

CITATION: *Kerinaiuua v NTA* [2008] NTMC 047

PARTIES: MARIE CARMEL KERINAIUA
v
NORTHERN TERRITORY OF AUSTRALIA

TITLE OF COURT: Local Court

JURISDICTION: Crimes (Victims Assistance) Act

FILE NO(s): 20628458

DELIVERED ON: 16th July 2008

DELIVERED AT: Darwin

HEARING DATE(s): 17th December 2007, 1st July 2008

JUDGMENT OF: Relieving Magistrate Fong Lim

CATCHWORDS:

Practice and Procedure – repealed provisions – retrospective operation of Act-
“substantially dependant”

Interpretation Act sections 3, 12

Victims of Crimes Act sections 14, 31, 73 &74

Crimes (Victims Assistance) Act sections 4,5

REPRESENTATION:

Counsel:

Plaintiff: Mr Hunter
Defendant: Ms McMasters

Solicitors:

Plaintiff: NAAJA
Defendant: Priestleys

Judgment category classification: C
Judgment ID number: [2008] NTMC 047
Number of paragraphs: 21

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20628458

[2008] NTMC 047

BETWEEN:

MARIE CARMEL KERINAIUA
Plaintiff

AND:

**NORTHERN TERRITORY OF
AUSTRALIA**
Defendant

REASONS FOR DECISION

(Delivered 16th July 2008)

MS FONG LIM RSM:

1. The applicant makes application to the Court for an extension of time to file an application for assistance as a dependent of a victim of crime pursuant to section 5 (2) of the *Crimes (Victims Assistance) Act*. The *Crimes (Victims Assistance) Act* was repealed by the commencement of the *Victims of Crime Assistance Act* on the 1st of May 2007. The applicant first filed her application for extension of time on the 30th of November 2007.
2. Prior to her present application the applicant made application for assistance for injury and grief arising out of the death of her husband on the 15th August 2006 pursuant to sections 5(1) and 5(2A) of the *Crimes (Victims Assistance) Act*. It was only later that she (or her solicitors) realised she may have an application under section 5(2). Unfortunately for the applicant, by the time she realised, the *Crimes (Victims Assistance) Act* was repealed.
3. The foremost issue in this application is whether the applicant's cause of action pursuant to section 5(2) survives the repeal of the Act and if it does,

then does she have a basis for such an application and grounds for an extension of time to be granted.

4. The applicant originally made her application for an extension of time pursuant to section 44 of the *Limitations Act*, however on the first hearing of this application, conceded that section 44 did not apply and has since orally amended her application. The applicant seeks a ruling that the operation of section 12(c) of the *Interpretation Act* applies to her situation and therefore, her right to make an application under section 5(2) survives.
5. Section 12 of the *Interpretation Act* provides:

“12. Effect of repeal

The repeal of an Act or part of an Act does not –

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of the Act or the part of the Act so repealed, or anything duly done or suffered under the Act or the part of the Act so repealed;

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under an Act or the part of the Act so repealed, or an investigation, legal proceeding or remedy in respect of that right, privilege, obligation or liability; or

(d) affect a penalty, forfeiture or punishment incurred in respect of an offence against the Act or part of the Act so repealed, or an investigation, legal proceeding or remedy in respect of that penalty, forfeiture or punishment,

and the investigation, legal proceeding or remedy may be instituted, continued or enforced, and a penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been made.”

6. The applicant’s submission is that she had accrued a right to an application for assistance as a dependant under section 5(2) and even though she had not commenced a proceeding to enforce that right before the repeal of that section, she was still entitled to institute the legal proceedings to enforce

that right. That entitlement of course would be subject to the Court accepting her explanation for delay.

7. Further submissions are made that section 12(c) should be interpreted as a beneficial legislative provision and with that go all of the principles regarding the interpretation of beneficial legislation. Particularly where there is ambiguity, then the legislation, in this case the section, should be read in favour of the applicant.
8. The respondent submits that section 12 of the *Interpretation Act* does not apply in these circumstances because there is a clear contrary intention in the *Victims of Crime Assistance Act*. Section 3(3) of the *Interpretation Act* provides:

“(3) In the application of a provision of this Act to a provision, whether in this Act or in another law, the first-mentioned provision yields to the appearance of an intention to the contrary in that other provision.”

9. The respondent argues that there is the appearance of an intention to the contrary (*to section 12(3)*) in the *Victims of Crimes Act* sections 73 & 74 which provide as follows:

“73 Repealed Act applies to application for assistance certificate

The repealed Act continues to apply in relation to an application for an assistance certificate made before the commencement day.

74 Application of Act to violent act

This Act applies to an application for counselling or financial assistance even if the violent act to which the application relates occurred before the commencement day.”

10. Section 73 specifically makes accommodation for proceedings already commenced under the old Act prior to the commencement of the *Victims of Crimes Act* preserving the application of those provisions. Section 74 specifically contemplates application of the new act to applications for

financial assistance relating to violent act which occurred before the commencement day if that application for financial assistance had not been commenced prior to the commencement.

11. It is the clear intention of the legislature that the provisions in the *Victims of Crimes Act* were to apply to those circumstances where there is a violent act committed before the commencement of the Act and no proceedings had been instituted before the commencement of the Act. In my view, that is a clear contrary intention in the *Victims of Crimes Act* to the application of section 12(c) of the *Interpretation Act* and therefore, section 12(c) does not apply.
12. Without the application of section 12(c) of the *Interpretation Act*, the applicant has no right to apply for assistance under *the Crimes (Victims Assistance) Act*. The applicant could of course make an application for an extension of time to make an application under the *Victims of Crime Assistance Act*.
13. Having ruled that section 12(c) does not apply in these circumstances and it is not necessary to decide if the applicant's claim for dependency has any merits, however it is appropriate for me to make comment on the evidence thus far provided.
14. Had I been required to decide if an extension of time was warranted, I would have to have considered the reasons for delay, prejudice to the respondent and whether there was evidence to support an application for dependency.
15. It is important to note that the applicant has two current applications for assistance yet to be determined and both of those applications were filed from instructions given to her solicitors in August of 2006. The reason given for the delay in making the application under section 5(2) is that the applicant couldn't remember the deceased's employment or income situation at the time those instructions were given. The solicitors made enquiries of

the former employer and it wasn't until sometime in early 2008 that information was made available as to the wages of the deceased.

16. The fact that the applicant could not give accurate details of where the deceased worked and how much he earned is not a basis to excuse this inordinate delay of the filing of this application. The applicant should have been able to give instructions of the couple's general financial arrangements without those details. The applicant had it within her knowledge to say that the defendant paid for the majority of food, clothing and incidentals and food, clothing and incidentals for the six grandchildren. The applicant also had it within her knowledge to give the instructions that it was she who paid most of the rent, electricity and water bills out of her Centrelink benefits. This knowledge would not have been acquired upon access to the wage records of the deceased, even though the records would help to quantify the loss.
17. The reasons given for the delay in making the application cannot be accepted as reasonable. If the delay was excusable, the Court would then consider whether there was a meritorious claim. There were some submissions as to the meaning of the phrase "substantially dependant" and whether the evidence produced by the applicant supported an arguable case for the applicant.
18. The evidence clearly shows that the applicant was most likely dependant on the deceased's income to pay for her food and clothing. The evidence is that they ran a joint household and shared expenses. The respondent submits that the fact the applicant can now provide for herself on her Centrelink benefits is evidence there was no dependency on the deceased's income in the first place. I disagree that this conclusion can be reached without further information as to how well she is providing for herself, compared with when she had the assistance of the deceased.

19. The parties have not referred the Court to any authorities to establish the meaning of the phrase “substantially dependant”, although the applicant’s reference to Butterworth’s Concise Australian Legal Dictionary (page 415) is of some assistance. I agree that “substantial” means real or of substance as distinct from ephemeral or nominal, however whether dependency is real or of substance must be a question of fact and for the tribunal of fact to decide. In Stroud’s Judicial Dictionary of words and phrases at page 2657, a reference to “substantially impaired” is discussed in relation to a judgment in *R v Lloyd* [1967] 1 QB 175 where the Court found that “substantial does not mean trivial or minimal, neither does it mean total. It is for the jury to decide whether the impairment is substantial”.
20. It is my view on the evidence thus far provided to the Court that the applicant has demonstrated an arguable case for a claim of substantial dependence on the deceased. However, given I am not satisfied she has a right to commence a proceedings under section 5(2) or that the reason for delay is not acceptable, the application for extension of time is dismissed.
21. I will hear the parties on the issue of costs.

Dated this 16th day of July 2008.

Tanya Fong Lim
STIPENDIARY MAGISTRATE