IN THE SUPREME COURT OF QUEENSLAND

No. 77 of 1977

(Cairns District Registry)

CIVIL JURISDICTION

BEFORE MR. JUSTICE CONNOLLY

BRISBANE, 3 APRIL 1979

BETWEEN:

DAVID WAYNE PASCOE — Plaintiff

- and -

KEITH JAMES MUIRHEAD — Defendant

- and -

NATIONAL & GENERAL INSURANCE COMPANY LIMITED — Defendant by Election

JUDGMENT

HIS HONOUR: The plaintiff was injured in a motor vehicle collision on 11 January 1975 when his sedan motor-car caine into collision with a utility interim label No. 93103 driven by the defendant Muirhead. In response to a request of 5 August 1976 the Main Roads Department advised that records regarding interim label No. 93103 had been destroyed and on 19 August 1976, the department advised that there was no record of Muirhead being registered for any vehicle. It appears that the vehicle was a write-off and at that stage the Main Roads Department stated that they had no records because they keep their files under registered numbers. The

plaintiff's solicitors made careful inquiries but neither the wrecker nor the Clerk of the Court could give any useful information.

The Writ of Summons issued on 21 September 1977 and on the defendant's entering an appearance inquiries were made of his solicitors without result. On 11 April 1978 the plaintiff's solicitors wrote to all third party insurance companies to inquire whether the vehicle in question was insured with them. All but National & General Insurance Company Limited, which I shall call National & General, replied, denying that they had held the insurance. National & General on 29 June 1978 wrote in terms which suggest that they did and they were served with a copy of the Writ of Summons on 7 July 1978. On 21 August 1978 National & General filed a notice of election to be joined and entered an appearance on the same day. It now appears that they assumed, without searching their records that they were the insurers.

The statement of claim was delivered on 18 September 1978. Paragraph 1 pleads, amongst other things, that National & General was the licensed insurer and paragraph 2 pleads the service of the Writ of Summons on that company on 7 July 1978 and the filing of an affidavit of service on 6 September. The defence which was delivered on 8 November 1978 admits these allegations.

It was not until 6 November 1978 that National & General's solicitors advised that their inquiries revealed that their client was not in fact the licensed insurer. In fact they asserted that as at 11 January 1975 S.G.I.O. was the licensed insurer and they informed the plaintiff's solicitors that the interim label had been issued in the name of one Wendy Poor. S.G.I.O. was served with a copy of the Writ of Summons on 10 November 1978. Finally a search by National & General's solicitors revealed on 11 December 1978 that interim label 93103 had been replaced by registered. No. OKN-670 but that the registration was cancelled from 12 December 1974. The vehicle was thus uninsured at the time of the collision on 11 January 1975.

On 6 March 1979 National & General issued a summons for leave to amend the defence by withdrawing the admission that it is the licensed insurer and to be struck out of the action.

The summons came on before me at Cairns on 7 and 15 March 1979, by which latter date the plaintiff had issued a summons to join the Nominal Defendant notwithstanding the lapse of time. Both summonses were adjourned to Brisbane to meet the convenience of the parties and are now before me.

On 19 December 1978 notice was sent to the Nominal Defendant (Queensland) pursuant to section 4(F) of the Motor Vehicles Insurance Act. I propose to deal with these applications in order and I shall deal first with the plaintiff application. In that application, the question under the Limitation of Actions Act should first be resolved. I am satisfied for the purposes of section 31(2)(a) of the Limitation of Actions Act 1974 that a material fact of a decisive character relating to the right of action against the Nominal Defendant namely that the vehicle was uninsured, was not within the means of knowledge of the plaintiff applicant until 19 December 1978. He and his advisers plainly did not know this fact, and at all relevant times, all reasonable steps had been taken on his behalf to ascertain the situations.

On 19 December 1978 the defendant by election's solicitors informed the plaintiff's solicitors of the result of the search of 12 December 1978. The period of limitation for the action is, I think, three years from 11 January 1973, so that it expired on 11 January 1978. Section 4(F)(2) suggests that it I is an Section in which the owner would be liable, which may be brought against the Nominal Defendants. That leads me to the conclusion that the ordinary period of limitation obtains. I am also of the view that section 31(2)(b) is satisfied by the affidavit of the plaintiff and by the police reports Accordingly I order that the period of limitation for the plaintiff's action against the Nominal Defendant (Queensland) be extended so that it expires on 19 December 1979.

I now turn to the requirements of section 4(F) of the Motor Vehicles Insurance Act. I am satisfied, as required by section 4(F)(4)(b), that the plaintiff's failure to give notice to the Nominal Defendant (Queensland) within three months from and including the date when his injuries were caused was not occasioned by any act or omission of his. Accordingly, application in that behalf having been made on 9 March 1979 (that is to say, not later than three months after the plaintiff gave notice of his claim to the Nominal Defendant, which occurred shortly after 19 December 1978) I extend the period for the giving of such notice to 31 December 1978.

I order that the plaintiff be at liberty to join the Nominal Defendant (Queensland) and to deliver an amended statement of claim within 21 days. I order that the costs of the plaintiff and of the Nominal Defendant (Queensland), of and incidental to this application, be costs in the cause.

So far as concerns the application of the defendant by election to be dismissed from the action and to withdraw its admission that it is the licensed insurer, I am of the opinion that the admission may be withdrawn. If I had considered that the defendant by election had by its admission in some way created a situation in which the plaintiff had lost his rights, I should have given serious consideration to whether it should not be held to its admission; but in the circumstances it seems to me that it is proper to allow the admission to be withdrawn and to allow this party to be dismissed from the action, but on terms. It is opposed by the defendant Muirhead who sets up that he has been prejudiced by the defendant by election having taken over the conduct of the action. It seems to me that any prejudice of this character which he may have sustained, as he alleges, will be made good by this order which will enable him, so far as the Statute law permits, to take over the action from the defendant by election. Whether he may do so as against the Nominal Defendant may wait until another day.

I order that the defendant be at liberty to deliver a defence. I order in terms of paragraphs 1 and 2 of the

summons, and I order that the defendant by election pay the plaintiff's costs of and incidental to this application to be taxed.
