SUPREME COURT OF QUEENSLAND

CITATION:	*Sanders v The Nominal Defendant* [2011] QSC 391
PARTIES:	**RICHARD SANDERS** (Applicant) v **THE NOMINAL DEFENDANT** (Respondent)
FILE NO/S:	BS 8436 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	9 December
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2011
JUDGE:	Boddice J
ORDER:	
CATCHWORDS:	INSURANCE – MOTOR VEHICLES – COMPULSORY THIRD PARTY INSURANCE AND LIKE SCHEMES – UNIDENTIFIED VEHICLE – NOTICES, CLAIMS AND EXTENSION OF TIME – Where the applicant was injured by an unidentified motor vehicle – Where the applicant seeks a declaration that the respondent has waived compliance with a requirement in the applicant's notice of accident claim form – Where the respondent opposes the making of such a declaration – Whether there has been compliance with provisions of s 39 of the *Motor Accidents Insurance Act* 1994 – Whether the applicant's claim is barred pursuant to s 39(8) of the Act *Motor Accident Insurance Act* 1994 *Motor Accident Insurance Regulation* 2004. *Haydon v Gread* [2000] QSC 334 *Brannigan v Nominal Defendant* [2000] 2 Qd R 116 *Kumer v Suncorp Metway Insurance Ltd* [2006] 1 Qd R 148 *Miller v Nominal Defendant* [2003] QCA 558
COUNSEL:	Sofronoff QC and Pope M for the applicant

Dickson R for the respondent

SOLICITORS: CMC Lawyers for the applicant

DLA Piper for the respondent

[1] The applicant, a pedestrian injured by an unidentified motor vehicle on 26 May 2010, seeks a declaration that the respondent has waived compliance with the requirement that he provide the doctor's provider number in the medical certificate accompanying the applicant's notice of accident claim form. The respondent opposes the making of such a declaration.

[2] The issue for determination is whether there has been compliance with the provisions of s 39 of the *Motor Accidents Insurance Act* 1994 ("the Act"). A related issue is whether the applicant's claim is barred pursuant to s 39(8) of the Act.

Background

[3] At approximately 11.00pm on 26 May 2010, the applicant was struck by an unidentified vehicle as he crossed Albert Street, Brisbane. He sustained significant personal injuries. By notice of accident claim form dated 15 June 2010, the applicant gave notice of claim to the respondent. This notice was sent to the respondent by the applicant's solicitors under cover of a letter dated 25 June 2010.

[4] By letter dated 1 July 2010 ("the first letter"), the respondent wrote to the applicant's solicitors requesting further information about the circumstances of the incident. The respondent asked that that request be treated as being made pursuant to s 45 of the Act.

[5] By separate letter dated 1 July 2010 ("the second letter"), the respondent wrote to the applicant's solicitors in the following terms:

> "We acknowledge receipt of your client's Notice of Accident Claim Form.
>
> We are not satisfied that the notice complies with the requirements of the *Motor Accident Insurance Act 1994* (the Act) for the following reason:
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> - 'Provider Number' not completed on the Medical Certificate accompanying your client's Notice of Accident Claim Form.
>
> In accordance with section 39 of the Act, the Nominal Defendant does not waive compliance with the issues identified above and will allow you until 01 August 2010 to satisfy us that you have in fact complied with the requirements or to remedy the non-compliance.
>
> Please note that where a notice pursuant to section 37 does not in the first instance comply, the date of the notice is deemed to be the date upon which the Nominal Defendant waives compliance or notifies the claimant that it is satisfied the claimant has taken reasonable action to remedy the non-compliance. The Nominal Defendant reserves our right to make application pursuant to Section 39(7) of the Act should proceedings be instituted.
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> Pursuant to section 39(1)(a)(iv) of the Act, we are not prepared to meet your client's rehabilitation costs at this stage.

> In addition, pursuant to section 37A of the Act, we request that your client complete an Additional Information Form (AIF) and forward it to this office within the timeframes prescribed by section 37A(3)."[1]

[6] The respondent's request related to a medical certificate completed by a medical practitioner, Dr Maine, which was sent as part of the applicant's notice. Dr Maine did not complete the section containing the medical practitioner's provider number.

[7] By letter dated 9 July 2010, the applicant's solicitors wrote to Dr Maine requesting that she complete the required section "Medical Practitioner's Information". The solicitors stated that the applicant was unable to submit the certificate to the respondent "as it does not comply with the requirements of the *Motor Accidents Insurance Act* 1994, as it is incomplete". The letter requested return of the completed medical certificate as soon as possible.[2] No response was received to that request. The material suggests the solicitors did not follow up the absence of any reply, until early 2011. Further, the solicitors did not advise the respondent of the request made by the letter dated 9 July 2010.

[8] By letter dated 17 August 2010, the respondent wrote to the applicant's solicitors enclosing a copy of the first letter, again seeking further details as to the circumstances of the incident. That letter did not refer to the incomplete medical certificate. By letter dated 25 August 2010, the applicant's solicitors provided the applicant's additional information in response to that request.

[9] Thereafter, correspondence was entered into between the applicant's solicitors and the respondent, wherein the respondent requested further material. Those requests were made pursuant to s 45 of the Act. By letters sent on various dates in October and November 2010, the applicant's solicitors provided to the respondent copies of medical records and Medicare notices.

[10] By letter dated 28 February 2011, the respondent wrote to the applicant's solicitors advising that as a compliant notice had not been provided within the time prescribed by the Act, the applicant's claim against the respondent "is barred".[3]

[11] By letter dated 7 March 2011, the applicant's solicitors wrote to the respondent advising they "have been in contact with Dr Maine", and advising her Medicare provider number. The applicant's solicitors requested the respondent deem the claim compliant, failing which an application would be made.[4]

The Application

[12] The respondent contends the declaration sought by the applicant does not accord with the arguments advanced at the hearing. The declaration sought, although perhaps inelegantly worded, raises the practical effect of what is contended to be the respondent's failure to comply with its statutory obligations. The issues in dispute were clearly enunciated at the hearing, and the respondent availed itself of the opportunity to file further written submissions.

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1 Affidavit of Daniel Osvaldo Meneghello filed 21 September 2011, exhibit "F".
2 Affidavit of Daniel Osvaldo Meneghello filed 21 September 2011, exhibit "G".
3 Affidavit of Daniel Osvaldo Meneghello filed 21 September 2011, exhibit "Q".
4 Affidavit of Ian Dereck Evans filed 24 November 2011, exhibit "IDE2".

[13] Against that background it is appropriate to determine the substance of the issues raised by the application.

Statutory scheme

[14] The Act provides a statutory scheme for the bringing of claims in respect of damages for personal injuries arising out of motor vehicle accidents. The statutory scheme applies to claims for damages by persons injured by unidentified motor vehicles. In that event, the respondent, a body corporate established by s 16 of the Act, is the appropriate entity to receive written notice of the claim.

[15] Relevantly, the scheme requires that a claimant must first give written notice of the accident claim to the insurer within a specified period. The written notice must contain "a statement of the information required under a Regulation".[5] One particular of the information required by Regulation is a certificate signed by a doctor stating "the doctor's Medicare provider number".[6]

[16] The Act makes provision for the consequences which follow where the requisite written notice is not given within the prescribed time limit. In the case of claims involving unidentified motor vehicles, a special time limit is imposed. In those cases, if notice is not given to the Nominal Defendant within nine months after the motor vehicle accident, the claim against the Nominal Defendant is barred.[7]

[17] Section 39 of the Act sets out the statutory requirements for any response to the notice of claim. Again, special provision is made in respect of claims made for injuries caused by unidentified motor vehicles. Section 39 provides:

> "39 Response to the notice of claim
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> (1) If notice of a motor vehicle accident claim is given to an insurer under this division or purportedly under this division –
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> (a) the insurer must, within 14 days after receiving the notice give the claimant written notice –
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> (i) stating whether the insurer is satisfied that the notice has been given as required under this division; and
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> (ii) if the insurer is not satisfied- identifying the noncompliance and stating whether the insurer waives compliance with the requirements; and
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> (iii) if the insurer does not waive compliance with the requirements- allowing the claimant a reasonable period (at least 1 month) specified in

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5 *Motor Accidents Insurance Act* 1994, s 37(1)(a).

6 Regulation 18, *Motor Accident Insurance Regulation* 2004.

7 *Motor Accidents Insurance Act* 1994, s 37(3).

the notice either to satisfy the insurer that the claimant has in fact complied with the requirements or to take reasonable action specified in the notice to remedy the noncompliance; and

(iv) stating whether the insurer is prepared (without admitting liability) to meet the reasonable and appropriate cost of the claimant's rehabilitation; and

(b) if the insurer is not prepared to waive compliance with the requirements in the first instance- the insurer must, within 14 days after the end of the period specified under paragraph (a)(iii), give the claimant a written notice-

(i) stating that the insurer is satisfied the claimant has complied with the relevant requirements, is satisfied with the action taken by the claimant to remedy the non-compliance or waives the noncompliance in any event; or

(ii) stating that the insurer is not satisfied that the claimant has taken reasonable action to remedy the noncompliance, giving full particulars of the noncompliance and the claimant's failure to remedy it.

(2) If an insurer to which notice of a motor vehicle accident claim is given under this division or purportedly under this division is not, for the purposes of the claim the insurer of the motor vehicle to which the claim relates under the statutory insurance scheme, the insurer must, instead of responding to the notice under subsection (1), give the claimant written notice denying that the insurer is the insurer under the statutory insurance scheme.

(3) If notice of a motor vehicle accident claim is given to an insurer under this division or purportedly under this division, and the insurer does not respond to the notice within 14 days after receiving it, the insurer is conclusively presumed to be satisfied the notice was given as required under this division.

(4) However, the insurer's failure to respond to the notice does not prevent the insurer from later denying that the insurer is the insurer of the motor

vehicle to which the claim relates under the statutory insurance scheme, but the insurer is liable to compensate the claimant and the insurer against which the claim properly lies for prejudice resulting from the insurer's failure to respond to the notice under subsection (2).

(5) A claimant's failure to give notice of a motor vehicle accident claim as required under this division prevents the claimant from proceeding further with the claim unless-

(a) the insurer-

(i) has stated that the insurer is satisfied notice has been given as required under this division or the claimant has taken reasonable action to remedy the noncompliance; or

(ii) is presumed to be satisfied notice has been given as required under this division; or

(b) the insurer 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 further proceedings based on the claim despite the noncompliance.

(6) An order of the court under subsection (5)(c) may be made on conditions the court considers necessary or appropriate to minimise prejudice to an insurer from the claimant's failure to comply with requirements of this division.

(7) If a claimant does not comply with the requirements of this division, a court before which the claimant brings an action for damages on the claim-

(a) may, on the insurer's application, award in the insurer's favour costs (including legal and investigation costs) reasonably incurred by the insurer because of the claimant's default; and

(b) may only award interest in the claimant's favour for a period for which the claimant was in default if the court is satisfied there is a reasonable excuse for the default.

> (8) If a claim against the Nominal Defendant is barred because the claim relates to personal injury caused by, through or in connection with a motor vehicle that can not be identified and the claimant failed to give notice of claim under this division within 9 months after the motor vehicle accident, the Nominal Defendant can not waive compliance with the requirement to give notice within the time allowed by this division, nor can the court give leave to bring a proceeding in a court despite the noncompliance."

Applicant's submissions

[18] The applicant submits that the respondent has not complied with its statutory obligations under s 39 of the Act. First, it was required to give the applicant a reasonable time, at least one month, in which to satisfy it that the notice in fact complied, or to take reasonable steps to remedy the non-compliance. Second, it was required to specify within the notice the reasonable action to be taken. The second letter was dated 1 July 2010 but not received until 5 July 2010. The time period specified to satisfy the respondent that the notice in fact complied with the requirements of the Act was therefore less than a period of one month. Further, the notice did not specify the reasonable action to be taken by the claimant to remedy the non-compliance. As the respondent's notice did not satisfy the statutory requirements of a notice under s 39(1)(a) of the Act, the respondent had not responded to the notice as required by s 39 of the Act. Section 39(3) of the Act was engaged and the respondent is "conclusively presumed" to be satisfied that the notice had been given in accordance with the Act.

[19] The applicant further submits that the respondent failed to comply with s 39(1)(b) of the Act. It failed to give a second notice, stating that it was not satisfied the applicant had taken reasonable action to remedy the non-compliance, giving full particulars of the non-compliance and full particulars of the failure to remedy it. The respondent had not responded to the notice as required, and s 39(3) of the Act was engaged. Finally, the applicant submits that as the respondent failed to give the second notice under s 39(1)(b) of the Act, and engaged in an exchange of information expressly pursuant to s 45 of the Act, the respondent, in any case, waived non-compliance.

Respondent's submissions

[20] The respondent submits the second letter specifically allowed one month from its date to satisfy the respondent of compliance, or of the action taken to remedy non-compliance and that this letter was a notice as required under s 39(1)(a) of the Act. The letter also gave sufficient particularity of the non-compliance, and of the steps to be taken by the applicant. The purpose of s 39(1)(b) is to allow a response by an insurer to those steps taken by a claimant in response to the insurer's notice under s 39(1)(a) of the Act. Where, as here, a claimant did not give any response to the insurer within the period specified, there is no requirement to send a second notice pursuant to s 39(1)(b) of the Act.

[21] The respondent further submits that s 39(3) operates only for a failure of an insurer to give notice under s 39(1)(a) of the Act. There is no corresponding default provision for any failure of an insurer to give notice under s 39(1)(b) of the Act. The respondent also submits there has been no waiver by it of the non-compliance.

The applicant had from 1 August 2010 until nine months after the incident to seek a court order under s 39(5)(c) of the Act. The applicant did not make an application. His claim is now barred by s 39(8) of the Act.

Discussion

[22] The statutory regime imposed in respect of claims made for damages for personal injuries requires strict compliance with the obligations under the Act. The specific terms of s 37(3) and s 39(8) of the Act are consistent with the legislature placing claims for damages in respect of unidentified vehicles into a special category, justifying an even stricter regime in respect of compliance with the obligations of a claimant.[8] Such a conclusion is consistent with the legislature having given explicit recognition of the position of the Nominal Defendant as the steward of public moneys.[9]

[23] A strict and literal interpretation of the requirements of the Act was endorsed in *Miller v Nominal Defendant*.[10] Davies JA (with whose reasons Williams JA and Mackenzie J generally agreed) said:

> "[39] Here both the creation of the right to sue the Nominal Defendant and the barring of the right or any claim based on that right are contained in the same Act. There are, moreover, two other indications that, so far as claims against the Nominal Defendant are concerned, it was the intention of the Act to terminate the right to make any such claim if notice is not given within nine months after the motor vehicle accident.
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> [40] The first of these is that s 37(3), in terms, bars not just the action but the claim on which it is based. And the second, even stronger indication, is that, as mentioned earlier, s 39(8) provides that, unless such notice is given within nine months after the motor vehicle accident, the Nominal Defendant cannot waive compliance with the requirement to give notice within that time, nor can the court give leave to bring a proceeding in a court despite the non-compliance. These provisions appear to be intended not merely to bar an existing right of action but to impose a condition which is of the essence of the right, created by the Act, to sue the Nominal Defendant. Reading s 37(3) with s 39(5) and s 39(8) that alternative condition, it seems to me, is that a notice is given within nine months of the motor vehicle accident, or that, within that period, compliance with the requirement for giving such notice is waived or the court gives leave to bring a proceeding despite the non-compliance. It follows that s 57(1), in my opinion, has no application."

[24] The mandatory statutory obligations imposed by s 39 of the Act are not restricted to a claimant. Section 39(1) of the Act specifies in mandatory terms the steps which must be taken by an insurer in response to a notice or purported notice given by a claimant. Section 39(3) of the Act provides that if the insurer does not respond to the notice "within 14 days after receiving it", the insurer is conclusively presumed

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8 *Brannigan v Nominal Defendant* [2000] 2 Qd R 116 at 120 [15]; 124 [30]; 125 [36].

9 *Kumer v Suncorp Metway Insurance Ltd* [2006] 1 Qd R 148 per Keane JA at [45].

10 [2003] QCA 558.

to be satisfied that notice has been given as required under Division 3. In *Haydon v Gread*,[11] Mackenzie J said:

> "[21] S39(3) provides that if a notice of claim is given under Division 3 or purportedly given under it and 'the insurer does not respond to the notice within one month after receiving it' the insurer is conclusively presumed to be satisfied that notice has been given as required under Division 3. Whilst s39(3) does not reproduce the words of s39(1) the words 'does not respond' can only sensibly refer to invoking the procedure under s39(1). Where that has not been done there is a statutory estoppel against denying that the notice has been given as required.
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> [22] If that seems to encourage formality and discourage informal resolution of issues concerning compliance, it is at least consistent with the emphasis in the Act upon the need to follow the prescribed steps in a timely way to facilitate prompt resolution of claims. The particular procedure seems to be designed to promote speedy resolutions of arguments about compliance with the requirements of the Act and Regulations in a notice given or purportedly given under s37."

[25] I respectfully agree with Mackenzie J that the words "does not respond" in s 39(3) can only sensibly refer to invoking the procedure under s 39(1). If the mandatory requirements of s 39(1) are not followed by the insurer, there is a statutory estoppel against denying that the notice has been given as required.

[26] The second letter was given within 14 days of the receipt of the applicant's notice. It stated the respondent was not satisfied the applicant had given a compliant notice, and that the respondent did not waive the non-compliance. The letter identified the non-compliance, and gave the applicant one month to comply. Whilst it did not specify the reasonable action to be taken, the specific notice of non-compliance identified the action to be taken, such that further specification was unnecessary. The second letter satisfied the requirements of s 39(1)(a)of the Act.

[27] That was not the respondent's only obligation under s 39(1) of the Act. Where, as here, the insurer is not prepared to waive compliance, the Act imposes upon the insurer a further obligation. Within 14 days after the end of the initial reasonable period, the insurer must give the claimant a written notice stating that it is satisfied the applicant has complied with the relevant requirements, is satisfied with the action taken by the applicant to remedy the non-compliance, or waives the non-compliance in any event, or stating that the insurer is not satisfied that the complainant has taken reasonable action to remedy the non-compliance giving full particulars of the non-compliance and of the applicant's failure to remedy it.[12] The respondent gave no such notice. As such, it failed to comply with its statutory obligation.

[28] The respondent contends that as the applicant did not advise the respondent he had taken steps to obtain the doctor's provider number, there was no requirement for the respondent to send a further notice pursuant to s 39(1)(b) of the Act. A plain

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11 [2000] QSC 334

12 The Act, s 39(1)(b).

reading of s 39(1)(b) does not support such a contention. Subsection (1)(b) is not conditional on a claimant corresponding with the insurer in response to the initial notice of non-compliance given under s 39(1)(a) of the Act. It is expressly framed as operating where the insurer is not prepared to waive compliance "with the requirements in the first instance". In that event, the insurer is required to give a further written notice, within 14 days after the end of the period specified in the initial notice of non-compliance.

[29] The requirement for a second notice, irrespective of whether there has been a response by the claimant to the first notice, is understandable. Non-compliance with the Act by a claimant has drastic consequences. The shortness of the time limits imposed are equally understandable. They are consistent with the regime of prompt notice, and prompt response to outstanding requests. The requirement for a further notice ensures the claimant is aware of the insurer's continued insistence on compliance, or of its waiver of any non-compliance.

[30] The respondent contends that the default provision in s 39(3) of the Act only operates if a notice is not given pursuant to s 39(1)(a) of the Act. That submission, if correct, would mean there was no consequence for a failure by an insurer to meet its statutory obligations other than when it failed to respond at all to the notice of claim within 14 days. Such a conclusion does not sit with the mandatory nature of the insurer's obligations under s 39(1) of the Act as a whole. The preferable interpretation, and the one I adopt, is that the reference in s 39(3) to "does not respond within 14 days" is a short form reference to a response in accordance with s 39(1) as a whole.

Conclusion

[31] The respondent did not follow the statutory requirements of the Act. Its failure to do so means it did not respond in accordance with the Act. The failure to respond to the notice as required by the Act renders the respondent conclusively presumed to be satisfied that the notice was given as required under Division 3. The respondent is statutorily estopped from denying that the notice has been given as required. Notice having been given, the applicant's claim is not barred by s 37(3) of the Act. Section s 39(8) therefore has no application.

[32] This conclusion is not inconsistent with the strict interpretation endorsed by the authorities, having regard to the unique position of the Nominal Defendant and its obligation to protect public moneys. It would be an odd result if a claimant could lose a right to claim, where the claimant has given notice under the Act but the Nominal Defendant did not comply with its obligations to respond to the notice as required by s 39(1)(b) of the Act. This is particularly so where, as here, the respondent, after giving the first notice, proceeded to exchange information with the applicant in accordance with the Act, and expressly stated so in its correspondence.

[33] I shall hear the parties as to the form of orders, and costs.