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| PARTIES: | Ceric<br><br>v<br><br>C E Heath Underwriting and Insurance (Australia) Pty Ltd |
| TITLE OF COURT: | Court of Appeal |
| JURISDICTION: | Appeals from Supreme Court |
| FILE NOS: | No. AP16 of 1993 |
| DELIVERED: | Darwin 27 October 1994 |
| HEARING DATES: | 27 and 28 September 1994 |
| JUDGMENT OF: | Gallop ACJ, Angel J and Morling AJ |

**CATCHWORDS:**

Statutes - interpretation - whether court has power to make an order nunc pro tunc where an action has been commenced without leave as required by s27(3) Law Reform (Miscellaneous Provisions) Act NT

*National Mutual Fire Insurance Co Ltd v Commonwealth of Australia* (1981) 1 NSWLR 400, doubted

*Dixon v Royal Insurance Australia Ltd & Ors* (1991) 124 ACTR 1, considered

*Re Testro Bros Consolidated Ltd* (1965) VR 18, considered

*Hatton v Beaumont & Ors* (1978) 52 ALJR 589, distinguished

*Smart v Stuart* (1992) 83 NTR 1, followed

Statutes - interpretation - Law Reform (Miscellaneous Provisions) Act NT - s27 - whether the cause of action given to a person is, for limitation purposes, complete before the time when the leave of the court to bring proceedings is granted

*Cambridge Credit Corporation v Lissenden* (1987) 8 NSWLR 411, considered
*Ratcliffe v V S & B Border Homes Ltd* (1987) 9 NSWLR 390, considered
*Grimson v Aviation and General (Underwriting) Agent Pty Ltd* (1991) 25 NSWLR 422, considered
*NSW Medical Defence Union Ltd v Crawford* (1993) 31 NSWLR 469, followed
*NSW Medical Defence Union Ltd v Crawford (No 2)* unreported decision of the NSW Court of Appeal delivered 30 June 1994, considered

**REPRESENTATION:**

*Counsel:*

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Respondent: T Riley QC

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Appellant: Waters James McCormack
Respondent: Ward Keller

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**IN THE COURT OF APPEAL OF THE**

**NORTHERN TERRITORY**

**OF AUSTRALIA**

**AT DARWIN**

No. AP16 of 1993

ON APPEAL from the Judgment of Justice Mildren, in proceedings numbers 108 of 1992 and 102 of 1993

BETWEEN:

VASILJ CERIC

Appellant

AND:

C.E. HEATH UNDERWRITING AND INSURANCE (AUSTRALIA) PTY LIMITED

Respondent

CORAM: Gallop ACJ, Angel J and Morling AJ

REASONS FOR JUDGMENT

(delivered 27 October 1994)

**GALLOP ACJ and MORLING AJ:**

This is an appeal by an unsuccessful applicant/ plaintiff ("the appellant") for leave to commence proceedings against the defendant ("the respondent") pursuant to s.27 of the **Law Reform (Miscellaneous Provisions) Act**, ("the Act") or alternatively for leave to proceed with Action No. 108 of 1992 ("the 1992 action") nunc pro tunc.

The appellant was injured at work on 28 September 1982. On 6 December 1982 he issued a writ of summons (Action No. 584 of 1982) ("the 1982 action") claiming damages at common law against Formstruct (NT) Pty Ltd ("Formstruct") in respect of injuries allegedly sustained by him on 28 September 1982 in the course of his employment with Formstruct.

On 10 October 1985 Formstruct went into liquidation. On 23 January 1987 the appellant obtained an award of workers' compensation against Formstruct in the sum of $268,526.15. Subsequently the appellant sued the respondent, as Formstruct's workers' compensation insurer, pursuant to s.18A of the former **Workers' Compensation Act** in order to recover the amount of the award, and on 19 June 1987 the Supreme Court ordered that the respondent pay to the plaintiff the amount of the workers' compensation award plus costs. Those sums were paid by the respondent to or on behalf of the appellant in July and August 1987.

On 5 May 1989 the appellant obtained interlocutory judgment for $600,000 against Formstruct in default of defence in the 1982 action, that being the amount of the assessed damages.

On 30 April 1992 the appellant commenced proceedings by writ of summons against the respondent (the 1992 action) seeking to enforce the statutory charge created by s.27(1) of

the Act to the extent of the unsatisfied liability of Formstruct to the appellant in the 1982 action. The 1992 action was commenced without the leave of the Court as required by s.27(3) of the Act.

On 16 June 1992 the respondent filed and served an unconditional appearance to the writ of summons in the 1992 action. It subsequently pleaded by its defence, inter alia, that the 1992 action was not able to be maintained as leave had not been granted and that, in any event, the appellant's claim was statute barred. On 12 August 1992 the respondent applied to strike out the 1992 action, or alternatively for summary judgment. After a number of adjournments that application came on for hearing before Mildren J. on 13 April 1993, together with an application filed by the appellant in the 1992 action for leave to proceed in the 1992 action nunc pro tunc.

On 16 June 1993 the appellant applied by originating motion for leave to commence fresh proceedings against the respondent pursuant to s.27 of the Act, at the same time seeking to rely upon the summons in the 1992 action for leave nunc pro tunc. Because of an objection taken by counsel for the respondent, the appellant was granted leave to amend the originating motion to seek the relief in the alternative. As previously stated, on 21 October 1993 Mildren J. dismissed the appellant's application for leave to commence proceedings against the respondent pursuant to s.27(1) of the Act and the

appellant's alternative application for leave to proceed with the 1992 action nunc pro tunc.

The relevant provisions of the Act are set out below. There are comparable provisions in other Australian jurisdictions, in particular New South Wales and the Australian Capital Territory.

"PART VIII - ATTACHMENT OF INSURANCE MONEYS

26. AMOUNT OF LIABILITY TO BE CHARGE ON INSURANCE MONEYS PAYABLE AGAINST THAT LIABILITY

(1) If a person (in this Part referred to as 'the insured') has, whether before or after the commencement of this Ordinance, entered into a contract of insurance by which he is indemnified against liability to pay any damages or compensation, the amount of his liability is, on the happening of the event giving rise to the claim for damages or compensation, and notwithstanding that the amount of the liability may not then have been determined, a charge on all insurance moneys that are or may become payable in respect of that liability.

(2) If, on the happening of the event giving rise to the claim for damages or compensation, the insured (being a corporation) is being wound up, or if any subsequent winding-up of the insured (being a corporation) is deemed to have commenced not later than the happening of that event, the provisions of subsection (1) apply notwithstanding the winding-up.

(3) Every charge created by this section has priority over all other charges affecting the insurance moneys, and where the same insurance moneys are subject to 2 or more charges by virtue of this section those charges have priority between themselves in the order of the dates of the events out of which the liability arose, or, if the charges arise out of events happening on the same date, they rank equally between themselves.

27. ENFORCEMENT OF CHARGE

(1) Subject to subsection (2), a charge created by this Part is enforceable by way of an action against the insurer in the same way and in the same court as if the action were an action to recover damages or compensation from the insured.

(2) In respect of any such action and of the judgment given in any such action the parties have, to the extent of the charge, the same rights and liabilities, and the court has the same powers, as if the action were against the insured.

(3) Except where the provisions of subsection (2) of section 26 apply, no such action shall be commenced in any court except with the leave of that court, and leave shall not be granted where the court is satisfied that the insurer is entitled under the terms of the contract of insurance to disclaim liability, and that any proceedings, including arbitration proceedings, necessary to establish that the insurer is so entitled to disclaim have been taken.

(4) Such an action may be brought although judgment has been already recovered against the insured for damages or compensation in respect of the same matter.

28. PROTECTION OF INSURER

(1) Notwithstanding anything in this Part, a payment made by an insurer under the contract of insurance without actual notice of the existence of a charge under this Part is, to the extent of that payment, a valid discharge to the insurer.

(2) An insurer is not liable under this Part for any greater sum than that fixed by the contract of insurance between himself and the insured.

29. CERTAIN OTHER PROVISIONS NOT AFFECTED

Nothing in this Part affects the operation of any of the provisions of the Workmen's Compensation Ordinance or Part V of the Motor Vehicles Ordinance."

Before Mildren J. the respondent opposed the appellant's application for leave to commence proceedings against the respondent on the grounds that the appellant's action was barred by the **Limitation Act.** The respondent's contention was that time begins to run against a plaintiff who has the right to enforce the charge referred to in s.26(1) at the time when the plaintiff's cause of action against the tortfeasor begins to run and that the period of limitation is

the same as in the action against the tortfeasor. Thus, so it was argued, the relevant limitation being three years, the appellant's action against the respondent arising out of the appellant's injury at work on 28 September 1982 became statute barred on 29 September 1985. It was the appellant's contention that the period of limitation did not commence to run until leave to bring an action to enforce the charge was given pursuant to s.27(3) of the Act.

His Honour held that the amount of the liability of Formstruct to pay damages or compensation to the appellant was a charge on all insurance moneys payable in respect of that liability, but that the appellant's cause of action to enforce the charge became statute barred on 29 September 1985. His Honour then considered the appellant's application for an order nunc pro tunc in respect of the 1992 action which had been commenced without leave as required by s.27(3) of the Act. His Honour concluded that he had no power to make an order nunc pro tunc and dismissed the application.

It is from those decisions that the present appeal is brought.

The appellant contends that his cause of action against the respondent to enforce the charge is not maintainable until leave is given. Until such leave is given the cause of action is not complete and the appellant may not prosecute it in the courts. Hence, so he contends, time does not run against the appellant until leave is granted. Secondly, the appellant

contends that leave can be ordered nunc pro tunc. If such an order were made, the 1992 proceedings would not be statute barred as they would have been instituted within three years of the statutory charge on the insurance moneys payable by the respondent to Formstruct by reason of the interlocutory judgment which the appellant obtained against Formstruct on 5 May 1989.

Thus two questions arise for decision on the hearing of the appeal. The first question is whether the date from which time runs under the Limitation Act for the purpose of claims arising under the relevant legislation is the date of the occurrence which gives rise to the claim against the insured or is the date upon which leave to commence an action is granted under s27(3) of the Act. The second question is whether, assuming the first mentioned date is the date from which time runs, it was competent for Mildren J to make an order nunc pro tunc under s27(3) of the Act granting leave to proceed in the 1992 action.

The first question has been much agitated in recent years in the Supreme Court of New South Wales and the Court of Appeal of New South Wales. In *Cambridge Credit Corporation v Lissenden* (1987) 8 NSWLR 411, Clarke J (as he then was) held that the effect of s6(1) of the Law Reform (Miscellaneous Provisions Act) 1946 (NSW) (the equivalent of s27(1) of the Act) is to create a charge of uncertain amount upon insurance monies, which charge may be enforced in the manner set out in s6(4) of the New South Wales Act (the equivalent of s27(1)) of the Act).

His Honour further held that such a charge is created on the accrual of the cause of action against the insured so that the limitation period regulating proceedings to enforce the charge commences at that time. If that decision is correct, the limitation period in the present case commenced on 28 September 1982, being the date the appellant was injured. The same conclusion was reached by Hunt J in *Ratcliffe v V S & B Border Homes Ltd* (1987) 9 NSWLR 390.

*Lissenden* and *Ratcliffe* were approved by a majority of the New South Wales Court of Appeal (Kirby P dissenting) in *Grimson v Aviation and General (Underwriting) Agent Pty Limited* (1991) 25 NSWLR 422. At p428-429 of *Grimson*, Meagher JA (with whom Hope A-JA. concurred) said:

> "The basic reason why the plaintiff must fail is that s6(4) expressly provides that the plaintiff in the statutory action 'shall ... have the same rights and liability ... as if the action were against the insured'. That necessarily involves, so it seems to me, the proposition that any defence which would be available in the primary action is a good defence in the statutory action. In other words, the Judge asked to grant leave to initiate the statutory action must ask himself: what would be the plaintiff's position if he or she began proceedings against the defendant in the primary action at this moment? In the present case, the only possible answer is the melancholy one that if the plaintiff commenced her claim against Venture in June 1988 for its negligence in 1977, her claim would be defeated by a defence raising the Limitation Act. This is nonetheless true in circumstances where, like the present, the plaintiff actually has on foot proceedings which are not statute-barred."

The facts in *Grimson* were relevantly not dissimilar from the facts in the present case and the application of Meagher JA's reasoning to the present case would mean that the

appellant must fail on the first point. Kirby P took a different view of the legislation. He said, (at p425):

> "The scheme of the section is clear enough. It is to permit the plaintiff, in the specified circumstances, to bypass the insured and to proceed directly against the insurer. The mechanics of the scheme are also comparatively simple. There is to be a notional 'charge' on the insurance monies immediately on the happening of the event giving rise to the claim for damages or compensation. That charge can then be enforced in the same courts as that in which the plaintiff would have sued the insured. In such action, 'to the extent of the charge', the parties have ... 'the same rights and liabilities ... as if the action were against the insured.'
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> In my view, the purpose of this phrase is to achieve the statutory assimilation of the action against the insurer to the action which would have existed against the insured at the time the cause of action arose. To prevent injustice to an insurer by a gross delay in the enforcement of the action based on the statutory charge which certainly arose at that time, the bringing of an action by the plaintiff against the insurer is controlled by the proviso which Parliament has enacted affording a gateway through which the plaintiff must pass to commence the action on the 'charge'. This is a gateway at which the relevant court must consider whether or not it will grant leave to the party to commence the action."

Kirby P went on to observe that the gateway of the leave to which he referred in his reasons provides the court considering an application an appropriate discretion to decide whether the action should or should not be commenced. He was of the view that *Lissenden* and *Ratcliffe* were wrongly decided.

The question arose again for consideration by the New South Wales Court of Appeal in *New South Wales Medical Defence Union Ltd v Crawford* (1993) 31 NSWLR 469 ("*Crawford No. 1*"). This decision was given after the conclusion of argument in the present appeal but shortly before Mildren J's decision was given. His Honour's attention was not drawn to it.

In *Crawford No. 1*, Mahoney JA considered the question whether the cause of action given to a person in the position of the appellant in the present case is, for limitation purposes, complete before the time when the leave of the Court to bring proceedings is granted. He said (at p504):

> "My opinion, in summary, is that leave is a necessary part of the cause of action. The cause of action is one created by statute and the provision by which it is created incorporates that leave as a precedent step to the commencement of it. Therefore, unless and until the Court's consent be given, the cause of action has not arisen and, for limitation purposes, the time does not commence to run.
>
> ...
>
> This follows from the nature of the rights created by s6. At the date when Mr Crawford's cause of action against Dr Bailey arose in 1974, the statutory charge created by s6(1) came into being. But what is here in question is not the existence of that charge but the right to take action to enforce it pursuant to s6(4). Time does not commence to run under the *Limitation Act* unless and until the relevant cause of action has 'accrued' in the sense referred to in Pt 2, Div 2 of that Act. In the present case, the charge came into existence 'on the happening of the event giving rise to the claim for damages', that is, in 1974. Were it not for the proviso to s6(4), such an action could presumably (special cases apart) be brought at once, if the insured could, 'on the happening of the event', immediately claim indemnity against the insurer. But the charge is 'enforceable by way of action against the insurer in the same way and in the same court as if the action were an action to recover damages ... from the insured ...' (s6(4)). Section 6(4), by its proviso, proscribes the commencement of such an action 'without the leave of that court'. In that sense, the relevant cause of action has not 'accrued'. In principle time does not run unless and until the plaintiff is entitled to commence proceedings for the enforcement of the cause of action and, if prior leave be necessary, does not commence at least until that leave is given. I am conscious that there is in principle no restriction on the plaintiff seeking leave at any time and that, accordingly, the delay in the arising of his right to sue on the cause of action results from his own failure to seek leave. But I do not think that, in a case such as the present, that should produce a different result."

Kirby P agreed with Mahoney JA on this point. He said, at p490:

> "Like Mahoney JA, I am conscious of the fact that s6 of the Law Reform (Miscellaneous Provisions) Act gives, in terms, not a right of action but a charge. However, the charge may not be enforced by action until leave of the Supreme Court has been granted. Alike with Mahoney JA, I consider that such leave is a necessary part of the cause of action which is thereby conferred by statute upon a person wishing to bring proceedings against an insurer to enforce the charge. Until such leave is given, the cause of action is not complete. The claimant may not prosecute in the court. Time does not run against the claimant."

Sheller JA, the third member of the Court in *Crawford No. 1* agreed with Kirby P that *Grimson* had been wrongly decided on this point.

In *McMillan v Mannix* (1993) 31 NSWLR 538 Meagher JA (with whom Cripps JA concurred) applied *Grimson* and re-affirmed *Lissenden* and *Ratcliffe*. Kirby P, the third member of the Court, declined to follow *Grimson.* The point at issue in *Mannix* was different from that which arises in the present appeal and the decision is not of assistance in determining the point with which we are presently concerned. Leave to appeal to the High Court in *Mannix* was refused.

In *New South Wales Medical Defence Union Ltd v Crawford (No. 2)* an unreported decision of the New South Wales Court of Appeal, delivered on 30 June 1994, Kirby P declined to alter his views as expressed in *Crawford No. 1*. Sheller JA also confirmed the views he had expressed in that case.

There is thus a serious conflict of opinion in the Court of Appeal on the first question which falls to determination in the present appeal. We do not think any useful purpose would be served by us canvassing all the arguments which have been considered in the New South Wales cases. We appreciate the strength of the arguments which underlie Meagher JA's judgment in *Grimson*. However, in our opinion, the view expressed by Mahoney JA in *Crawford No. 1* is to be preferred. We agree with Mahoney JA that leave is properly regarded as a necessary ingredient in the cause of action which ss26 and 27 of the Act give to a person in the position of the appellant. Until leave is granted to such a person, he does not have a cause of action which he can prosecute. We adopt the reasoning of Mahoney JA as expressed in the passage in his reasons which we have set out above. It follows that, in our opinion, time does not commence to run under the Limitation Act until leave of the court is granted under s27(3) of the Act. As such leave has not as yet been granted in the present case, time has not been running against the appellant under the Limitation Act.

In circumstances where the facts make out a cause of action known to the common law, eg in tort, it is easy to describe a statutory requirement that the leave of the court be obtained before proceedings based on that cause of action are commenced as a purely procedural requirement. But where the cause of action itself is to be found in statutory provisions, we think it is legitimate and necessary to consider the whole of those provisions in order to identify the ingredients of the

cause of action. That is the approach which Mahoney JA took and we agree with him.

We recognise, as did Mahoney JA, that this construction of the legislation leads to the result that there is no restriction on a plaintiff seeking leave at any time and that, accordingly, he may by his own act prevent time running against himself. But, by delaying making an application for leave, a plaintiff exposes himself to the risk that leave will not be granted if his delay is shown to be unreasonable.

This Court is not, of course, obliged to follow a decision of the New South Wales Court of Appeal. But we think we should be slow to dissent from the decision in *Crawford No. 1*. It was reached after a careful and extensive consideration of all the authorities on the point with which we are concerned. The reasoning of the majority in *Grimson* was considered and rejected. Nothing said by the majority in *Mannix* diminishes the strength of the reasoning in *Crawford No. 1* on the point which arises in the present appeal. In these circumstances, we think we should apply the decision in *Crawford No. 1* unless we are of the opinion that it was plainly wrong. We are not so persuaded.

We express no view whether, in the present case, leave under s27(3) of the Act should be granted to the appellant. It was common ground before us that this Court should not determine whether leave should be granted. It was conceded by counsel for the appellant that the respondent was

entitled to place further material concerning the merits of the application before Mildren J (or such other Judge as hears the application for leave).

Mildren J rejected the application for leave under s27(1) because of his view that the appellant's cause of action had become statute-barred on 29 September 1985. Since we are of the view that the cause of action has not become statute-barred, it follows that we think Mildren J's decision in this respect was incorrect. We think it likely that Mildren J would have come to a different decision on this point if the decision in *Crawford No. 1* had been drawn to his attention.

We turn now to consider the second question which arises in this appeal. That question is whether Mildren J had power to make an order nunc pro tunc granting leave under s27(3) of the Act in the 1992 proceedings. His Honour held that he had no power to make such an order. He reached that decision after considering conflicting authority in New South Wales and in the Australian Capital Territory. In *National Mutual Fire Insurance Co Ltd v Commonwealth of Australia* (1981) 1 NSWLR 400, the New South Wales Court of Appeal considered whether the Court had power to make an order granting leave nunc pro tunc under the equivalent provision in that State, ie s6(4) of the Law Reform (Miscellaneous Provisions) Act. With respect to an action commenced without leave, Glass JA (with whom Moffitt P and Samuels J concurred) said at p408:

> "The action is commenced with leave or it is not. If it is commenced without leave, the proceeding is either a complete nullity or else it remains valid irrespective of whether or not leave is subsequently granted or else it continues in a state of suspended validity which will come to an end if leave is not obtained within an unspecified time. I can see nothing to support the attribution of a legislative intention of the two last-mentioned kinds. In my view the legislative intention properly to be garnered from the terms of sub-s(4) and its place in the framework of s6 is that a failure to obtain the leave of the Court in advance invalidates the action and renders it incapable of being revived by leave retrospectively given."

A different view has been taken in the Australian Capital Territory. See *Dixon v Royal Insurance Australia Ltd & Ors* (1991) 105 ACTR 1. In that case Higgins J pointed out that the requirement to obtain leave before bringing an action against a company in liquidation under the various Companies Acts has for well over a century been held to be a provision which does not impose a condition precedent to the jurisdiction of the Court, and that failure to obtain leave can be cured by an order nunc pro tunc: *Re Testro Bros Consolidated Ltd* (1965) VR 18 at 32-5; *Re Sydney Formworks Ltd* (1965) NSWR 646 at 650-1.

Mildren J felt constrained by the decision in *Hatton v Beaumont & Ors* (1978) 52 ALJR 589 to reach the conclusion that he had no power to make an order nunc pro tunc in the present case. We do not think *Hatton's* Case is directly in point. It was not a case in which the question of the power of a court to make an order nunc pro tunc was considered. The decision turned upon the question whether a provision requiring an appellant to lodge a sum of money as security for the prosecution of his appeal within seven days of lodging his notice of appeal was

mandatory or directory. We do not think anything was said in that case which negatives the power of this Court to make an order nunc pro tunc under 27(3) of the Act.

The reasoning which led the Court of Appeal in *National Mutual* to conclude that an order nunc pro tunc could not be made on the facts of that case was that an action commenced without leave was expressed to be a "complete nullity". With respect, we are unable to agree with that reasoning. We find it difficult to describe a proceeding commenced in a court which has jurisdiction to entertain the proceeding as a nullity. If the defendant in the *National Mutual* Case had failed to plead that the requisite leave to commence the proceedings had not been obtained by the plaintiff and the matter had proceeded to judgment without the point ever having been taken, we cannot think that the judgment would have been a nullity. In *Smart v Stuart* (1992) 83 NTR 1 at p7, Angel J said:

> "Although there has been judicial recognition of instances where a defect may render a writ a "nullity", some care must be taken with this terminology. A document which conforms with the rules of court in form and has been issued and sealed by the court should not later be described as a nullity because of the connotation of an absolute "void" that this induces: cf Atco Industries (Aust) Pty Ltd v Ancla Maritima SA (1984) 35 SASR 408 at 413, 414, 415 per Walters J, at 416, 417 per Mohr J. That a defect may render the document inoperative - in that it is incapable of amendment and yet unable to operate without the necessary amendment - may be accepted; however, the term "nullity" is one which, with the statutory and judicial trend favouring substance over form and wide powers of amendment, can be seen to be altogether inappropriate."

We agree with this observation.

It is true that *National Mutual* has been followed in New South Wales: see *Ratcliffe* (supra) and *Spautz v Kirby* (1989) 21 NSWLR 27 at 30. But the decision is inconsistent with decisions in other States. In *Testro* (supra), Sholl J held that an Attorney-General's petition under ss175 and 221(1)(e) of the Companies Act 1961 (Vic) which had wrongly been commenced without leave of the Court pursuant to s199 of that Act could be the subject of a subsequent application for leave and an order could be made nunc pro tunc granting such leave. At p34 he said:

> "If the proceedings are brought without leave in the Supreme Court itself, they are irregular as lacking that Court's own leave. If this Court were unable to give the leave once the proceedings had begun, it would be necessary to start them afresh, as indeed Gillard J has held. But with all respect, I do not feel able to adopt the view that this Court is prevented by the statute from recognising and sanctioning, even retrospectively, its own proceedings, more especially when the principal, and it may be the sole effect of its order, will be to save costs ..."

The decision of Gillard J referred to by Sholl J was given in *Re Excelsior Textile Supply Pty Ltd* (1964) VR 574, where his Honour held that the Supreme Court of Victoria had no power to make an order nunc pro tunc in a case to which s199 applied. Sholl J declined to follow that decision.

In *Carden v Allen Insulations Pty Ltd* (1987) VR 29 Nicholson J followed *Testro* and held that the Court had power to make an order nunc pro tunc granting leave to bring an application for an extension of time to commence an action which

was otherwise statute-barred, notwithstanding that the action had already been commenced.

In our opinion, the 1992 action, although commenced without the leave of the Court first having been obtained under s27(3) of the Act, is not a nullity. If the defendant in those proceedings had failed or elected not to take the point that leave to commence the action had not been obtained, we do not think that a judgment obtained by the plaintiff would have been a nullity. We do not think we should follow the view on this matter expressed in *National Mutual* and we prefer to follow the other cases to which we have referred.

In our opinion, Mildren J had power to make an order nunc pro tunc in the 1992 proceedings granting leave to the appellant to bring those proceedings. We express no view whether such an order should have been made. It is agreed by counsel that a decision on that question cannot be made on the material before this Court. In the light of our decision on the first point, the appellant may not wish to proceed with the application in the 1992 claim. But he should be at liberty to do so if he is so advised.

The appeal is allowed and the orders made by Mildren J are set aside. The application for leave to proceed nunc pro tunc in matter number 108/1992 is remitted to Mildren J (or another Judge of the court) for determination. The respondent must pay the costs of the appeal.

**ANGEL J:**

I have had the advantage of reading the reasons for judgment of Gallop ACJ and Morling AJ. They set out the two questions which arise for decision on the hearing of the appeal at p7 above.

On the first point, I am of the view that the date from which time runs under the Limitation Act for the purpose of a claim under the Law Reform (Miscellaneous Provisions) Act is the date of the occurrence which gives rise to the claim against the insured, ie the limitation period in the present case commenced on the date the appellant was injured, viz 28 September 1982. On this question, I respectfully prefer the reasoning of Clarke J (as he then was) in *Cambridge Credit Corporation v Lissenden* (1987) 8 NSWLR 411 and of Hunt J (as he then was) in *Ratcliffe v V S & B Border Homes Ltd* (1987) 9 NSWLR 390 and of Meagher JA in *Grimson v Aviation and General (Underwriting) Agent Pty Limited* (1991) 25 NSWLR 422, to the reasoning of Kirby P, and the reasoning of Mahoney JA in *NSW Medical Defence Union Ltd v Crawford* (1993) 31 NSWLR 469.

As I read s27 of the Act, I think a statutory cause of action to enforce the s26 charge is created by s27(1) - which is expressed to be subject to sub s(2) but not sub s(3) - and that the leave of the court required by s27(3) is not an ingredient of the cause of action but rather is a procedural prerequisite to its enforcement.

The alleged inconvenience of this construction is largely ameliorated by s44 of the Limitation Act.

On the first point I think the appellant fails.

On the second point I am of the view that Mildren J had power to grant leave to proceed with the 1992 action nunc pro tunc and that the appeal should be allowed and that the appellant's application for such leave should be remitted back to Mildren J or to another Judge of the court for determination. I particularly wish to say that I agree with the reasoning of Sholl J in *Re Testro Bros Consolidated Ltd* [1965] VR 18 at 32-35 which I think is applicable here, and disagree with the view expressed in *National Mutual Fire Insurance Co Ltd v Commonwealth of Australia* [1981] 1 NSWLR 400 at 408 that proceedings commenced without leave are "a complete nullity". It is to be noticed that even though holding that view, the NSW Court of Appeal nevertheless - and somewhat paradoxically - made orders in the proceedings.

I agree that the appeal should be allowed and that the application in Action 108 of 1992 for leave to proceed nunc pro tunc should be remitted back to Mildren J (or to another Judge of the court) for determination. I agree that the respondent should pay the appellant's costs of the appeal.

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