arising from the need to comply with the Act's requirements.

Conclusion

[19] No error of principle or of substance has been identified in the way in which the learned primary judge exercised the discretion. I would refuse leave to appeal. The applicants should pay the costs of the application.

[20] **CHESTERMAN JA:** I agree that the application for leave to appeal should be refused, with costs, for the reasons given by Holmes JA.

[21] **ATKINSON J:** I agree with the order proposed by Holmes JA and with her Honour's reasons.