[HIGH COURT OF AUSTRALIA.]

SOPHRON . . . . . APPELLANT;
APPLICANT,

AND

THE NOMINAL DEFENDANT . . . . RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1957.

SYDNEY, *Apr.* 9, 10; *May* 3.

Dixon C.J., McTiernan, Fullagar and Taylor JJ.

Negligence—Motor vehicles—Third party insurance—Bodily injury—Caused by unidentified motor vehicle—Claim against nominal defendant—Notice of intended claim—Failure to give within prescribed period—Reasons for failure—Omission on part of claimant's solicitor—Application to extend time for giving notice—"Sufficient cause"—Motor Vehicles (Third Party Insurance) Act 1942-1951 (*N.S.W.*) (*No.* 15 *of* 1942—*No.* 59 *of* 1951), *s.* 30 (2) (*b*) (ii).

Whilst the blamelessness of the claimant and the responsibility of his solicitor for failure to give within time to the nominal defendant a notice of intended claim pursuant to s. 30 (2) (b) (i) of the *Motor Vehicles (Third Party Insurance) Act* 1942-1951 (N.S.W.) may be a very material consideration in determining whether "sufficient cause" within the meaning of s. 30 (2) (b) (ii) of such Act has been shown for extending the time for giving such a notice, each case must be determined on its own facts, and there is no fixed general rule that such a circumstance necessarily amounts to "sufficient cause" within the sub-section.

Connotation of the expression "upon sufficient cause being shown" in s. 30 (2) (b) (ii) of the *Motor Vehicles (Third Party Insurance) Act* 1942-1951 (N.S.W.), considered.

Decision of the Supreme Court of New South Wales (Full Court): *Sophron v. Nominal Defendant* (1957) S.R. (N.S.W.) 59; 74 W.N. 55, affirmed.

APPEAL from the Supreme Court of New South Wales.

On 13th April 1954 William George Sophron of Yarraville, Victoria, instructed a firm of solicitors in Sydney to act for him in connexion with a claim for damages against the nominal defendant for bodily injuries sustained by him on 6th April 1954 near Bega in New South Wales whilst riding a motor cycle between Melbourne, Victoria,

H. C. OF A. 1957.

SOPHRON v. THE NOMINAL DEFENDANT.

and Sydney, New South Wales. Sophron claimed that he was forced off the road by a motor vehicle travelling towards him on its incorrect side of the road, that he was thrown from his motor cycle, that the motor vehicle did not stop after this occurrence and that as a consequence he was unable to ascertain its registration number or the identity of its driver. He reported the incident to the police at Bega, on the day of its occurrence.

He was advised by the partner in the firm, to whom he gave instructions, to contact the police at Bega upon his return journey to Melbourne to see whether they had been able to obtain any information as to the driver of the offending vehicle, and this he agreed to do. Within a week or ten days of receiving his instructions the partner handed the matter over to his articled clerk for attention and informed him of the advice given to Sophron concerning the police at Bega. The articled clerk had had considerable experience in litigious matters including common law actions tried in the Supreme Court.

In October 1954 the partner asked his articled clerk about the progress of the matter and then ascertained that no notice of intended claim had been given to the nominal defendant as required by the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942-1951. On 21st October 1954 the firm wrote to the nominal defendant giving him particulars of the occurrence and advising him of Sophron's intention to make a claim pursuant to the provisions of the Act and requesting his consent to such claim being made out of time. To this letter the solicitors for the nominal defendant by letter dated 5th November 1954 replied that the nominal defendant had no power to consent to an application being brought out of time and accordingly the request made of him could not be granted.

On 31st October 1955 a summons was issued out of the Supreme Court of New South Wales on Sophron's behalf against the nominal defendant seeking an order that the prescribed period for giving a notice of intention to claim against the nominal defendant pursuant to the *Motor Vehicles* (*Third Party Insurance*) *Act* 1942-1951 be extended until 22nd October 1954.

The application came on for hearing before the prothonotary of the Supreme Court who ordered that the prescribed period be extended to 31st December 1955 and that the notice given by the letter dated 21st October 1954 be regarded as sufficient compliance with the order. In the course of his reasons the prothonotary indicated that he felt bound by the decision of the Full Court of the Supreme Court in *Delaney* v. *Flynn* (1) to conclude that if the

(1) (1954) 55 S.R. (N.S.W.) 520; 72 W.N. 365.

failure to give notice of intended claim within the prescribed period was due to the fault of the solicitor consulted by the prospective plaintiff then "sufficient cause" for extending the prescribed period in accordance with s. 30 (2) (b) (ii) of the *Motor Vehicles (Third Party Insurance) Act* 1942-1951 had necessarily been shown. He accordingly indicated for the information of the nominal defendant that in similar circumstances in any future matter coming before him he proposed to grant the application.

The nominal defendant being dissatisfied with the decision of the prothonotary requested that the matter be referred to a judge sitting in chambers and gave as grounds of his dissatisfaction with such decision the following:—(1) that the prothonotary erred in law in holding that notwithstanding the facts of the case, once default on the part of the plaintiff's solicitor was shown he was obliged to hold in law that this was sufficient cause for granting an extension of the time, and (2) that on the facts as disclosed in the application sufficient cause was not shown.

The reference duly came on for hearing before *Clancy* J. sitting in public chambers, when on the application of the parties the matter was referred by consent to the Full Court.

The Full Court (*Owen*, *Herron* and *Manning* JJ.) duly heard the matter on 28th September 1956 and delivered its judgment on 24th October 1956. All members of the court were in agreement that the prothonotary had erred in the view he had taken of *Delaney* v. *Flynn* (1), but *Owen* and *Manning* JJ. were of opinion that sufficient cause for extending the prescribed period had not been shown, whilst *Herron* J. took the contrary view. The appeal was accordingly allowed, the prothonotary's order discharged and the summons dismissed with costs.

An appeal was accordingly instituted as of right to the High Court against the judgment of the Supreme Court, and having given notice of appeal the appellant, Sophron, then applied *ex parte* for special leave to appeal from such judgment. This application was stood over until the hearing of the appeal.

Further facts appear in the judgment of the Court hereunder.

J. D. Holmes Q.C. and *G. D. Needham*, for the appellant.

N. A. Jenkyn Q.C. and *Colin Begg*, for the respondent.

Cur. adv. vult.

(1) (1954) 55 S.R. (N.S.W.) 520; 72 W.N. 365.

H. C. OF A. 1957.

SOPHRON v. THE NOMINAL DEFENDANT.

May 3.

THE COURT delivered the following written judgment:—

This appeal was instituted as of right from an order of the Full Court of the Supreme Court of New South Wales disposing of an application made under s. 30 (2) (b) (ii) of the *Motor Vehicles (Third Party Insurance) Act* 1942-1951 (N.S.W.) to extend the period for suing the nominal defendant. The appellant, after giving notice of appeal, proceeded, in anticipation of his right of appeal being questioned, to apply *ex parte* for special leave to appeal from the order. The court stood over that application to the hearing of the appeal.

The application for an extension of time under s. 30 (2) (b) (ii) was made by the appellant in the first instance in chambers in accordance with the *Motor Vehicles (Third Party Insurance) Act—Extension of Time—Rules* of the Supreme Court, and it was dealt with by the prothonotary as in pursuance of the *Prothonotary (Chamber Work) Rules* of that court. The prothonotary granted the appellant's application, whereupon the nominal defendant, the respondent, filed a request under r. 9 of the last-mentioned rules that the matter be referred to a judge. One would suppose that under r. 17 the judge would decide the matter referred as if it were before him, not by way of appeal, but as an original application. He would, of course, decide it on the evidence taken by the prothonotary, unless the judge for some reason ordered fresh evidence to be taken (see r. 16). But he would, nonetheless, decide it as an original matter. The parties joined in requesting the judge to refer the matter to the Full Court and he accordingly did so, under what provision we have not been told. No doubt the Full Court should be treated as occupying the position of the judge in chambers. This would mean that the Full Court might have exercised an original power to decide the application under s. 30 (2) (b) (ii) of the *Motor Vehicles (Third Party Insurance) Act*. In the Full Court, however, the matter was treated rather as an appeal from the prothonotary whose exercise of discretion would stand unless it were shown to have miscarried, that is to say on the footing that the primary question was whether he had taken into account extraneous considerations or had failed to take into account relevant considerations or had otherwise mistaken the proper grounds on which he should act. The decision of the Full Court (*Owen J.* and *Manning J.*, *Herron* J. dissenting) was that the appellant's application for an extension of time should be refused (1).

Section 30 (2) (a) provides that where the death of or bodily injury to any person is caused by or arises out of the use of a motor vehicle but the identity of the motor vehicle cannot after due

(1) (1957) S.R. (N.S.W.) 59; 74 W.N. 55.

inquiry and search be established, any person who could have enforced a claim for damages against the owner or driver of the motor vehicle in respect of the death or bodily injury may enforce against the nominal defendant the claim which he could have enforced against the owner or driver of the motor vehicle. Paragraph (b) of s. 30 (2), so far as material, provides that no action to enforce any such claim shall lie against the nominal defendant unless notice of intention to make a claim is given by the claimant to the nominal defendant— . . . (ii) . . . within a period of three months after the occurrence out of which the claim arose or within such further period as the court, upon sufficient cause being shown, may allow.

The facts which the appellant put forward in support of his application may be stated briefly. Early in April 1954 the appellant, a resident of Melbourne, rode a motor cycle from Melbourne on a journey to Sydney. He was accompanied by a woman riding pillion. At about five o'clock in the evening of a day which he fixes as Tuesday, 6th April, while he was riding towards Bega he says that a small greenish car travelling in the opposite direction forced him off the road and actually touched his machine. As a result he came to the ground and suffered injuries which included a broken collar bone. The greenish car did not stop and he cannot identify the car or the driver. The appellant proceeded to Bega where for a day or two he was treated at the hospital. His companion at once reported the accident to the police there and before he left Bega he made and signed a statement at the police station. The couple then went on to Sydney. There he instructed his solicitors. After a few weeks in Sydney he and his companion returned by ship to Melbourne. There he was an out-patient of a hospital for three or four months undergoing some treatment or procedure to which he applied the word " plastic ". Four or five months after the accident he sent a communication to the police at Bega, who seem to have replied that they could not assist him. It was on 13th April 1954, that is a week after the accident, that he instructed a firm of solicitors in Sydney. In the affidavit of the partner whom he saw the instructions are described as being " to commence an action against the nominal defendant claiming damages ". Statements were taken from the appellant and his companion and at the same time he was advised to see the police at Bega, presumably on the assumption that he would return by road. From them he was to ascertain whether they had obtained more information about the accident. The partner handed the matter over to an articled clerk then in his final year. The latter gathered from the file of papers that the appellant was to return

H. C. OF A. 1957.

SOPHRON v. THE NOMINAL DEFENDANT.

Dixon C.J. McTiernan J. Fullagar J. Taylor J.

through Bega and attempt to obtain further information with a view to suing the driver of the small green car and also was to supply information as to the expense to which he had been put. On 24th May 1954 the firm received a letter from the appellant from which the articled clerk inferred that the appellant had obtained no further information. He therefore turned his attention to the *Motor Vehicles (Third Party Insurance) Act* 1942-1951. Although it is par. (a) of s. 30 (2) that gives the right of action against the nominal defendant, the articled clerk failed to note that by par. (b) a notice of the claim must be given within three months, that is, of course, unless the period is enlarged by the court. On 3rd August 1954 the appellant wrote again to his solicitors in Sydney giving an account of his medical treatment. Hearing nothing further the articled clerk early in October turned again to the Act. He then saw the requirement that notice of the claim must be given within three months. On 21st October 1954 a letter giving a notice, sufficient in contents, was sent to the nominal defendant. The letter requested the nominal defendant " to consent to this application being out of time ". Needless to say the request was not fruitful; a waiver of due notice was refused by a letter from the defendant's solicitors dated 5th November 1954. Nothing further was done on the appellant's behalf until a summons was issued on 31st October 1955 applying for an extension of time under s. 30 (2) (b) (ii). The summons sought an extension to 22nd October 1954, the day after the date of the letter.

In the materials before the Supreme Court no details were given of the injuries or of the loss sustained by the appellant, but in the affidavit in this Court filed with the notice of appeal it is stated that the solicitors were instructed to sue for £5,000, that the medical and other expenses amounted to £107 and the loss of wages to £500. That, however, affects nothing but the amount involved in the order from which it is sought to appeal.

When the application was before the prothonotary he appears to have adopted the view that a fixed general rule existed that when the failure to give notice within time could not be ascribed to the fault of the claimant but was attributable entirely to fault on the part of his solicitor, that necessarily amounted to sufficient cause within the meaning of s. 30 (2) (b) (ii). Such a view is opposed to the principles laid down by *Walsh* J. in *Martin* v. *Nominal Defendant* (1) and it gained no support in the Full Court in the present case. No one, of course, doubts that such a consideration as the blamelessness of the claimant and the responsibility of his solicitor is very material. But every case must be determined on its own

(1) (1954) 74 W.N. (N.S.W.) 121.

facts. Fixed formulae cannot be substituted for the wide words of the sub-section, viz. " or within such further period as the court, upon sufficient cause being shown, may allow ". There is apparently no definition of the word " court ". " The court " must mean the court in which the action is, in the event, commenced. It has been commonly treated in the Supreme Court as including, if not meaning, an extension granted by the court before the actual commencement of the action, and there is nothing to require us to depart from the well-settled practice based on that assumption. The expression " upon sufficient cause shown " does, of course, connote that the facts amounting to sufficient cause must be made positively to appear. It connotes too that the " cause " must in any given case suffice to authorise the allowance of the particular " further period " for which the court does in fact extend the time.

But it is a mistake to attempt to reduce the expression " sufficient cause " to a closer or more rigid definition than the legislature has chosen to provide. The words no doubt are concerned with the justice of the case. There must be some positive reason for concluding that as between the parties it would be just to extend the period for giving notice. Fault on the part of the claimant in failing to give notice within three months must be an element affecting the justice of extending the time and so on the other side must be the prejudice which the nominal defendant has or may have suffered because of that failure. The justice of extending the time may be affected too by what happened after the expiration of the three months. You cannot leave entirely out of account the time which has been allowed to pass in addition to that period. The form of s. 30 (2) (b) (ii) is quite different from that on which *Lingley* v. *Thomas Firth & Sons* (1) was decided, a case that is not in point.

The power which the Supreme Court was called upon to exercise is one involving the formation of a judgment into which a measure of discretion must enter. The majority of the court formed a judgment against extending the time. We ought not to interfere with their conclusion unless we are able to perceive in the reasons upon which their Honours proceeded or may be taken to have proceeded some error of principle, as for example the entry of some inadmissible consideration into the decision of the matter, the failure to take into account a material consideration of possibly decisive importance, or some other misconception of the manner in which the discretionary judgment must be formed. We ought not, as an appellate court, simply to reach a discretionary determination of the matter anew. Our duty is to correct such a judgment of the Supreme Court only if we are satisfied that error occurred in the manner in which it was arrived at. No such error in fact appears.

(1) (1921) 1 K.B. 655.

H. C. OF A. 1957.

SOPHRON v. THE NOMINAL DEFENDANT.

Dixon C.J. McTiernan J. Fullagar J. Taylor J.

The majority of the Supreme Court were dissatisfied, not unnaturally, with the explanations placed before them of some of the circumstances of the case. Two examples were given in their Honours' reasons, but they were no more than examples. One example concerned the failure of the solicitor himself to explain why he did not direct notice to be given. Another example was the absence of any explanation of the subsequent delay. In fact the record leaves untouched a number of detailed facts which should have been dealt with fully and precisely in the evidence offered in support of an application under s. 30 (2) (b) (ii). For instance it does not appear whether the solicitors made any attempt to ascertain from the police what had been reported to them and what they had done. It does not appear what light the pillion rider would or could throw on the course of events. The letters, if any, passing between the solicitors and their client are not enumerated or offered for examination or consideration. In short, it is a plain enough inference that the question of pursuing the claim of the appellant fell into suspense and no complete or entirely satisfactory reason for this is forthcoming. The allowance of a further period of time under s. 30 (2) (b) (ii) is not a thing to be done lightly or on facts that may be guessed at. "Sufficient cause" must be "shown". In the present case there is no good reason for saying that the majority of the Full Court took an unsound view in deciding that sufficient cause was not shown. Assuming, therefore, that an appeal lies as of right it should be dismissed. But, assuming without deciding that the order under appeal is final and not interlocutory, it does not follow that an appeal does lie as of right. For it to do so, it must appear that at least £1,500, to put it shortly, is involved in the order of the Supreme Court. No process or proceeding before the Court claims such an amount. What the claimant instructed his solicitor cannot matter. There is a paucity of evidence about the appellant's injuries and it cannot be said to be established that £1,500 is really involved. Either it would be necessary, therefore, to produce further evidence of the real prejudice to the appellant which the order works or else for the appellant to obtain special leave to appeal. It is not, however, a case for special leave. But since the appeal was instituted as of right and inasmuch as we think that it should be dismissed on the substantial grounds, the proper order is, appeal dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Higgins, de Greenlaw & Sisley.*
Solicitors for the respondent, *Stephen, Jaques & Stephen.*

R. A. H.