HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

Matter No B62/2005

SARAH DAVISON — APPELLANT

AND

STATE OF QUEENSLAND — RESPONDENT

Matter No B63/2005

VANESSA FAYNE JEAN GIBSON — APPELLANT

AND

STATE OF QUEENSLAND — RESPONDENT

Matter No B64/2005

STEPHEN ANDREW GIRARD — APPELLANT

AND

STATE OF QUEENSLAND — RESPONDENT

Matter No B65/2005

JASON THOMAS ORR — APPELLANT

AND

STATE OF QUEENSLAND — RESPONDENT

Matter No B66/2005

NATASHA YARRIE APPELLANT

AND

STATE OF QUEENSLAND RESPONDENT

Matter No B67/2005

ALEXANDRA ORR APPELLANT

AND

STATE OF QUEENSLAND RESPONDENT

Davison v State of Queensland, Gibson v State of Queensland,
Girard v State of Queensland, Orr v State of Queensland,
Yarrie v State of Queensland, Orr v State of Queensland
[2006] HCA 21
17 May 2006
B62/2005, B63/2005, B64/2005, B65/2005, B66/2005, & B67/2005

ORDER

In each matter:

1. Appeal allowed with costs.

2. Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 3 December 2004 and, in lieu thereof, order that the appeal to that Court be dismissed with costs.

On appeal from the Supreme Court of Queensland

Representation:

R J Douglas SC with G R Mullins and M Horvath for the appellants (instructed by Nicol Robinson Halletts)

M Grant-Taylor SC with K Philipson for the respondents instructed by Crown Solicitor for State of Queensland)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Davison v State of Queensland

Limitation of actions – Personal injury – *Personal Injuries Proceedings Act* 2002 (Q) – *Limitation of Actions Act* 1974 (Q) – Appellants alleged serious physical and mental abuse suffered while in foster care under the supervision and care of the respondent – Application for extension of limitation period – Whether an applicant for leave to commence proceedings under s 43 of the *Personal Injuries Proceedings Act* 2002 (Q) must demonstrate a "reasonably arguable case for the granting of an extension" of time under s 31(2) of the *Limitation of Actions Act* 1974 (Q) – Whether evidence relied on by appellants established a prima facie case for extension of time under s 31(2).

Statutory interpretation – Remedial legislation – Purposive approach – Provision for urgent interim relief – *Personal Injuries Proceedings Act* 2002 (Q), s 43.

Limitation of Actions Act 1974 (Q), ss 30(1), 31(2).
Personal Injuries Proceedings Act 2002 (Q), s 43.

1 GUMMOW, HAYNE, HEYDON AND CRENNAN JJ. Each appellant[1] wished to commence an action in tort in relation to abuse allegedly suffered as a child while in foster care and while under the supervision and care of the respondent, the State of Queensland. In relation to each, the limitation period expired. Each wished to obtain an order extending the limitation period pursuant to s 31(2) of the *Limitation of Actions Act* 1974 (Q), which provides:

> "(2) Where on application to a court by a person claiming to have a right of action to which this section applies, it appears to the court –
>
> (a) that a material fact of a decisive character relating to the right of action was not within the means of knowledge of the applicant until a date after the commencement of the year last preceding the expiration of the period of limitation for the action; and
>
> (b) that there is evidence to establish the right of action apart from a defence founded on the expiration of a period of limitation;
>
> the court may order that the period of limitation for the action be extended so that it expires at the end of 1 year after that date and thereupon, for the purposes of the action brought by the applicant in that court, the period of limitation is extended accordingly."

The key terms in s 31(2) are defined in s 30(1) as follows:

> "(1) For the purposes of this section and sections 31, 32, 33 and 34 –
>
> (a) the material facts relating to a right of action include the following –
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> (i) the fact of the occurrence of negligence, trespass, nuisance or breach of duty on which the right of action is founded;
>
> (ii) the identity of the person against whom the right of action lies;

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1 Sarah Davison, Vanessa Fayne Jean Gibson, Stephen Girard, Jason Thomas Orr, Natasha Yarrie and Alexandra Jane Orr.

(iii) the fact that the negligence, trespass, nuisance or breach of duty causes personal injury;

(iv) the nature and extent of the personal injury so caused;

(v) the extent to which the personal injury is caused by the negligence, trespass, nuisance or breach of duty;

(b) material facts relating to a right of action are of a decisive character if but only if a reasonable person knowing those facts and having taken the appropriate advice on those facts, would regard those facts as showing –

(i) that an action on the right of action would (apart from the effect of the expiration of a period of limitation) have a reasonable prospect of success and of resulting in an award of damages sufficient to justify the bringing of an action on the right of action; and

(ii) that the person whose means of knowledge is in question ought in the person's own interests and taking the person's circumstances into account, to bring an action on the right of action;

(c) a fact is not within the means of knowledge of a person at a particular time if, but only if –

(i) the person does not know the fact at that time; and

(ii) as far as the fact is able to be found out by the person – the person has taken all reasonable steps to find out the fact before that time."

2 Each appellant wished to argue that "a material fact of a decisive character" became known to them on 18 June 2003, when the Brisbane *Courier-Mail* published an article suggesting that there had been widespread abuse of children in the care of the respondent. However, each had failed to comply with the preconditions for commencing proceedings created by the *Personal Injuries Proceedings Act* 2002 (Q) ("the Act"), particularly the requirements for service of timely and detailed notices of accident.

3 Section 43 of the Act, which is in Ch 2, Pt 1, provides in part:

"(1) The court, on application by a claimant, may give leave to the claimant to start a proceeding in the court for damages based on a liability for personal injury despite noncompliance with this part if the court is satisfied there is an urgent need to start the proceeding.

(2) The order giving leave to start the proceeding may be made on conditions the court considers necessary or appropriate having regard to the particular circumstances of the case.

(3) However, if leave is given, the proceeding started by leave is stayed until the claimant complies with this part or the proceeding is discontinued or otherwise ends."[2]

4 Each appellant made an application to the Supreme Court of Queensland (Douglas J) for leave under s 43 well before the end of the one year period referred to in s 31(2) of the *Limitation of Actions Act*. Douglas J made orders refusing the applications for leave on the ground that there was no urgent need to start the proceedings[3]. Appeals were brought against those orders. More than one month after the Queensland Court of Appeal heard those appeals, nine days before it dismissed them[4], and two days before the latest date to which the limitation period could be extended, Holmes J heard and granted further applications by the appellants for leave under s 43[5]. After the orders of Holmes J were made, proceedings were commenced and applications to extend time under s 31(2) were filed. They have not been heard, because appeals were brought by the respondent against Holmes J's orders, and those appeals were allowed by the Court of Appeal (de Jersey CJ and Chesterman J, McMurdo P dissenting)[6]. The majority reasoning rested on the proposition, with which McMurdo P disagreed, that an applicant seeking a s 43 order after the expiration of the ordinary limitation period must demonstrate a reasonably arguable case for the granting of an extension to the limitation period.

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2 Some other jurisdictions have legislation equivalent to the Act, and in particular to s 43. See *Civil Law (Wrongs) Act* 2002 (ACT), s 79; *Personal Injuries (Civil Claims) Act* 2003 (NT), s 7(2).

3 *Orr v State of Queensland* [2003] QSC 463.

4 *SG v State of Queensland* [2004] QCA 215.

5 *Girard v State of Queensland* [2004] QSC 236.

6 *SG v State of Queensland* [2004] QCA 461.

5 The appellants have brought appeals to this Court against the allowing of the respondent's appeals to the Court of Appeal. The appellants' appeals should be allowed.

Statutory background

6 Before the Act came into force on 18 June 2002, with its requirement for various steps to be taken before proceedings could be commenced, a solicitor consulted by a client whose cause of action was subject to a limitation period which was about to expire, or which had expired and in respect of which the maximum period for extension under s 31(2) of the *Limitation of Actions Act* was about to expire, could commence proceedings by filing a claim and statement of claim. This would stop the limitation period running, and, if it had expired, would stop the one year period referred to in s 31(2) from running. If the defendant then chose to raise a limitation defence and apply for summary judgment, the plaintiff could make a cross-application for extension of the limitation period. The issues raised by s 31(2) could then be examined with appropriate care.

7 The introduction of Ch 2, Pt 1 of the Act was an important and drastic inroad into the common law rights of citizens. The effect of the preconditions for commencing proceedings created by Ch 2, Pt 1, in cases where either the limitation period or the one year period in s 31(2) was about to expire, was to create the potential for harsh results where plaintiffs or their legal advisers had failed to realise the significance of the need for compliance with Ch 2, Pt 1. The function of s 43 is to avert these potentially harsh results, and this has relevance to the construction of s 43.

Court of Appeal's reasoning

8 One ground of appeal to the Court of Appeal against Holmes J's orders was that the application to her was an abuse of process, in view of the failure of the earlier application to Douglas J. However, this ground was abandoned in the Court of Appeal[7] and not renewed in this Court.

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7 *SG v State of Queensland* [2004] QCA 461 at [15]. The respondent took no point in this Court about the failure of the appellants to challenge the dismissal by the Court of Appeal of appeals against Douglas J's refusal of their s 43 applications.

9 In allowing the appeal, the Court of Appeal majority appeared to differ from the primary judge in two respects. First, the Court of Appeal majority said that leave could not be extended under s 43 in aid of an application to extend time under s 31(2) unless the claimant for leave could demonstrate that there was "a reasonably arguable case for the granting of an extension" under s 31(2)[8]. The Court of Appeal majority did not explicitly say whether the need to show a reasonably arguable case was a precondition to the existence of a power to grant leave under s 43 or a factor going to the discretionary exercise of that power. Their language suggests it is not the latter and hence it must be the former, because a factor which supposedly goes to discretion but which requires the discretion always to be exercised one way is not in truth a discretionary factor. Although the Court of Appeal majority did not explicitly say that the primary judge was wrong in law for not applying the test stated by the Court of Appeal, it is clear that Her Honour did not do so. Secondly, the Court of Appeal majority said that the appellants' application should have been refused on the ground that "urgency" was not established. In form, this appears to be a conclusion that the primary judge erred on a point of fact. It will be seen below, however, that in truth this contention that "urgency" was not established is a reformulation and repetition of the first ground.

Issues on the appeal

10 Counsel for the appellants conceded that if there were no prospect whatever of obtaining an extension of time under s 31(2), then it would be right not to grant leave under s 43 because to do so would be futile. This concession corresponded with the opinion of McMurdo P[9]. McMurdo P also suggested that applicants under s 43 might have to demonstrate "real, not merely fanciful, prospects of mounting a reasonably arguable case for the granting of an extension of the limitation period" under s 31(2), "even though they had not then obtained all the material necessary to succeed in such an application."[10]

11 It is not necessary to consider in this appeal how great a degree of weakness in a proposed s 31(2) application must be found before leave will be refused under s 43. The question was not argued. That is because the primary approach of the respondent was not to defend the test employed by the Court of

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8 *SG v State of Queensland* [2004] QCA 461 at [22].

9 *SG v State of Queensland* [2004] QCA 461 at [33].

10 *SG v State of Queensland* [2004] QCA 461 at [38].

Appeal majority, but rather to contend that the evidence tendered by the appellants revealed that they had no prospects of success in obtaining an extension of time under s 31(2).

12 Before turning to the respondent's argument, however, it is necessary, in view of its importance, to examine the Court of Appeal majority's construction of s 43, despite the failure of the respondent to act as a contradictor in relation to the appellants' arguments on that subject[11].

Construction of s 43

13 The appellants submitted that to require of s 43 claimants for leave to initiate proceedings which are about to be statute barred and in relation to which an extension of time may be sought under s 31(2), that they show a reasonably arguable case for the granting of an extension, was to read words into s 43 in an impermissible manner. That submission is correct for the following reasons.

14 The Court of Appeal majority said that s 43 was not to be construed "restrictively" and that the s 43 discretion had an "unfettered" character[12]. However, the requirement for a reasonably arguable case does restrict and fetter discretion. There is no support for this outcome in the express statutory language or the subject-matter, scope and purpose of the legislation.

15 If a claimant under s 43 has to demonstrate a reasonably arguable case for extension under s 31(2), it would seem to follow from that premise that the claimant is obliged to demonstrate a reasonably arguable case on every issue relevant to the proceeding for the starting of which leave is required. This conclusion is improbable in relation to legislation which operates where there is an urgent need to start proceedings, and the improbability of the conclusion falsifies the premise.

16 The function of s 43 may be explained by borrowing some well-known words which Dixon J used in another context – to prevent litigants being

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11 It may be noted that the respondent conceded that, assuming the preconditions for the exercise of the power to grant leave under s 43 were satisfied, there was no discretionary factor pointing against the grant of leave in the present case.

12 *SG v State of Queensland* [2004] QCA 461 at [20]-[21]. They relied on the consideration given by the Court of Appeal to a different aspect of s 43 in *Gillam v State of Queensland* [2004] 2 Qd R 251.

deprived of the right to submit real and genuine controversies to the determination of the courts by the due procedure appropriate for the purpose[13]. Section 43 will no doubt operate in many circumstances outside the intersection between Ch 2, Pt 1 and the limitation period exemplified by this case, but the case does illustrate an important potential field of its operation. In the present case, the construction propounded by the Court of Appeal majority prevents determination of the nature and lawfulness of the respondent's conduct in relation to the appellants while they were children – on the appellants' case, conduct of a grave kind. It also prevents determination of the preliminary potential controversy over whether the limitation period should be extended under s 31(2).

17 Even if there were some verbal foothold in the legislation for the construction adopted by the Court of Appeal majority, the context points strongly against that construction in the present field of application of s 43. Section 31(2), read with its companion provision s 31(1), bristles with difficulties of construction and application[14]. The court might often find the task of assessing whether there is a reasonably arguable case for the granting of an extension under s 31(2) extremely difficult where it has to be performed in the course of a necessarily hurried s 43 application.

18 The construction stated by the Court of Appeal majority perhaps rests on a fear that injustice for defendants might arise from too free a grant of leave under s 43. That risk is reduced by the capacity of the court under s 43(2) to impose conditions which are necessary or appropriate in the particular circumstances, and by the stay of the proceeding which has been started by leave until either the claimant complies with Ch 2, Pt 1 or the proceeding ends.

19 In so far as the Court of Appeal majority contended, independently of the question of construction just discussed, that there was not an urgent need to start the proceeding, the contention must fail if it is considered simply as a matter of dates: the expiration of the one year period stipulated in the tailpiece to s 31(2) was imminent. However, the majority saw the issue of whether there was urgency in a special sense – as being integrally linked with the issue of whether the s 31(2) application was reasonably arguable. This flows from the fact that the majority held that "urgency" was not established "essentially for the reasons expressed by" Douglas J[15]. His Honour said:

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13 *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 92.

14 *State of Queensland v Stephenson* [2006] HCA 20.

15 *SG v State of Queensland* [2004] QCA 461 at [24].

> "... I am not satisfied that there is an urgent need to start the proceeding under s 43. Either the proceeding is out of time, in which case there is no urgency shown, or it may become a proceeding which can be proceeded with successfully if leave is given under section 31 of the Limitation of Actions Act to extend the period of limitation, and I just cannot predict on the material available to me whether that will happen and whether the limitation period will be extended to any particular date. At most, all that the applicant ... can show is that he is investigating whether there is evidence to warrant an extension of the period of limitation."

This Court does not have before it the material which Douglas J had before him. So far as his Honour viewed the question as whether he could predict that the limitation period would be extended, he appears to have adopted a construction of s 43 which is even stricter than that of the Court of Appeal majority, and which must be rejected for the same reasons.

Satisfactoriness of appellants' affidavit evidence

20 The primary argument advanced by the respondent was that the evidence relied on by the appellants revealed the absence of any case for an extension of time under s 31(2), and also showed that even if one of the tests referred to by McMurdo P (dissenting) were applied, namely, that leave should be refused if it would be "futile" to grant it, that test would be satisfied[16].

21 The evidence to which the respondent pointed was in a series of affidavits sworn by the solicitor for the appellants on 11 June 2004 and filed in each application for leave under s 43. Paragraph 25 stated:

> "25. I am advised by the Applicant and verily believe that although the Applicant knew he had been abused, he did not know he could do anything about it or that the Department be at fault. After reading the article in the Courier Mail on 18 June 2003 he realised he may have a claim against the Respondent and that he should investigate. Thereafter he contacted Bravehearts who put him in contact with Solicitors."

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16 This argument does not appear in the transcript of the respondent's submissions to Holmes J, or the respondent's written submissions to the Court of Appeal, and if it was advanced orally, it left no trace in the Court of Appeal's reasons.

The solicitor then exhibited the article. Paragraph 26 stated: "It appears the most likely date of material fact is 18 June 2003 however we cannot be certain without further enquiry and medical evidence." Paragraph 27 stated:

> "27. The Applicant may have therefore only have become aware on 18 June 2003 of the following:–
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> a. that the abuse carried out by his foster family and other similar families was not only perpetrated against other children but was much more widespread than the applicant has believed at the time of the abuse or since;
>
> b. the applicant has always believed that he was the only victim of abuse perpetrated by a member(s) of Foster Families;
>
> c. notwithstanding any actual knowledge of the abuse by the respondent it is also submitted that as a result of the extensive abuse now uncovered by Queensland Police Service and CMC enquiry and which occurred over a long period of time that it is more likely to have been suspected or known about by the respondent at the time of the individual abuses and since; however, until 18 June 2003 the applicant was unaware of this;
>
> d. the applicant was not aware that a criminal investigation had taken place until on or after 18 June 2003."

The respondent did not complain about the hearsay character of the evidence.

22 The respondent cast doubt on whether sub-pars (a)-(d) of par 27 were material facts. That doubt is without foundation. If the abuse of children in foster care were extensive, as par 27(c) says, it would be more likely that the respondent would have suspected it or known about it. If it did suspect it or know about it, the prospects of establishing a breach of a duty of care would be improved. That supports the existence of a "material [fact] relating to a right of action" of the kind defined in s 30(1)(a) of the *Limitation of Actions Act*.

23 The respondent then submitted that the opening words of par 27 made it evident that neither the appellants nor their solicitor could say when the facts came within the appellants' means of knowledge; that it could not be expected that this state of ignorance would cease; and hence that the appellants would never be able to demonstrate a prospect of establishing that a material fact of a decisive character relating to the right of action was not within their means of knowledge until the date identified in s 31(2).

24 These submissions must be rejected. Read together, pars 25-27, while cautiously drafted, do demonstrate some prospect of establishing at the hearing of the s 31(2) application that it was not until 18 June 2003 that a material fact relating to the right of action (the respondent's negligence) which was of a "decisive character" within the meaning of s 30(1)(b) of the *Limitation of Actions Act* was within their means of knowledge. They say, in short, that before 18 June 2003 the appellants did not realise that the respondent might be at fault. As the appellants submitted, s 31(2) applications often involve the filing of extensive affidavit material on questions of duty, breach, causation and quantum, and cross-examination on the affidavits. Evidence of that kind goes not only to the issue referred to in s 31(2)(a) (which leads back into questions about the existence of material facts under s 30(1)(a), questions about whether they were of a decisive character under s 30(1)(b), and questions about means of knowledge under s 30(1)(c)), but also to questions of whether there is evidence to establish the right of action under s 31(2)(b). Paragraph 26 of the affidavit can be seen, particularly in the light of other evidence filed by the appellants as to the extent of the inquiries they had in train in relation to s 31(2), as an elliptical reference to s 31(2)(a) issues. To say that the appellants and their advisers cannot be certain about the date referred to in s 31(2)(a) without further inquiry and medical evidence is no more than a demonstration of prudence. When par 26 is read with the opening words of par 27, it cannot be said that it was evident that neither the appellants nor the solicitor could say, or would ever be able to say, what the s 31(2)(a) date was. Holmes J was right to say that there was a strong basis for an argument that a material fact of a decisive character became known to the appellants on 18 June 2003.

Orders

25 Since the construction advanced by the Court of Appeal majority is unsound, and since the error attributed by the Court of Appeal majority to Holmes J in relation to "urgency" does not exist, her Honour's orders should be restored.

Sarah Davison v State of Queensland (B62/2005)

1. The appeal is allowed with costs.

2. The orders of the Court of Appeal are set aside and in lieu thereof it is ordered that the appeal to that Court be dismissed with costs.

Vanessa Fayne Jean Gibson (B63/2005).

1. The appeal is allowed with costs.

2. The orders of the Court of Appeal are set aside and in lieu thereof it is ordered that the appeal to that Court be dismissed with costs.

Stephen Girard (B64/2005)

1. The appeal is allowed with costs.

2. The orders of the Court of Appeal are set aside and in lieu thereof it is ordered that the appeal to that Court be dismissed with costs.

Jason Thomas Orr (B65/2005)

1. The appeal is allowed with costs.

2. The orders of the Court of Appeal are set aside and in lieu thereof it is ordered that the appeal to that Court be dismissed with costs.

Natasha Yarrie (B66/2005)

1. The appeal is allowed with costs.

2. The orders of the Court of Appeal are set aside and in lieu thereof it is ordered that the appeal to that Court be dismissed with costs.

Alexandra Jane Orr (B67/2005)

1. The appeal is allowed with costs.

2. The orders of the Court of Appeal are set aside and in lieu thereof it is ordered that the appeal to that Court be dismissed with costs.

26 KIRBY J. Six appeals are before this Court. They raise common issues. They come from a majority decision[17] of the Queensland Court of Appeal[18]. Primarily, they concern the meaning and application of the *Personal Injuries Proceedings Act* 2002 (Q) ("the Personal Injuries Act").

27 The provisions of s 43 of the Personal Injuries Act, so far as relevant, are set out in the reasons of Gummow, Hayne, Heydon and Crennan JJ ("the joint reasons")[19]. Also appearing there are provisions of the *Limitation of Actions Act* 1974 (Q) ("the Limitations Act") which govern the rights of the appellants. They are otherwise well out of time to bring proceedings against the State of Queensland ("the State") for abuse which they allege they suffered, as children, when in foster care or otherwise under the responsibility of the State[20].

28 As appears in the joint reasons, there are two ways of interpreting s 43 of the Personal Injuries Act. The first is the way preferred by the majority in the Court of Appeal. This holds that, to secure leave under s 43, in order to start a proceeding for damages notwithstanding non-compliance with the Personal Injuries Act, it is necessary for a claimant to establish affirmatively that he or she has "a reasonably arguable case for the granting of an extension" under s 31(2) of the Limitations Act[21].

29 The other meaning, preferred by McMurdo P[22] in her dissent in the Court of Appeal (and by Holmes J at first instance[23]) is that, by its language and purpose, the power afforded by s 43 of the Personal Injuries Act is addressed to responding to an urgent need to start proceedings because of a danger, otherwise arising, of the descent of a limitation bar. In such circumstances, the provision is no more than a procedural facility that may be granted on terms to preserve the *status quo*[24]. At most, the prospect of ultimately securing an order extending the limitation period under the Limitations Act would be relevant if a court, considering the application under s 43, were convinced that the prospect of

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17 de Jersey CJ and Chesterman J; McMurdo P dissenting.

18 *SG v State of Queensland* [2004] QCA 461.

19 Joint reasons at [2].

20 Joint reasons at [1].

21 [2004] QCA 461 at [22].

22 [2004] QCA 461 at [37]-[38].

23 *Girard v State of Queensland* [2004] QSC 236.

24 Personal Injuries Act, s 43(2) and (3).

mounting an arguable case for such an extension was fanciful[25] or if it appeared that the application amounted to an abuse of process[26].

30 In my view, the better construction was that adopted by the primary judge and McMurdo P in the Court of Appeal. However, as is often the case, by the time disputed questions of statutory construction reach this Court, the point is not unarguable[27]. There are persuasive contentions both ways. To arrive at the preferable, and therefore the correct, interpretation of s 43, it is necessary to evaluate the arguments for and against the competing approaches.

Arguments favouring the State's position

31 Several considerations favour the approach adopted by the majority in the Court of Appeal.

32 First, although it is contemplated that an order under s 43(1) of the Personal Injuries Act will be made on an interlocutory basis, subject to any conditions imposed pursuant to s 43(2) and subject also to a stay as contemplated by s 43(3) of that Act, the grant of leave to start proceedings that might not otherwise be lawfully commenced, is clearly a serious step. It disturbs the entitlement of a party to be free of the burdens, worries and costs of litigation.

33 The law abhors judicial orders (even of a temporary and conditional kind) which disturb the legal rights of parties without good reasons being demonstrated for making them. Thus, the necessity to demonstrate the existence of a "reasonably arguable" foundation for the granting of leave might be viewed as no more than affirmation of the common requirement that a litigant, seeking a privilege not otherwise belonging to it, must demonstrate, to a reasonable standard, the utility and justifiability of granting that benefit. Such an approach is not unknown in judicial procedure. Where a litigant has become out of time and seeks leave to file a defence, he or she will often be required to justify an order to overcome the time default by, for example, demonstrating that he or she has a real defence[28]. This is sometimes expressed as the requirement to show a

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25 [2004] QCA 461 at [33] per McMurdo P.

26 *Girard* [2004] QSC 236 at 7 per Holmes J.

27 *News Limited v South Sydney District Rugby League Football Club Limited* (2003) 215 CLR 563 at 580 [42].

28 *Vacuum Oil Pty Co Ltd v Stockdale* (1942) 42 SR (NSW) 239 at 243-244; *Re Cameron Smith; Ex parte Vigilant Finance (NSW) Pty Ltd* [1964] NSWR 1282 at 1285; *Garrard v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 at 671; *Evans v Bartlam* [1937] AC 473 at 480; *Grimshaw v Dunbar* [1953] 1 QB 408 at 415.

defence on the merits. Applications for such leave might otherwise easily become a means of spinning out litigation, without any ultimate prospect of success and, in the meantime, imposing unreasonable burdens on the opposing party.

34 Secondly, the foregoing considerations may have special relevance where the propounded "start [of] the proceeding[s]", claimed pursuant to s 43(1) of the Personal Injuries Act, involves the commencement of proceedings that are otherwise barred by a limitation statute. Until the appellants in the present case could secure orders that "the period of limitation for the action be extended", in accordance with s 31(2) of the Limitations Act, they are out of time. One objective of limitation statutes is to spare potential defendants of having to live with the burden of a legal action indefinitely where a potential claimant has not pursued his or her remedies in a timely fashion. Old claims impose special burdens on parties obliged to defend them. Parties conducting their affairs are ordinarily entitled to predict when they can regard potential actions as stale and expired. The community has a general interest in the prompt commencement of proceedings and in the finality of contested rights and obligations, given the injustices that can attend long delayed claims[29]. In such circumstances, where the propounded "urgency" to start the proceedings involves the hypothesis that an extension of the period of limitation for the bringing of the action will be granted, proof that this is a reasonable hypothesis is, in one sense, inherent in the exercise of the grant of leave under s 43(1) of the Personal Injuries Act.

35 Thirdly, the State put this last submission in terms (accepted by the majority of the Court of Appeal) of the language of s 43(1) of the Personal Injuries Act. Unless it could be shown that the appellants enjoyed, as a matter of fact and law, "a reasonably arguable case for the granting of an extension" the precondition to the utility and urgency for the order under s 43(1) would not be made out. On this view, there could only be "an urgent need to start the proceeding" if "the proceeding" so envisaged were shown to be "reasonably arguable". If, at the time the applications under s 43(1) of the Personal Injuries Act were made, the appellants could not show this, it would follow that the appellants could not truly demonstrate "an urgent need to start the proceeding." The very "urgency" and the "need", upon this view, postulates the demonstrable viability of "the proceeding."

36 The majority in the Court of Appeal, and a judge at first instance who had earlier rejected similar interlocutory applications for grants of leave under s 43(1) of the Personal Injuries Act (Douglas J[30]) embraced this approach. It was one

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29 McGee and Scanlan, "Judicial attitudes to limitation", (2005) 24 *Civil Justice Quarterly* 460 at 460-461.

30 *Orr v State of Queensland* [2003] QSC 463.

that they regarded as inherent in the provision of leave for "an urgent need to start the proceeding." Absent demonstrated viability, such a "need", particularly an "urgent need", was unproved.

37 Fourthly, the State contested (correctly in my view) the repeated suggestions of the appellants that the discretion conferred on the primary judge (relevantly Holmes J in the second application under s 43) was "unfettered". Support for such a categorisation of the power in s 43 of the Personal Injuries Act appears in some of the reasoning in the Court of Appeal in this case[31] and in an earlier decision on the section[32].

38 However, no discretion granted by statute is absolutely unfettered[33]. The applicable law may not contain express qualifications, limitations or restrictions. But it remains for a repository of statutory power always to exercise that power in accordance with the language of the grant, and so as to achieve the purposes of the statutory provision. The State's submission to this effect was clearly right. To the extent that the appellants rested their resistance to disturbance of the order Holmes J made under s 43 of the Personal Injuries Act upon the suggestion that her Honour's discretion was "unfettered" or "untrammelled"[34], their argument should be rejected. However, this analysis leaves to be ascertained the ambit of the requirements imposed on the exercise of the power by the Personal Injuries Act.

The appellants' preferable construction

39 Whilst I accept that establishment of a reasonably arguable case (and thus in a matter of the present kind of a reasonably arguable entitlement to an extension of the period of limitation) is a possible interpretation of s 43 of the Personal Injuries Act), I do not consider it to be the preferable construction of the section.

40 First, the language of s 43(1) of the Personal Injuries Act does not spell out, in terms, a requirement that leave should not be granted unless the claimant demonstrates a reasonably arguable case for an extension under the Limitations Act. To make good that precondition, it is necessary to derive it, by implication,

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31 [2004] QCA 461 at [21] per de Jersey CJ.

32 *Gillam v State of Queensland* [2004] 2 Qd R 251 at 258 [23].

33 *Gerlach v Clifton Bricks Pty Ltd* (2002) 209 CLR 478 at 503-504 [70] per Callinan J and myself; *Neat Domestic Trading v AWB Ltd* (2003) 216 CLR 277 at 300 [66].

34 [2005] HCATrans 1006 at 281.

from the language and purpose of s 43(1), read with other applicable legislation, such as that providing for an extension of the period of limitation where "the proceeding" could otherwise not be successfully maintained.

41 Secondly, s 43 is a remedial provision[35]. It is designed to permit a party to start a proceeding who is not otherwise entitled to do so. It thus contemplates an exceptional facility. Clearly, it does so for a purpose protective of the rights of the party seeking to do so, so that such party will not lose possible rights by reason of any further delay in commencing the proceedings. It is normal for remedial provisions of legislation to be given a broad, and not a narrow or restricted, interpretation[36]. This is especially so where the beneficial provision in question has been enacted to protect the access of a party to the courts so as to vindicate claims to legal rights before those courts[37] and to prevent such access from being lost by the descent of a limitation bar[38].

42 Moreover, the settled approach to the construction of legislation, expressed by this Court over many years[39], is one that endeavours to give effect to the purpose of a legislative prescription, deriving that purpose from the language and structure of the legislation and any available supplementary sources. In the present case, the purpose of s 43 is, relevantly, to permit the Court to deal with urgent circumstances by the provision of what is, effectively, interim relief granted on conditions designed to do no more than to prevent any further detrimental running of time that might result from additional delay in the commencement of proceedings.

43 Thirdly, the foregoing arguments for affording the language of s 43 of the Personal Injuries Act a broad and beneficial construction are reinforced when regard is had to considerations implied in the language of the section. Section 43(1) requires that the claimant, seeking leave, must secure it from "[t]he court". Of itself, this affords a protection to the party affected by the grant of leave, but only in terms of the stated conditions for its exercise. As stated, this is no more than the existence of "an urgent need to start the proceeding." The focus,

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35 See *State of Queensland v Stephenson* [2006] HCA 20.

36 See, eg, *Bull v Attorney-General for New South Wales* (1913) 17 CLR 370 at 384; *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638; *SG* [2004] QCA 461 at [33] per McMurdo P.

37 *Magrath v Goldsbrough, Mort & Co Ltd* (1932) 47 CLR 121 at 134.

38 Cf *Brakespeare v The Northern Assurance Co Ltd* (1959) 101 CLR 661 at 668.

39 See, eg, *Bropho v Western Australia* (1990) 171 CLR 1 at 20.

expressed in the statute, is therefore upon procedural urgency. The statutory language goes no further.

44 The need for care in the importation of other preconditions was correctly explained by Jerrard JA in *Gillam*[40]. In that case, his Honour (with the agreement of Dutney J and Philippides J) rejected an attempt to import into s 43 of the Personal Injuries Act an implication obliging the claimant, seeking the urgent leave there provided, to demonstrate a "reasonable excuse for delay". Addressing that submission, which is analogous to the construction favoured by the majority of the Court of Appeal in this case, Jerrard JA said[41]:

> "That submission must be rejected for a number of reasons. Section 43 contains no restrictions on the discretion it grants, and certainly none requiring the court be satisfied a reasonable excuse exists for delay or other non-compliance with pt 1 of ch 2 of the [Personal Injuries Act], which part contains s 9 to s 43. Further, s 43(3) contemplates the making of orders granting leave to claimants to commence proceedings when that may ultimately prove a futile step, since the section envisages leave being given in proceedings which are then stayed and ultimately discontinued. Next, some claimants may not know whether they have a reasonable excuse for delay".

45 Fourthly, the last observation suggests a critical reason why the construction urged by the State, and adopted by the majority in the Court of Appeal, should not be accepted. To accept it would be to undermine the achievement of the expressed purpose of s 43. By its terms, that section is addressed to interim relief designed to hold the *status quo* for an identified period. It is designed to do so in urgent circumstances. To impose as a precondition for the provision of such urgent relief the obligation to prove a reasonably arguable case for an order for the extension of the period of limitation under the Limitations Act, would risk frustrating or defeating the object of s 43.

46 Historically, before the enactment of the Personal Injuries Act, it had been possible in Queensland (as in other jurisdictions) simply to file a statement of claim (previously a writ of summons). That initiative, without more, would then typically stop time running. Applications for an extension of time under provisions such as those in the Limitations Act could then be made without the pressure of the risk of the descent of a limitation bar, either on the cause of action itself or on an application for extension of the period of limitation for bringing an action. The enactment of the Personal Injuries Act, which was retrospective in

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40 [2004] 2 Qd R 251 at 258 [23].

41 [2004] 2 Qd R 251 at 258 [23].

its operation[42], terminated this more leisurely state of procedural affairs. It introduced various restrictions and time limits, presenting a statutory obstacle course to be negotiated by a party wishing to vindicate a claim in court. Because this is the context in which s 43 of the Act has been enacted, it suggests the manner in which the section should be construed. A construction that upholds the facility of urgent relief is to be preferred to one that would endanger, or defeat, the grant of such relief in circumstances arguably urgent.

47 Fifthly, an added reason for adopting this approach to s 43 of the Personal Injuries Act is the highly complex nature of the law applicable to the provision of orders for extensions of a period of limitation under the Limitations Act. The law in question, copied in Queensland as in other Australian States from amendments to limitations law first enacted in England[43], has given rise to much litigation, uncertainty and complaint[44].

48 Apart from the law, the facts usual to many cases arising under applications for orders to extend the limitation period are typically complicated by many features of such applications, including the vulnerability, disadvantage and other personal characteristics of claimants[45]. To accept, as a precondition to the provision of the urgent relief for which s 43 of the Personal Injuries Act provides, an obligation in the claimant to establish a reasonably arguable case that extension of the limitation period will be ordered would not only impose, in many instances, a burden difficult or impossible to discharge in an application which, of its nature, is addressed to allegedly urgent circumstances. It would also risk shifting the contest about that question from the proper time when, and venue where, it is presented for determination. It would divert a proceeding essentially concerned with an "urgent need", into a proceeding likely to frustrate,

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42 Section 6(1).

43 See McGee and Scanlan, "Judicial attitudes to limitation", (2005) 25 *Civil Justice Quarterly* 460 at 470 with reference to the report of the Committee on Limitation of Actions in Personal Injury, (1974) Cmnd 1829.

44 See, eg, Morgan, "Limitation and Discretion – Procedural Reform and Substantive Effect", (1982) 1 *Civil Justice Quarterly* 109; Jones, "Latent Damage – Squaring the Circle?", (1985) 48 *Modern Law Review* 564; McGee, "A Critical Analysis of the English Law of Limitation Periods", (1990) 9 *Civil Justice Quarterly* 366; Rogers, "Limitation and intentional torts", (1993) 143 *New Law Journal* 258; Jones, "Accidental Harm, Intentional Harm and Limitation", (1994) 110 *Law Quarterly Review* 31.

45 *Adams v Bracknell Forest BC* [2005] 1 AC 76 at 100 [91] per Baroness Hale of Richmond. See McGee and Scanlan, "Judicial attitudes to limitation", (2005) 24 *Civil Justice Quarterly* 460 at 466, 477.

or defeat, a timely response to such need. This cannot be what Parliament meant by enacting s 43(1). If the law abhors futility, it is especially reluctant to accept futility in a provision enacted by Parliament for particular and limited purposes.

49 Sixthly, nothing that is done by the provision of leave under s 43 of the Personal Injuries Act to start a proceeding alters, in the slightest, the ultimate disposition of the application that may then be necessary for an order for the extension of the period of limitation. The grant of leave under s 43(1) does not advance the proceeding substantively until any necessary order is made extending the period of limitation. The grant of leave outside a limitation period, if that it be, does not overcome any available limitation defence[46]. It merely suspends the running of time that would have occurred had the proceeding not been started at all.

50 Seventhly, the imposition of procedural safeguards, as contemplated by s 43(2) of the Personal Injuries Act, and compliance otherwise with the provisions of the Act as contemplated by s 43(3) (with the prospect of revocation of leave if such conditions and compliance are not forthcoming), mean that abuse of the leave for which s 43(1) provides can be quickly, and effectively, dealt with.

51 This fact was acknowledged by Holmes J when her Honour made it clear that the leave provided was conditional on the appellants' seeking orders for an extension of the limitation period in applications filed and served within an indicated period after the date of her Honour's orders. The orders subsequently made by Holmes J established a clear timetable for the filing and serving of the appellants' applications; for the return of such applications before the court; and for the personal swearing by each of the appellants "to the issue of when ... and the circumstances under which, a material fact or facts of a decisive character relating to [the] cause of action against the respondent was first within [his or her] means of knowledge". These were the kind of conditions that s 43 of the Personal Injuries Act contemplated.

52 In the events that occurred, Holmes J's timetable was interrupted by the appeal to the Court of Appeal[47]. The orders were vacated when the Court of Appeal, by majority, substituted its own orders dismissing each appellant's application under s 43. Had such orders not been made, the orders of Holmes J would have quickly brought the proceedings to a consideration of the extension of the limitation bar. But they would have done so in the proper place and at the proper time for decisions on such questions.

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46 *SG* [2004] QCA 461 at [16]-[21], [33].

47 Joint reasons at [4].

Conclusion

53 Once it is accepted that the majority of the Court of Appeal applied an incorrect test for the grant or refusal of leave under s 43 of the Personal Injuries Act, and imposed an inapplicable precondition that the appellants must prove a "reasonably arguable case for the granting of an extension" under s 31(2) of the Limitations Act, the judgment of the Court of Appeal cannot stand.

54 The State filed no notice of contention, seeking to uphold the Court of Appeal's orders on a different basis. However, it did submit orally that, even if the test of McMurdo P, as to the prospective "futility" of the appellants' proceedings, were applied, the State was entitled to hold the orders of the Court of Appeal. In expressing the very clear case in which, where urgent need to start the proceeding is otherwise demonstrated, leave might be refused under s 43(1) by reference to futility, McMurdo P could not have meant a futility discovered only following a full exploration of the merits of the application for orders that the periods of limitation for the proposed actions be extended to show "a reasonably arguable case" for the extension. In some, rare, cases it will be plain, and easily demonstrable in a proceeding necessarily urgent and abbreviated, that the proceeding for which s 43(1) leave is sought is bound to fail. In such circumstances alone, the focus of attention in the court to which the application is made under s 43(1) of the Personal Injuries Act would shift from the urgent need to preserve the *status quo* to the pointlessness of providing any relief in the particular circumstances of the case.

55 For the reasons expressed in her minority opinion in the Court of Appeal, McMurdo P was correct to conclude that the present was not a case where "futility" of this kind was made out[48]. In her Honour's view, there had been an arguable advance in the preparation of the appellants' cases for the orders they would seek for the extension of the respective limitation periods applicable to those cases. This was affirmed by the appellants' solicitor, notwithstanding the acknowledged difficulties of securing instructions from the appellants themselves. Moreover, in the opinion of McMurdo P, other material before Holmes J demonstrated the genuine attempts that had been made by the appellants to gather materials in order to advance their respective claims for limitation extensions. And, as McMurdo P put it[49]:

> "Most significantly, the material, unlike that before the judge in the first application, established urgency in that the date one year after, at least

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48 [2004] QCA 461 at [37].

49 [2004] QCA 461 at [37] (footnote omitted).

> arguably, some material facts of a decisive character became known to the [appellants] through the [newspaper] article was about to expire. Without the order sought under s 43 [of the Personal Injuries Act] … even if the anticipated applications for an extension of the limitation period were successful, the [appellants] could never commence their claims against the [State]."

56 Unless Holmes J was shown to have applied an incorrect test for the grant of leave under s 43(1) of the Personal Injuries Act, the Court of Appeal was not warranted to disturb her Honour's discretionary orders[50]. The State made it clear that it raised no contest to her Honour's grant of leave because of the hearsay character of the appellants' solicitor's affidavit evidence[51]; the failure of the appellants to pursue any appeal to this Court from the Court of Appeal's separate confirmation of the order of Douglas J[52]; or on any other unstated discretionary ground[53].

57 It follows that the Court of Appeal's disturbance of the orders of Holmes J was erroneous. The grant of leave and the conditions imposed by Holmes J should in each case be restored although it will now be necessary for the Supreme Court of Queensland to fix a new timetable for the proceedings, having regard to the interruption to that timetable consequent on the appeals.

Orders

58 To give effect to this conclusion in each appeal, I agree in the orders proposed in the joint reasons.

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50 *House v The King* (1936) 55 CLR 499 at 504-505.

51 [2005] HCATrans 1006 at 841-863. See joint reasons at [21].

52 [2005] HCATrans 1006 at 953-959.

53 [2005] HCATrans 1006 at 808-814.