

AUSTRALIA / JUDGMENT

Stein v Ryden [2022] NSWCA 212

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Court of Appeal

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Court of Appeal

Supreme Court

New South Wales

Medium Neutral Citation: Stein v Ryden [2022] NSWCA 212

Hearing dates: 9 September 2022

Date of orders: 26 October 2022

Decision date: 26 October 2022

Before: Macfarlan JA at [1]

Gleeson JA at [2]

Griffiths AJA at [3]

Decision: (1) The applicant has leave to appeal.

(2) The appeal is allowed.

(3) The judgment and orders dated 16 December 2021 are set aside, save for order 1.

(4) Leave is granted to the applicant to commence proceedings in the District Court of NSW pursuant to s 109(1) of the Motor Accidents Compensation Act 1999 (NSW).

(5) The respondent pay the applicant's costs of and incidental to the appeal and of the proceedings below.

(6) The notice of contention filed on 11 April 2022 is dismissed.

Catchwords: LIMITATION OF ACTIONS – Motor accidents – Failure to commence proceedings within three years of accident – Requirements of leave under Motor Accidents Compensation Act 1999 (NSW) ss 66(2) and 109(3)(a) – Whether a "full and satisfactory" explanation for delay – Whether evidence required by each of the applicant's former legal advisors to constitute a full and satisfactory explanation for delay

Legislation Cited: District Court Act 1973 (NSW)

Motor Accidents Compensation Act 1999 (NSW)

Personal Injury Commission Act 2020 (NSW)

Supreme Court Act 1970 (NSW)

Cases Cited: *Dijakovic v Perez* [2015] NSWCA 174; (2015) 71 MVR 334*House v The King* (1936) 55 CLR 499; [1936] HCA 40*Hunter v Roberts* [2019] NSWCA 116; (2019) 88 MVR 456*Karambelas v Zaknic (No 2)* [2014] NSWCA 433; (2014) 69 MVR 127*Nominal Defendant v Browne* [2013] NSWCA 19; (2013) 64 MVR 214

Rahman v Al-Maharmeh [2021] NSWCA 31; (2021) 95 MVR 394

Walker v Howard (2009) 78 NSWLR 161; [2009] NSWCA 408

Category: Principal judgment

Parties: Annemie Nathalie Stein (Applicant)

Sten Patrick Ryden (Respondent)

Representation: Counsel:

B Kelleher SC, B Jones (Applicant)

J Turnbull SC, J Sleight (Respondent)

Solicitors:

Stacks Goudkamp (Applicant)

Carroll & O'Dea Lawyers (Respondent)

File Number(s): 2021/00360651

2022/00269744

Publication restriction: Nil

Decision under appeal Court or tribunal: District Court of NSW

Jurisdiction: Civil

Citation: NA

Date of Decision: 16 December 2021

Before: Kearns ADCJ

File Number(s): 2021/00249676

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The applicant, Ms Stein, was injured in a motor vehicle accident on 7 February 2014. The respondent's compulsory third-party insurer admitted liability for the accident. Ms Stein approached Stacks Goudkamp for legal advice on 21 May 2014. A claim was lodged with the Claims Assessment and Resolution Service (CARS) on 2 September 2020.

The CARS was replaced by the Personal Injury Commission (PIC) on 1 March 2021. The PIC did not have jurisdiction to determine Ms Stein's claim because it related to residents of two different States and therefore involved federal jurisdiction. Accordingly, it became necessary for Ms Stein to commence proceedings in the District Court.

Pursuant to s 109(1) of the Motor Accidents Compensation Act 1999 (NSW) (MACA), proceedings must not be commenced more than three years after the date of the accident without leave of the Court. Pursuant to s 109(3)(a), the Court must not grant leave unless the claimant has provided "a full and satisfactory explanation ... for the delay". In this case, Ms Stein gave unchallenged evidence, which was accepted by the primary judge, to the effect that she was unaware of the relevant limitation period until early May 2021. An amended summons seeking leave was then filed on 21 September 2021. The primary judge found, however, that her explanation was neither full nor satisfactory because only one of the several solicitors who had carriage of her matter in the preceding years gave evidence stating that no advice had been given to Ms Stein in respect of the limitation period. Ms Stein appealed from that decision. The respondent filed a notice of contention submitting that the primary judge's decision should be affirmed on the basis that the primary judge

ought to have found, in the alternative, that Ms Stein's explanation was neither full nor satisfactory as she did not give evidence that she was not told by her solicitors of the requirements of the MACA, in particular the time limitations imposed by it. The Court held (Griffiths AJA, Macfarlan and Gleeson JJA agreeing), granting leave to appeal, allowing the appeal and dismissing the notice of contention: The primary judge erred in finding that the lack of direct evidence from the solicitors who had carriage of the applicant's matter was fatal to her application for leave: [41]. The applicant's explanation for the delay was the central focus of the inquiry and the applicant gave unchallenged evidence that she had no knowledge or awareness at any relevant time of limitation period requirements and that she relied upon her solicitors to progress her claim: [39], [45]. It was unnecessary in the particular circumstances of this case for the applicant to adduce further evidence from individual solicitors who had carriage of her matter in order for her to comply with the statutory requirement that she provide a "full and satisfactory explanation" for the delay. Her explanation was sufficiently full to enable an evaluation to be made of whether it was satisfactory in the sense that a reasonable person in the position of the applicant (ie one who had no knowledge of the limitation periods) would have been justified in experiencing the same delay: [40].

JUDGMENT

1. MACFARLAN JA: I agree with Griffiths AJA.
2. GLEESON JA: I agree with Griffiths AJA.
3. GRIFFITHS AJA: The applicant seeks leave to appeal from the judgment and orders made in the District Court: *Stein v Ryden* (District Court (NSW), Kearns ADCJ, 16 December 2021). The primary judge refused the applicant leave to commence proceedings out of time under s 109 of the Motor Accidents Compensation Act 1999 (NSW) (MACA).
4. It was common ground that the applicant required leave to appeal because the decision below is an interlocutory decision (see Supreme Court Act 1970 (NSW) s 101(2)(e)). Leave was granted to file a summons seeking leave to appeal in court on 9 September 2022. The parties agreed that the application for leave to appeal and the appeal should be heard concurrently. The respondent opposed the grant of leave to appeal and relied upon a notice of contention.
5. For the following reasons, leave to appeal should be granted, the appeal allowed and the notice of contention dismissed. For convenience, I will continue to use the term "the applicant" throughout these reasons for judgment.
6. I will first summarise the background facts and the primary judge's reasons for judgment.

Summary of background facts

1. The applicant was involved in a motor vehicle accident on 7 February 2014. The Victorian Transport Accident Commission (the compulsory third-party insurer of the respondent's vehicle) admitted liability for the accident.

2. On 2 September 2020, an application for general assessment was lodged with the Claims Assessment and Resolution Service (CARS). As long as the claim was duly made, there was no time limit for lodging such a claim with the CARS. On 1 March 2021, the Personal Injury Commission (PIC) replaced the CARS. The PIC lacked jurisdiction to determine the applicant's claim as it involved residents of different States, the applicant being a resident of NSW and the respondent's insurer being a resident of Victoria (noting that a claim of the kind in question is made by giving notice of the claim to the other party's third-party insurer, not the driver of the car involved in the accident: MACA s 72(2)(a)). Thus the matter involved federal jurisdiction. It was therefore necessary for the applicant to commence proceedings in the District Court. Under s 26 of the Personal Injury Commission Act 2020 (NSW), a person with standing to apply to the President of the PIC or the PIC concerning a compensation claim may, with the leave of the District Court, make an application to the District Court instead of the President or the PIC. Leave to commence the District Court proceedings was also required by s 109(1) of the MACA because the proceedings were being commenced more than three years after the accident.

3. The relevant terms of s 109 are (emphasis added):

109 Time limitations on commencement of court proceedings (cf s 52 MAA)

- (1) A claimant is not entitled to commence proceedings in respect of a claim more than 3 years after—
 - (a) the date of the motor accident to which the claim relates, or
 - (b) if the claim is made in respect of the death of a person—the date of death,

except with the leave of the court in which the proceedings are to be taken.

- (2) Time does not run for the purposes of this section from the time that a claim has been referred to the Commission for assessment and until 2 months after a certificate as to the assessment or exemption from assessment is issued.

- (3) The leave of the court must not be granted unless—

- (a) the claimant provides a full and satisfactory explanation to the court for the delay, and
- (b) the total damages of all kinds likely to be awarded to the claimant if the claim succeeds are not less than 25% of the maximum amount that may be awarded for non-economic loss under section 134 as at the date of the relevant motor accident.

...

1. Section 109 is in Chapter 4 of the MACA. Sub-section 66(2) of that Act defines what is meant by the expression "a full and satisfactory explanation by a claimant ... for delay" (emphasis added):

66 Definitions (cf s 40 MAA)

...

- (2) In this Chapter, a reference to a full and satisfactory explanation by a claimant for non-compliance with a duty or for delay is a reference to a full account of the conduct, including the actions, knowledge and belief of the claimant, from the date of the accident until the date of providing the explanation. The explanation is not a satisfactory explanation unless a reasonable person in the position of the claimant would have failed to have complied with the duty or would have been justified in experiencing the same delay.
1. On 21 September 2021, the applicant filed an amended summons seeking leave in the District Court to commence a proceeding pursuant to s 26(3) of the Personal Injury Commission Act and an extension of time as required by s 109 of the MACA. The respondent opposed time being extended under s 109.
2. In support of her applications for leave in the District Court, the applicant relied on an affidavit affirmed by her on 3 November 2021. The affidavit formed part of the material relied on by the applicant in seeking to address the statutory requirement that she provide a "full and satisfactory explanation" for the delay. The key relevant parts of this affidavit may be summarised as follows:
 1. On 21 May 2014, the applicant had spoken with Ms Julie Mahony (special counsel at Stacks Goudkamp) to seek advice relating to the accident. The applicant said that, prior to contacting Ms Mahony, she had not needed to seek advice in relation to any compensation claim for injuries.
 2. The applicant deposed that, as at 21 May 2014, she was unaware of the provisions of the MACA or of any time limits imposed by that Act.
 3. The applicant summarised various steps taken by her relating to her claim from May 2014, including attending various conferences with her legal advisors (both solicitors and counsel) and various medical specialists.
 4. At [22] and [23] of the affidavit, the applicant deposed to attending a meeting on 7 November 2018, organised by Stacks Goudkamp, with Mr Andrew Campbell of counsel and Ms Jayne O'Sullivan (a solicitor employed by Stacks Goudkamp). She deposed that she was not informed at that conference that a claim had to be lodged with the CARS within three years of the date of the accident. (It may be interpolated here that the effect of s 109(2) of the MACA is that time does not run for the purposes of the limitation period to commence court proceedings identified in s 109(1) from the time that a claim has been referred to the CARS for assessment and until 2 months after a certificate of assessment or an exemption from assessment is issued – see [9] above).

5. At [24] and [25], the applicant described a further conference with Mr Campbell on 5 September 2019 (also attended by Mr Alexander Hairs, another solicitor employed by Stacks Goudkamp) and that Mr Campbell did not inform her at this conference that her claim had to be lodged with the CARS within three years of the date of the accident.
6. At [26] and [27], the applicant described a third conference with Mr Campbell and Mr Hairs on 13 November 2019. She said that Mr Campbell did not provide her with advice that any application to the CARS needed to be lodged within three years of the date of the accident.
7. She deposed that it was not until she received a letter dated 7 May 2021 from Mr Hairs that she learned that she needed to commence proceedings in the District Court. She said that, in that letter, she was told:
 1. the PIC had been established;
 2. an application for general assessment had been lodged with the CARS on 2 September 2020;
 3. the PIC advised that it did not have jurisdiction to decide her claim;
 4. Stacks Goudkamp agreed with that position; and
 5. her claim would have to be determined by the District Court.
1. At [32] of her affidavit, the applicant deposed that she "was still unaware that court proceedings needed to be commenced within three years of the date of the accident". It may be interpolated that this statement was made immediately after a reference in the applicant's affidavit to her having received the letter dated 7 May 2021 from Mr Hairs. Presumably, therefore, the reference in [32] of the affidavit to her state of mind and being unaware of the three year time period refers to her state of mind as at that date.
2. She said that she relied on her solicitors to manage her claim and that she did not personally research the claims process because she had solicitors.
 1. Significantly, the applicant was not cross-examined on this affidavit.
 2. In support of her applications in the District Court, the applicant also relied upon five affidavits affirmed by Mr Thomas Goudkamp, the managing director of Stacks Goudkamp and the solicitor on the record for the applicant. Mr Goudkamp's affidavits were dated 28 October 2021, 4 November 2021, 15 November 2021, 22 November 2021 and 23 November 2021. In his first affidavit (dated 28 October 2021), Mr Goudkamp described the legal work done by his firm for the applicant from 21 May 2014 onwards. It is evident that, although Mr Goudkamp was the solicitor on the record for the applicant, several solicitors employed by Stacks Goudkamp had carriage of the matter at various times. Those solicitors were Ms Julie Mahony (special counsel), Ms Jayne O'Sullivan (solicitor), Mr Alexander Hairs (solicitor), Ms Vladana Vracar (solicitor) and Ms Karina Goodall (paralegal).

3. In his fourth affidavit (dated 22 November 2021), Mr Goudkamp deposed that, apart from Ms Goodall, all the other employed practitioners of Stacks Goudkamp who had earlier worked on the applicant's matter were no longer employed by the firm.
4. In his fourth affidavit, Mr Goudkamp also deposed that, on 22 November 2021, he had reviewed the applicant's physical file maintained by the firm and that he found that:
 1. no advice had been given to the applicant that her claim must be lodged with the CARS within three years of the accident; and
 2. there was no indication on the file that Mr Campbell had advised the applicant that her claim must be lodged with the CARS within three years of the date of the accident.
1. On the appeal, the Court was informed by Mr Turnbull SC (who appeared for the respondent) that these aspects of Mr Goudkamp's evidence were admitted into evidence on the limited basis that the "advice" in question was limited to written advice only.
2. In his fifth affidavit (dated 23 November 2021), Mr Goudkamp again deposed that, on his review of the applicant's file, the applicant was never advised of the three year limitation period under the MACA, nor given any advice in relation to any limitation periods including the limitation period specified in s 109 of the MACA apart from the fact that the claim has to be lodged within six months of the date of the accident. This evidence was admitted subject to the same limitation as noted above, namely that the "advice" was limited to written advice only.
3. Mr Goudkamp was not cross-examined.

Primary judge's reasons summarised

1. The primary judge noted that, for the applicant to be granted leave to commence proceedings in the District Court outside the three year time period as required by s 109(1) of the MACA, the applicant needed to provide a full and satisfactory explanation for the delay as well as establish that her likely total damages would be not less than 25% of the maximum amount that may be awarded for non-economic loss as at the date of the accident.
2. On the first of those matters, the primary judge set out a detailed chronology of events, largely relying upon Mr Goudkamp's first affidavit.
3. Importantly, the primary judge made an express finding at page 4 that, at all relevant times, the applicant was personally unaware of the provisions of the MACA, including any time limits. His Honour then added that the applicant said that she was not given any advice about this by her solicitors or counsel and that she relied upon her solicitors to look after her claim and protect her interests. As will be developed below (see [46]ff), the primary judge erred in stating that the applicant said that she was not given any advice about time limitations by her solicitors. Her affidavit did not address that issue.

4. The primary judge noted Mr Goudkamp's explanation as to why the proceedings had not been commenced in time. Mr Goudkamp said that, in cases where insurers had admitted liability (such as here), there was a practice of not lodging a claim with the CARS within three years of the accident (nor commencing proceedings in the District Court within that time), because "more often than not CARS' assessors made the correct decision and claimants accepted it".
5. Critically, on the requirement that there be a full and satisfactory explanation for the delay, the primary judge concluded that there was no such explanation because of the absence of evidence from any of the applicant's solicitors apart from Mr Goudkamp. His Honour added that if it were the fact that no one had said anything to the applicant about time limitations, "that is something that could have been said by each of [the solicitors who had worked on the matter] in an affidavit". His Honour added that there was a need to explain why the applicant was in "a state of ignorance" about the time limitation, particularly where she was being advised by solicitors who were experts and specialists in personal injury law.
6. Although the primary judge acknowledged that Mr Goudkamp's evidence got the applicant "part way", his Honour regarded it as inadequate because it did not cover what the applicant had been told or not told by the various other solicitors who had worked on her matter.
7. The primary judge concluded that the explanation was not "full", because the file maintained by Stacks Goudkamp was not "the sole repository of evidence of what was said to the [applicant]": there were also telephone conversations and face to face meetings between the applicant and the named solicitors at the firm. His Honour then explained why he did not regard the explanation as "satisfactory". He said that it was correct for Mr Goudkamp to have provided evidence of the contents of the applicant's file (without waiving privilege), but his Honour added that the file was not the only thing that helped explain the applicant's state of mind or what she was told or not told by others, especially her solicitors.
8. His Honour concluded that it was not "satisfactory" to seek to explain the applicant's state of mind by providing evidence of what was written by her solicitors and not what was told to her.
9. Although strictly unnecessary to do so, the primary judge considered the second limb of the test in s 109(3) of the MACA, namely whether the total damages likely to have been awarded to the applicant if the claim succeeded was not less than 25% of the maximum amount that could be awarded for non-economic loss as at the date of the accident. His Honour found in the applicant's favour on this criterion.

The application for leave to appeal

1. The draft notice of appeal identified the following alleged errors:

1. His Honour erred in finding that appellant's explanation for the delay in commencing proceedings with reference to s109 of the Motor Accidents Compensation Act (NSW) was not full in that:
 - i. His Honour erroneously found that evidence was required from Ms Mahony, Ms O'Sullivan, Mr Hares (sic), Ms Varacar (sic) and Ms Goodall, who had all been involved in the conduct of the appellant's case at one stage or another, in order for the explanation to be full, despite the appellant giving evidence, which was accepted and not challenged, that she had never been given any advice about the timeframe imposed by s109 of the Motor Accidents Compensation Act 1999 (NSW).
 - ii. His Honour adopted the wrong legal test in applying s109 of the Motor Accidents Compensation Act 1999 (NSW) by finding that evidence was required from Ms Mahony, Ms O'Sullivan, Mr Hares (sic), Ms Varacar (sic) and Ms Goodall, who had all been involved in the conduct of the appellant's case at one stage or another, in order for the explanation to be full, despite the appellant giving evidence, which was accepted and not challenged, that she had never been given any advice about the timeframe imposed by s109 of the Motor Accidents Compensation Act 1999 (NSW).
 - iii. His Honour erred in finding that in the circumstances of the case, and based on the evidence adduced, that evidence beyond what the appellant was told about the timeframe imposed by s109 of the Motor Accidents Compensation Act 1999 (NSW) was required in order for the explanation to be full.
2. His Honour erred in finding that the explanation provided by the appellant for the delay in commencing proceedings was not satisfactory in circumstances where his Honour found that:
 - i. At all relevant times the appellant was unaware of the provisions of the Motor Accidents Compensation Act 1999 (NSW) and any time limits imposed by it.
 - ii. The appellant was not given any advice about time limits by her solicitors and counsel.
 - iii. The appellant relied on her solicitors to look after her claim and protect her interests.
 - iv. In relying upon her solicitors to look after her claim and protect her interests, the appellant adopted a reasonable position.
 - v. The appellant left the prosecution of her claim in the hands of her expert lawyers, and it was reasonable for her to rely upon them.
 - vi. The appellant could not be responsible for the unnecessary delays on the part of her lawyers, and such delays could not be attributed to her.
 - vii. The appellant gave unchallenged evidence that she had never been given any advice about timeframes imposed by the Motor Accidents Compensation Act 1999.

3. His Honour erred in finding that the appellant had not provided a satisfactory explanation for the delay in that:
 - i. His Honour applied the wrong legal test.
 - ii. His Honour failed to consider whether a reasonable person in the position of the appellant would have been justified in experiencing the same delay;
 - iii. His Honour found that it was necessary to adduce evidence from the appellant's previous solicitors to explain the appellant's state of mind, in circumstances where the appellant had given unchallenged evidence that she had never been given any advice about timeframes imposed by the Motor Accidents Compensation Act 1999 (NSW).
1. The applicant submitted that leave should be granted. The applicant contended that, having accepted the applicant's unchallenged evidence that she was unaware at all relevant times of the provisions of the MACA, including any time limits, the primary judge erred in requiring evidence to be given by solicitors who had worked on the applicant's matter, apart from Mr Goudkamp. The applicant contended that the case raised an issue of important principle because the primary judge's approach was inconsistent with authorities, particularly *Rahman v Al-Maharmeh* [2021] NSWCA 31; (2021) 95 MVR 394 and *Djakovic v Perez* [2015] NSWCA 174; (2015) 71 MVR 334 (and other authorities referred to therein).
2. For reasons which will be elaborated upon later in these reasons for judgment, there is substance in that contention. It is appropriate for the applicant to have leave to appeal. Resolution of the appeal does not require the development of any new principle. Rather, it turns on the application to the particular circumstances here of the relevant statutory provisions and some related settled principles.

The appeal

1. To avoid adding unnecessarily to the length of these reasons, I will not separately summarise the parties' submissions on the appeal. Their primary submissions will be addressed in explaining why I consider that the appeal should be allowed.
2. It is desirable first to summarise the relevant significance of *Djakovic* and *Rahman* respectively. *Djakovic* involved an appeal from a decision of the District Court refusing to grant the applicant leave to commence the proceeding. Leave was refused in respect of both limbs of s 109(3) of the MACA. The terms of those provisions are set out at [9] above. The appeal was allowed. In the primary judgment, Gleeson JA (Leeming and McCallum JJA agreeing) stated at [7] that "evaluative judgments" were involved in determining whether either or both of the limbs in s 109(3) were satisfied. Although his Honour noted that differing views had been expressed as to whether the satisfaction of those conditions is truly a discretionary decision in the sense discussed in *House v The King* (1936) 55 CLR 499; [1936] HCA 40, his Honour proceeded on the basis that the applicant needed to satisfy the well-known criteria in *House v The King*.

3. Gleeson JA discussed the expression "full and satisfactory explanation" at [15] to [19] with reference to *Karambelas v Zaknic* (No 2) [2014] NSWCA 433; (2014) 69 MVR 127 at [16] per Meagher JA (Basten and Simpson JJA agreeing). His Honour identified the following two requirements for an explanation to be "full and satisfactory":
 1. The explanation must provide a full account of the conduct, including the actions, knowledge and belief of the claimant, from the date of the accident until the date of providing the explanation. The purpose of the requirement that the explanation be full was explained by his Honour at [17]:

The purpose of the requirement that the explanation be full, and the necessity to set out fully "the conduct, including the actions, knowledge and belief of the claimant", is so that the Court can evaluate all of the reasons for the delay and decide whether they are full and satisfactory: *Mancini v Thompson* [2002] NSWCA 38 at [46]. It is for this reason that it has been said that the applicant for leave cannot "pick and choose" the information to be given relevant to the delay and which the Court has to decide is "satisfactory": *Mancini v Thompson* at [46].

1. The explanation must be such that a reasonable person in the position of the claimant "would have been justified in experiencing the same delay".
1. Gleeson JA said at [19] that the concept of a satisfactory explanation within the meaning of s 66(2) "requires the making of an evaluative judgment or assessment as to whether, by reference to an objective standard and given the claimant's position, the delay which has occurred was reasonably justifiable".
2. Turning now to *Rahman*, this was another appeal from a decision of the District Court refusing to grant leave to commence proceedings out of time on the basis that the Court found that neither of the limbs in s 109(3) of the MACA was satisfied. Leave to appeal was granted and the appeal was allowed. The primary judgment was given by Brereton JA (with whom Meagher and Leeming JJA agreed). In this case, a claim had been lodged with the CARS and an assessment issued on 14 December 2018. The appellant had two months to commence proceedings if she elected not to accept the assessment. Approximately a week after receiving the assessment, the appellant gave written instructions to her solicitors to reject the CARS assessment and commence proceedings. The employed solicitor handling the matter left the firm around this time, without commencing proceedings. The employed solicitor who took over carriage of the appellant's matter did not commence proceedings within time. The proceedings were ultimately commenced approximately four months after the limitation period expired.
3. On appeal, Brereton JA said at [39] that it was settled that the reference to a "full account of the conduct" in s 66(2) of the MACA is not confined to the conduct of the claimant personally but extends to the conduct of persons who have acted or purported to act on the claimant's behalf. Significantly, however, with reference to the issue of delay, this did not mean that the explanation was required to include "the actions, knowledge and belief" of any solicitors who acted for the claimant, as opposed to the claimant herself. It is the claimant who is

obliged to provide the explanation for the delay in commencing proceedings (citing *Walker v Howard* (2009) 78 NSWLR 161; [2009] NSWCA 408 at [55] and [56]). Brereton JA added at [41] that evidence as to why the claimant's solicitors failed to implement her instructions to commence proceedings was not required for a full and satisfactory explanation to be given for the delay. This was because the information was beyond her personal control and knowledge and, while her account of the conduct for the relevant period was required to cover the relevant conduct of her solicitors, that requirement did not extend to including the "actions, knowledge and belief" of her solicitors. His Honour added at [42] that "[a] more elaborate explanation of why the solicitors failed to act would not have contributed to an evaluation of whether or not the appellant's explanation was a satisfactory one".

4. As to the requirement that the explanation not only be "full", but also be "satisfactory", Brereton JA stated at [43] that it was sufficient that some reasonable claimants in the claimant's position would have experienced the same delay as the claimant (citing *Hunter v Roberts* [2019] NSWCA 116; (2019) 88 MVR 456 at [18] per Meagher JA; Brereton JA and Simpson AJA agreeing).
5. Applying the relevant principles to the circumstances here, with particular emphasis on the fact that it is the applicant's explanation for the delay which is the central focus, the primary judge found, consistently with her unchallenged evidence, that she was not aware of any relevant time limitations and that she relied upon her solicitors to progress her claim.
6. Having regard to this unchallenged evidence by the applicant below as to her state of mind, it was unnecessary for the applicant to adduce further evidence from individual solicitors who had carriage of her matter in order for her to comply with the statutory requirement that she provide a "full and satisfactory explanation" for the delay. Consistently with *Walker*, the requirement that the claimant provide a full and satisfactory explanation for the delay requires that evidence be adduced as to "the acts and omissions of all relevant persons", but fulfilment of that requirement will turn heavily on the particular circumstances of the case. As noted above, in *Rahman*, it was made clear at [42] that a more elaborate explanation of why the appellant's solicitors in that case had failed to carry out her instructions would not have contributed to an evaluation of whether or not the appellant's explanation was a satisfactory one. That is also the case here. The applicant gave unchallenged evidence, which was accepted by the primary judge, that she was entirely unaware at all relevant times of any limitation requirements. Her explanation was sufficiently full to enable an evaluation to be made of whether it was satisfactory in the sense that a reasonable person in the position of the applicant (ie one who had no knowledge of the limitation periods) would have been justified in experiencing the same delay.
7. In the particular circumstances of this case, the primary judge erred in finding that the lack of direct evidence from the solicitors who had carriage of the applicant's matter was fatal to her application for leave.

8. The respondent relied upon this Court's decision in *Nominal Defendant v Browne* [2013] NSWCA 197; (2013) 64 MVR 214 and, in particular, Basten JA's statement at [24] to the effect that, in determining whether an explanation is "satisfactory" there may be a "need to look to the actions of persons other than the claimant where those actions may form part of the position or circumstances of the claimant".
9. This statement must be read in the context of the circumstances of that case. The respondent there commenced a proceeding against the Nominal Defendant in circumstances where she claimed that she had been injured when she stepped backwards into a drain in order to avoid an unidentified vehicle. The issue was whether the respondent had provided a full and satisfactory explanation for her failure to make a claim within six months of the date of the accident, as required by s 72 of the MACA. The respondent's explanation for the delay was that she did not realise that she had a claim against the driver or owner of the motor vehicle which caused her to step backwards until she was so advised by her lawyers in or about February 2011. Having retained solicitors to act for her on the matter on 17 April 2009, a question arose as to whether her lawyer's failure to advise her for a period of approximately 20 months that she could make a motor accident compensation claim was relevant to the question whether there was any unreasonable conduct on her part.
10. It was in those circumstances that Basten JA said at [25]:

Whether the partly objective test of satisfactoriness was satisfied will depend to a large extent on precisely what the claimant told her lawyers in April 2009, what advice they gave her and what instruction she gave, based on the advice. For example, it could make a great deal of difference to the outcome if her account to them failed to suggest a plausible claim against the Nominal Defendant in the minds of either a solicitor or senior counsel experienced in personal injury matters. Alternatively, if her instructions had been such that senior counsel advised that steps should be taken to pursue a motor accident claim, but that was not done, a different issue would arise. It is precisely for these reasons that the Act requires a "full" explanation. The explanation given in the present case was patently not "full" and the section was therefore not satisfied. The Court should therefore not have been affirmatively satisfied under s 73(7) as to the completeness of the explanation and was therefore obliged to dismiss the proceedings.

1. In contrast to the position here, the claimant in *Browne* acknowledged that she had attended a conference with senior counsel on two occasions but could not recall anything which was said (see at [22]). It was in those circumstances that Basten JA said that it would be expected that both solicitors and counsel would have made some note of the instructions given by the claimant and the advice given to her. Although the plaintiff's lack of recollection was described as "understandable", his Honour found that her explanation was not "full" in the absence of any attempt to obtain further information from her own solicitors and counsel (at [23]). *Browne* is distinguishable on its facts. In this case, the applicant's evidence was not that she was unable to remember what legal advice she was given. Rather, her unchallenged evidence was that she simply had no knowledge or awareness at any relevant time of limitation period requirements.

Notice of contention

1. The respondent filed a notice of contention on 11 April 2022. That notice of contention claims that the primary judge ought to have found, in the alternative, that the applicant's explanation for the delay was neither full nor satisfactory as she did not give evidence that she was not advised by her solicitors of the time limits imposed by the MACA. The basis for this claim is the primary judge's error in stating on page 6 of his Honour's reasons for judgment that the applicant "says that she was not given any advice about this by her solicitors or counsel" (see [22] above).
2. It is common ground that that is an inaccurate description of the applicant's evidence. As noted above, in paragraphs [23], [25] and [27] of her affidavit dated 3 November 2021, the applicant deposed that Mr Campbell had not advised her of the three year time limit for lodging an application with the CARS. She did not state that her solicitors had not given her any such advice. The respondent contended that the primary judge's mistake served to underline the need for the solicitors to have given evidence as to what he or she told the applicant about the time limitation.
3. This contention should not be accepted. In her affidavit below, the then applicant gave unequivocal evidence that at the time when she sought legal advice in May 2014 and until she was told in early May 2021 that she needed to commence proceedings in the District Court, she was unaware of the relevant limitation period. Accordingly, the applicant gave direct and unqualified evidence as to her state of mind at the relevant times. It is necessarily implicit in her evidence that she had not been told by any of her legal advisors about the time limitation period.
4. I have explained above why the circumstances here are quite different from those in Browne. The circumstances are also quite different from those in Walker where the claimant was brain damaged and incapacitated by his injuries, and the proceedings were brought by a tutor. In particular, in the rather unusual circumstances of that particular case, it is understandable that the Court held that the scope of an explanation for delay is not restricted to the conduct of the claimant personally without regard to those who have acted or purported to act on his or her behalf.

Conclusion

1. It is common ground that, if the appeal is allowed, order 1 made by the primary judge on 16 December 2021 should stand. Under that order, leave was granted to the plaintiff to commence proceedings in the District Court pursuant to s 26(3) of the Personal Injury Commission Act.
2. For the reasons given above, leave to appeal should be granted and the appeal allowed, with costs. The notice of contention should be dismissed.
3. The formal orders should be:

1. The applicant has leave to appeal.
2. The appeal is allowed.
3. The judgment and orders dated 16 December 2021 are set aside, save for order 1.
4. Leave is granted to the applicant to commence proceedings in the District Court of NSW pursuant to s 109(1) of the Motor Accidents Compensation Act 1999 (NSW).
5. The respondent pay the applicant's costs of and incidental to the appeal and of the proceedings below.
6. The notice of contention filed on 11 April 2022 is dismissed.

Amendments

28 October 2022 - Misspelling of surname of junior counsel for the respondent corrected

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Decision last updated: 28 October 2022

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