SUPREME COURT OF QUEENSLAND

CITATION:	*Crawford v Forna & Anor* [2016] QSC 309
PARTIES:	**VONNE LOUISE CRAWFORD** (plaintiff) **v** **SULAIMAN FORNA** (first defendant) **RACQ INSURANCE LIMITED** **(ACN 009 704 152)** (second defendant)
FILE NO:	SC No 68 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	5 July 2016
JUDGE:	Douglas J
ORDER:	**1. The second defendant's application for summary judgment is granted.** **2. The plaintiff's application for leave to commence proceedings under s 57(2)(b) of the Act is dismissed.** **3. I shall hear the parties as to costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – where the plaintiff claims for damages for personal injuries arising out of a motor vehicle accident that occurred in 2007 – where the plaintiff obtained an extension of the limitation period – where the plaintiff was given leave to commence proceedings within 60 days of a compulsory conference being held or of the parties' agreement to dispense with the compulsory conference or of an order of the court dispensing with the compulsory conference – where an order was made on 16 September 2015 stating that if the compulsory conference was not held on or before 28 November 2015 it was to be dispensed with and the applicant was to commence proceedings within 60 days – where no compulsory conference was held – where the

plaintiff failed to commence proceedings within the 60 day period – where the plaintiff's solicitors asked the court not to visit the solicitors' failings on the plaintiff – where the plaintiff had a history of delay and non-compliance with provisions of the Act – where the plaintiff sought leave to commence proceedings by 5 February 2016 – whether the second defendant's application for summary judgment should be granted

Motor Accident Insurance Act 1994 (Qld), s 51A, s 51A(5), s 51D, s 51D(4)(b), s 51D(5), s 57(2)(b)

Jonathan v Mangera & Anor [2016] QCA 86, cited
Morrison-Gardiner v Car Choice P/L & Anor; Crain v Crocker & Anor; O'Dare v Vitanza & Ors [2005] 1 Qd R 378; [2004] QCA 480; (2004) 43 MVR 153, cited

COUNSEL: M Holmes for the plaintiff
K S Howe for the second defendant

SOLICITORS: Lehmann Featherstone Lawyers for the plaintiff
Cooper Grace Ward Lawyers for the second defendant

[1] In this case the plaintiff filed and served her claim and statement of claim on 5 February 2016. She should have done so on or before 28 January 2016 but, by her solicitors' omission, failed to do so. The issue raised by the second defendant is whether that failure is fatal to her action.

[2] Her claim is one for damages for personal injuries arising out of a motor vehicle accident. The accident happened on 9 December 2007 so the limitation period under s 11 of the *Limitation of Actions Act* 1974 (Qld) has long since passed.

[3] She completed a notice of accident claim form on 19 February 2008 under the *Motor Accident Insurance Act* 1994 (Qld) ("the Act"). That claim progressed slowly, partly because she suffered many subsequent injuries and other health problems. There have also been lengthy periods when her solicitors lost contact with her because changes of address were not notified to them by the plaintiff. She sought an extension of the limitation period under s 57(2)(b) of the Act on 2 December 2010 and a consent order was made on 3 December 2010 which gave her leave to commence proceedings within 60 days of one of the following events occurring:

> "(a) A conference being held pursuant to sections 51A and 51B of the Act and mandatory final offers being exchanged in accordance with section 51C of the Act; or
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> (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) An order by the Court, pursuant to section 51A(5)(b) of the Act, dispensing with the compulsory conference."

[4] Between 10 December 2010 and 12 August 2015 there was correspondence between the second defendant's solicitors and the plaintiff's solicitors requesting performance of the obligations under the order but the plaintiff's solicitors did not provide the defendant's solicitors with all the documents or address all the issues, including the making of informal offers, that had been requested.

[5] By 11 May 2015 the second defendant's solicitors had arranged for a re-examination of the plaintiff by an orthopaedic surgeon, to occur on 20 July 2015. The surgeon had originally reported on 24 July 2008. Because of a lack of response from the plaintiff's solicitors the appointment was re-scheduled from 20 July 2015 to 7 September 2015 and, subsequently, to 28 September 2015.

[6] Eventually, an order was made by me on 16 September 2015, apparently by consent, that the plaintiff submit to the re-examination on 9 November 2015 and provide further information. Importantly for present purposes the order included this paragraph:

> "5. If the compulsory conference is not held on or before 28 November 2015, it is to be dispensed with in accordance with section 51A(5) of the *Motor Accident Insurance Act* 1994 (Qld) and the applicant, Vonne Louise Crawford, to commence her proceedings within 60 days therefrom."

[7] No compulsory conference was held on or before 28 November 2015 or, indeed, later.

[8] The second defendant's argument is, therefore, that the plaintiff had until 28 January to commence proceedings and that that amounted to the fixing of a time limit by my order within which the action must be started. It is not an issue between the parties that the 60 day period from 28 November 2015 expired on 28 January 2016. What is in issue is the consequence of the failure to commence proceedings by then.

[9] Section 51D of the Act deals with the time for bringing an action. It provides:

> "**51D Time for bringing action**
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> (1) An action for damages should be started in the court-
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> (a) within 60 days after the conclusion of the compulsory conference; or
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> (b) within a further period-
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> (i) agreed by the parties within the 60 day period mentioned in paragraph (a); or
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> (ii) fixed by the court on an application made by the claimant within the 60 day period mentioned in paragraph (a).
>
> (2) If the parties or the court dispenses with the compulsory conference, an action for damages should be started in the court-
>
> (a) within 60 days after the later of the following-

(i) the date falling 6 months after the date on which the claimant gives notice to the insurer of the claim or if the insurer asks for additional information, the date on which the claimant gives the insurer the completed additional information form;

(ii) the date of the agreement or order dispensing with the conference; or

(b) within a further period-

(i) agreed by the parties within the 60 day period mentioned in paragraph (a); or

(ii) fixed by the court on an application made by the claimant within the 60 day period mentioned in paragraph (a).

(3) However, if the court dispenses with the obligation to make mandatory final offers, an action for damages should be started in the court within a period fixed by the court when giving the dispensation or later.

(4) The expiry of the time within which an action should be started under subsection (1), (2) or (3) does not prevent the claimant from starting the action but-

(a) the court may (unless the claimant establishes a reasonable excuse for the delay) order the claimant to pay, in any event, the insurer's costs arising out of the delay; and

(b) the court may, on the insurer's application, make an order fixing a time limit within which the action must be started.

(5) If the claimant fails to start an action in the court within a time limit fixed under subsection (4)(b), the claim is barred."

[10] The second defendant's submission is that my order of 16 September 2015 fixed a time limit within which the action must be started for the purposes of s 51D(4)(b). The consequence followed that, with her failure to start an action within that time limit, her claim was barred pursuant to s 51D(5). Both parties accepted that if that were the appropriate result, then the discretion to alter a period of limitation under s 57(2)(b) did not arise.

[11] The plaintiff's submission was that the application made by the second defendant insurer that led to my order of 16 September 2015 was under s 51A to dispense with the compulsory conference, not pursuant to s 51D, with the consequence that the time limit in my order was not "fixed under subsection (4)(b)" for the purposes of s 51D(5). Section 51A does not, however, permit the fixing of a time within which the action must be started. The application filed on 7 September 2015 also sought the order in the terms made, that, if the compulsory conference was not held on or before 28 November 2015, it be dispensed with and the applicant commence her proceedings within 60 days.

[12] Section 51A(5) does permit the making of other orders, however, that the court considers appropriate. Mr Holmes for the plaintiff submitted I should interpret the order of 16 September 2015 as one made pursuant to s 51A(5) and not one addressing the fixing of a time limit within which the action must be started for the purposes of s 51D(4)(b).

[13] The issue then is whether the order should be construed as one fixing a time limit under s 51D(4)(b). Section 51D(4)(b) is the only section in the Act appropriate for the fixing of such a time limit. The question then is whether the order made was one that could be regarded as made under s 51D(4)(b) or whether it is more appropriate, for example, to characterise it as an order made under s 51A(5).

[14] I raised with the parties whether it could be characterised as an order made under s 51D(2) or 51D(3). There was no order made, however, dispensing with the obligation to make mandatory final offers so s 51D(3) has no application. Nor does s 51D(2) apply. Section 51D(2)(a) merely sets the statutory time within which an action should be started if an order is made dispensing with the conference. It does not deal with an order made in the form issued on 16 September 2015. Nor was the time under this order fixed by the court on an application made by the claimant under s 51D(2)(b). The application was by the second defendant.

[15] In my view the power to make other orders under s 51A(5) does not mean that an order which, on its face, has the effect of fixing a time limit within which the action must be started should not be given the force which it otherwise deserves. The order requiring the applicant to commence her proceedings within 60 days from 28 November 2015 can readily be characterised as one fixing a time limit within which the action must be started under 51D(4)(b). It seems appropriate to me, therefore, to treat it as such an order which leads to the consequence that her claim is barred under s 51D(5).

[16] The failure of the application filed 7 September 2015 to refer to s 51D(4)(b) should not dictate the result that it could not be said to be a time limit fixed under that subsection. That would be to permit form to triumph over substance.

[17] As I indicated earlier, the parties agreed that the application under s 57(2)(b) of the Act by the plaintiff that she have leave to commence proceedings by 5 February 2016 would fail if I decided the second defendant's summary judgment application in the way I have. Strictly speaking it may be unnecessary for me to say anything about it but it may also be of some use for me to summarise my views about that application.

[18] I have referred to the plaintiff's history of delay and non-compliance with the provisions of the Act. Part of that was explicable by her later accidents and health problems but her failures to keep in touch with her solicitors, her delays in responding to what appear to be normal requests for medical re-examinations and her and her solicitors' delays, particularly during the critical period between 28 November 2015 and 28 January 2016, were not adequately explained. I was asked not to visit her solicitors' failings on her but the plaintiff herself would have had great difficulty in persuading me that she had made a "conscientious effort to comply" with the Act.[1] That was made more difficult by the

[1] See *Morrison-Gardiner v Car Choice P/L & Anor; Crain v Crocker & Anor; O'Dare v Vitanza & Ors* (2004) 43 MVR 153, 172 at [82]; [2004] QCA 480; *Jonathan v Mangera & Anor* [2016] QCA 86 at [17]-[22].

absence of any sworn affidavit by her addressing those issues. If I had needed to I would have dismissed that application on the merits also.

[19] The result is that the second defendant's application for summary judgment should be granted and the plaintiff's application for leave to commence proceedings under s 57(2)(b) of the Act should be dismissed. I shall hear the parties as to costs.