

CITATION: Dale Marshall and Bronwyn Marshall v Shorebarge Pty Ltd [2020] NTLC 03

PARTIES: DALE MARSHALL  
FIRST PLAINTIFF

AND

BRONWYN MARSHALL  
SECOND PLAINTIFF

V

SHOREBARGE PTY LTD (ACN 111 090  
110) trading as SHOREBARGE

TITLE OF COURT: LOCAL COURT

JURISDICTION: CIVIL

FILE NO: 21921682

DELIVERED ON: 14 FEBRUARY 2020

DELIVERED AT: DARWIN

HEARING DATE: 5 December 2019

DECISION OF: JUDGE NEILL

**CATCHWORDS:**

*Determination of correct limitation period applicable in claim in tort arising out of collision between two marine vessels; principles applicable to extension of that limitation period.*

*Limitation Act subsections 12(1)(b); 20(1), (3), (5)(a) and (6); 44(1) and (3)(b)(i)*

*Anthony Horden & Sons Pty Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1*

*The Commonwealth of Australia v D.K.B. Investments Pty Ltd [1991] NTSC 58*

*Fryer v Frost [2009] NTSC 65*

*May v Competitive Foods Pty Ltd [2011] NTSC 79*

**REPRESENTATION:**

*Counsel:*

Plaintiffs: Mr W Piper

Defendant: Mr G J Nell SC

*Solicitors:*

Plaintiffs: Piper Ellis Lawyers

Defendant: Maher Raumteen Solicitors  
as agent for Agar Cahalan Maritime

Judgment category classification: B

Judgment ID number: 003

Number of paragraphs: 46

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

No. 21921682

BETWEEN

DALE MARSHALL  
FIRST PLAINTIFF

BRONWYN MARSHALL  
SECOND PLAINTIFF

AND

SHOREBARGE PTY LTD (ACN 111 090  
110) trading as SHOREBARGE

Defendant

REASONS FOR DECISION

(Delivered 14 February 2020)

JUDGE: JOHN NEILL

**Introduction**

1. At all material times the First and Second Plaintiffs were the owners of a marine vessel known as "Leader Wildcat" ("the vessel"). On or about 21 May 2016 the vessel was involved in a collision ("the collision") at sea near Darwin Harbour with another marine vessel ("the other vessel"). The First Plaintiff was on board the vessel at the time of the collision.
2. As a consequence of the collision the vessel sank and the other vessel continued on its way without stopping. The First Plaintiff and others on board the vessel survived the collision and were eventually rescued.
3. The First and Second Plaintiffs lost the vessel and all property on board the vessel at the time of the collision. The First and Second Plaintiffs made a claim on their insurer for the loss. In due course their insurer commenced proceedings in the names of the First and Second Plaintiffs to recover the insured loss against the

Defendant in the Local Court at Darwin in proceedings bearing Claim No. 21827015 ("the insurance proceedings").

4. The First and Second Plaintiffs on their own behalf separately commenced these proceedings against the Defendant to recover an apparently uninsured loss, namely a new Yanmar 4 Cylinder Turbo Diesel 240HP engine which they valued at \$46,853.40 inclusive of GST, and additionally to claim for personal injuries said to have been suffered by the First Plaintiff arising out of the collision ("the personal proceedings").

### **The Issues**

5. The Defendant in each of the insurance proceedings and the personal proceedings has defended the claims and, among other things, has denied that its vessel as identified in each of the proceedings was the other vessel involved in the collision.
6. Additionally, the Defendant in each of the insurance proceedings and the personal proceedings pleaded that the limitation period applicable to each of the proceedings was two years pursuant to subsection 20(3) of the *Limitation Act* ("the Act") rather than three years pursuant to subsection 12(1)(b) of the Act. The First and Second Plaintiffs in the insurance proceedings filed a Reply pleading that subsection 12(1)(b) of the Act rather than subsection 20(3) of the Act was the applicable subsection, but in the alternative requesting the Court to extend the two year limitation period to the date of the commencement of proceedings.
7. It is not in dispute that both the insurance proceedings and the personal proceedings were commenced more than two years after the date of the collision. These proceedings – the personal proceedings – were commenced on 21 May 2019, three years from the date of the collision.
8. The First and Second Plaintiffs in the insurance proceedings successfully applied to the Judicial Registrar for a preliminary hearing to determine which subsection of the Act was applicable to determine the limitation period, and to consider any extension of the limitation period if required. That preliminary hearing was allocated to me. I caused the insurance proceedings to be listed before me for a Directions Hearing and at the same time I arranged for the personal proceedings also to be listed before me and for the relevant lawyers in the personal proceedings to be notified. At that Directions Hearing I made orders for a preliminary hearing of the same issues also in the personal proceedings. I made orders that the preliminary issues in both proceedings were to be heard together and for evidence in one proceedings also to be evidence in the other proceedings. The preliminary hearing was listed to be heard before me on 5 December 2019.
9. Shortly before that date the parties settled the insurance proceedings with the result that only these personal proceedings were considered at the preliminary hearing on 5 December 2019. First I heard submissions on the question of which limitation

period was applicable. I ruled that section 20 of the Act was the relevant section and that the limitation period was therefore two years from the date of the collision. I then proceeded to hear submissions on whether I should extend that two year limitation period to the date the personal proceedings were actually commenced, namely 21 May 2019. At the conclusion of those submissions I reserved my Decision.

## The Legislation

10. The sole relevant legislation is the *Limitation Act*. Section 12 appears in Part II of the Act and relevantly provides as follows:

"12 **Actions in contract, tort etc**

"(1) *Subject to subsection (2), the following actions are not maintainable after the expiration of a limitation period of 3 years from the date on which the cause of action first accrues to the plaintiff or to a person through whom he claims:*

- (a) an action founded on contract (including quasi-contract) not being a cause of action which is evidenced by a deed;*
- (b) an action founded on tort including a cause of action founded on a breach of statutory duty;*
- (c) an action to enforce a recognizance; and*
- (d) an action to recover money recoverable by virtue of an enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.*

"(2) Not relevant.

"(3) Not relevant".

11. Section 20 of the Act also appears in Part II of the Act and relevantly provides as follows:

"20 **Admiralty actions**

"(1) *In this section:*

- (a) **freight** includes passage money and hire;*
- (b) **vessel** means a vessel used in navigation other than air navigation, and includes a barge, lighter or similar vessel; and*
- (c) reference to salvage or loss caused by the fault of a vessel extends to salvage or other expenses, consequent upon that fault, recoverable as damages.*

"(2) Section 12(1)(a) extends to a right to bring an action to recover a

*seaman's wages but otherwise sections 12 to 20 inclusive do not apply to a cause of action in rem in Admiralty.*

- "(3) *An action to enforce a claim or lien against the vessel or her owners in respect of damages or loss to another vessel, that other vessel's cargo or freight or any property on board her, or damages for loss of life for personal injuries suffered by a person on board that other vessel or caused by the fault of the first mentioned vessel whether that vessel was partly or wholly at fault, is not maintainable after the expiration of the limitation period of 2 years from the date when the damage, loss or injury was caused.*
- "(4) *not relevant*
- "(5) *For the purposes of an action in a court, the court:*
- (a) *may extend the limitation period referred to in subsection (3) or (4) to such an extent and on such terms as it thinks fit; and*
  - (b) *not relevant*
- "(6) *The provisions of Part III do not apply to a cause of action to which subsection (3) or (4) applies".*

12. Section 44 appears in Part III of the Act and relevantly provides as follows:

**"44 Extension of periods**

"(1) *Subject to this section, where this or any other Act, or an instrument of a legislative or administrative character prescribes or limits the time for:*

- (a) *instituting an action;*
- (b) *doing an act, or taking a step in an action; or*
- (c) *doing an act or taking a step with a view to instituting an action,*

*a court may extend the time so prescribed or limited to such an extent, and upon such terms, if any, as it thinks fit.*

"(2) *A court may exercise the powers conferred by this section in respect of an action that it:*

- (a) *has jurisdiction to entertain; or*
- (b) *would, if the action were not out of time, have jurisdiction to entertain.*

"(3) *This section does not:*

- (a) *apply to criminal proceeding; or*

- (aa) *apply to an action on a cause of action for defamation; or*
- (b) *empower a court to extend the limitation period prescribed by this Act unless it is satisfied that:*
  - (i) *facts material to the plaintiff's case were not ascertained by him until some time within 12 months before the expiration of the limitation period or occurring after the expiration of that period, and that the action was instituted within 12 months after the ascertainment of those facts by the plaintiff; or*
  - (ii) *the plaintiff's failure to institute the action within the limitation period resulted from representations or conduct of the defendant, or a person whom the plaintiff reasonably believed to be acting on behalf of the defendant, and was reasonable in view of those representations or that conduct and other relevant circumstances.*

*and that in all the circumstances of the case, it is just to grant the extension of time.*

(4), (5), (6) and (7) Not relevant".

## **The Limitation Period**

13. Upon first consideration it might appear that either subsection 12(1)(b) or subsection 20(3) of the Act could apply to the circumstances in these proceedings. The cause of action identified in the Plaintiffs' Statement of Claim is one founded in tort arising out of the pleaded negligence on the part of the Defendant. The limitation period for a claim in tort is ordinarily covered by subsection 12(1)(b) of the Act. However, the claim as pleaded is also one contemplated by the words of subsection 20(3) of the Act, namely "*...against a vessel or her owners in respect of damage or loss to another vessel, that other vessel's cargo or freight or any property on board her, or damage for loss of life or personal injury suffered by a person on board that other vessel or caused by the fault of the first mentioned vessel whether that vessel was partly or wholly at fault...*". Why then should the First and Second Plaintiffs be bound by the shorter two year limitation period in subsection 20(3) rather than by the more usual limitation period of three years in the apparently equally applicable subsection 12(1)(b)?
14. There is a principle of statutory interpretation that where a particular procedure is designed to achieve something, other relevant but more general procedures in the same instrument are thereby excluded. In *Anthony Horden and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 Gavan Duffy CJ and Dixon J said:

*"When the Legislature specifically gives a power by particular provision*

*which prescribes the mode in which it shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power".*

15. Applying this observation to the present matter, subsection 20(3) is the particular provision of the Act which "*prescribes the mode*" by establishing a two year time limit in respect of the sub-category of torts involving two vessels where a vessel is defined as "*a vessel used in navigation other than air navigation...*". Subsection 12(1)(b) is the "*general expression(s) in the same instrument which might otherwise have been relied upon for the same power...*" and whose operation is excluded.
16. No doubt there are historic commercial reasons for the development of different procedures in claims involving vessels as defined, in what is generally understood by the description "Admiralty matters". Whatever those historic reasons, the different procedures still exist in the Northern Territory *Limitation Act* and provide for these different limitation periods.
17. The Plaintiffs' case as pleaded involves a claim in respect of loss of property on board a vessel and a claim in respect of personal injury suffered by a person on board that vessel, arising from a collision between two vessels, "vessel" being as defined in section 20 of the Act. I am satisfied and I rule that this claim is one as contemplated by the wording "*An action to enforce a claim... against a vessel or her owners in respect of damage or loss to another vessel... or any property on board her, or damage for loss of life or personal injury suffered by a person on board that other vessel...*" within the meaning of subsection 20(3) of the Act. Accordingly, in this case the operation of subsection 12(1)(b) is excluded.
18. It is for the foregoing reasons that I ruled on 5 December 2019 that subsection 20(3) of the *Limitation Act* determines the limitation period relevant to this claim, namely a period of two years. Accordingly these proceedings were brought out of time and are not maintainable unless the limitation period is extended.

### **Extending the Limitation Period – The Law**

19. Subsection 20(5)(a) of the Act provides that a court "*may extend the limitation period referred to in subsection (3) or (4) to such an extent and on such terms as it thinks fit...*". This language imposes no fetter on a court's discretion other than the underlying requirement that it must be exercised judicially. As far as I have been able to ascertain, there are no reported Decisions by any Northern Territory court involving this subsection or any part of section 20 of the Act.
20. Subsection 44(1) of the Act provides in very similar terms that "*... a court may extend the time so prescribed or limited to such an extent, and upon such terms, if any, as it thinks fit*".



21. Subsection 44(3)(b)(i) of the Act provides that in cases where the limitation period to be extended is itself prescribed by the Act, as in this case, then the Plaintiff must identify a material fact which was first ascertained by him within 12 months of instituting the action, as an additional prerequisite to the court's exercise of discretion whether to extend the time.
22. Subsection 20(6) of the Act provides that the provisions of Part III of the Act do not apply to a cause of action to which subsection (3) or (4) applies. As identified above, subsection 20(3) does apply to the cause of action pleaded in these proceedings. Part III of the Act includes section 44 of the Act and therefore the extension of time provisions in section 44 of the Act do not apply in this case. That means that there is no requirement in an application to extend time under subsection 20(5)(a) to identify any recently ascertained material fact.
23. Even though the extension of time provisions in section 44 do not apply in this case, there is Northern Territory case law which has considered the section 44 extension of time provisions. The principles identified in these Decisions can still be applicable to an extension of time being considered pursuant to subsection 20(5)(a) of the Act.
24. This is because subsections 20(5)(a) and 44(1) are in essentially the same terms. Further, although the case law relevant to subsection 44(3)(b)(i) involves a consideration of a material fact and identifying when that was first ascertained by a plaintiff, this does not necessarily make that case law irrelevant to an extension of time pursuant to subsection 20(5)(a). In *May v Competitive Foods Pty Ltd* ("May") [2011] NTSC 79 Master Luppino (as he then was) considered an application for an extension of time pursuant to subsection 44(3). Having satisfied himself of the existence of a new material fact and the timeliness of the institution of proceedings, he said at paragraph [23]: "*The residual discretion in section 44(3)(b) of the Act is therefore enlivened. It remains for me to be satisfied that it is just in all the circumstances that the discretion should be exercised*". I am satisfied that this "*residual discretion in section 44(3)(b) of the Act*" is in fact the general discretion granted by subsection 44(1) of the Act, but with the additional requirement in subsection 44(3) not found in subsection 44(1) or 20(5)(a), that "*in all the circumstances of the case, it is just to grant the extension of time*".
25. In *May*, Master Luppino went on in paragraph [24] to identify the principles relevant to an extension of a limitation period pursuant to subsection 44(3)(b) of the Act, as follows:

*"In Patten v Lend Lease Funds Management, I discussed the authorities relevant to the exercise of the residual discretion and set out the relevant considerations. These are: –*

1. *The extent of the delay;*
2. *The explanation for the delay;*

3. *The hardship to the applicant if the application is not granted;*
4. *The hardship or prejudice to the defendant if the application is granted;*
5. *The conduct of the party;*
6. *The nature, importance and circumstances surrounding the ascertainment of the new material facts;*
7. *The extent to which the evidence is likely to be less cogent than if the action had been brought within the time allowed”.*

26. In *Fryer v Frost* (“*Fryer*”) [2009] NTSC 65 Master Luppino considered an extension of a limitation period pursuant to subsection 44(1) of the Act. This case involved a taxation of costs and the subsequent filing of a Notice of Objection to some of the rulings of the Taxing Master made during that taxation. The Notice of Objection was required by the Rules to have been filed within 14 days, and it was filed outside that period of time. This happened because the Objector believed the 14 days did not start to run until the date of the Order for Taxation but in fact a consideration of the relevant Rules led to the conclusion that the 14 days started to run from the date of the ruling objected to, which was an earlier date.

27. In the course of his consideration whether to extend time for the filing of the Notice of Objection Master Luppino identified some slightly different considerations for the exercise of his discretion, as follows:

*“[23] Turning now to consider whether an extension should be ordered, both under Rule 3.02(1) and section 44(1) of the Limitation Act, the issue is entirely discretionary. In my view relevant matters are: –*

- (1) *The late filing of the Notice was by way of an error, excusable in my view, on the part of the solicitor for the plaintiff;*
- (2) *The default was excusable given that ordinarily time for taking a step in the nature of review or appeal runs from the conclusion of the matter sought to be reviewed or repealed; the defendant’s solicitor was apparently under the same misapprehension;*
- (3) *There was no default on the part of the plaintiff himself;*
- (4) *Reconsiderations under Rule 63.55 are rare and it is unreasonable to expect a solicitor to be aware of the minute provisions in the Rules and specifically, with variations with the usual procedures which apply to appeals and reviews;*
- (5) *The plaintiff’s solicitor complied with the time limit that she mistakenly believed applied to the review;*
- (6) *The plaintiff’s solicitor had given notice of the intention to revisit the matter now covered by the notice at the start of the second*

*day of the taxation and, but for the non-attendance of the solicitor for the defendant, that matter would likely have been dealt with then;*

- (7) *The defendant has not shown any prejudice which will flow in the event that the extension is granted”.*

28. I am also assisted by a consideration of the analogous principles applicable to the extension of time for the validity of a writ. Subrules 5.12(2) and (3) of the *Northern Territory Supreme Court Rules* provide as follows:

*“(2) Where a writ or originating motion has not been served on a defendant, the Court may from time to time, by order, extend the period of validity of such period, being not more than 12 months from the date of the order, as it thinks fit.*

*“(3) An order may be made under subrule (2) before or after expiry of the writ or originating motion”.*

29. In *The Commonwealth of Australia v D.K.B. Investments (“D.K.B. Investments”)* [1991] NTSC 58 from page 4 to page 6 Justice Mildren of the Northern Territory Supreme Court identified the following considerations for the extension of time for the validity of a writ:

*“No criteria are set out in the Rules of court which determine the factors to be considered on whether to grant or refuse such an application. Rule 5.12(3) provides that an order may be made before or after the expiry of the Writ. The relevant legal principles which may apply to the exercise of the court’s discretion in these matters are as follows:*

*“1. The court will not grant the extension unless good reason is shown for the extension: Irving v Carbines (1982) VR 861; Soper v Matsukawa (1982) VR 948; Kleinwort Benson Ltd v Barbrak Ltd (1987) 1 AC 597; (1987) 2 WLR 1035.*

*“2. Whether there is good reason depends on all the circumstances of the case. The question whether an extension should be allowed was one for the discretion of the judge who is entitled to have regard to the balance of hardship between the parties and the possible prejudice to the defendant if an extension is allowed: Kleinwort Benson Ltd v Barbrak Ltd supra; Zappelli v Falkiner and Others (Supreme Court of Victoria, O’ Bryan J, unreported, 21/9/87).*

*“3. The fact that the action is statute barred if the extension is not granted may be a good reason for extending the Writ. As O’ Bryan J observed in Zappelli, supra: ‘In my view, should the extension not be granted the plaintiff’s claim against the defendants may be time-barred*

*and they would have to look to their solicitors for a remedy. Such a result would be inconvenient, time-consuming, wasteful of costs and tend to bring the law into disrepute. Further delay in the prosecution of this proceeding is contrary to the interests of justice’.*

*“This is all the more so where the solicitors are the clients’ own employees, as is the case here. Be that as it may, the fact that the action is statute barred if the extension is not granted does not increase the burden of proof upon the plaintiff: Soper v Matsukawa supra; Williams v F. S. Evans and Sons and District Council of Stirling (1988) 52 SASR 237; Kleinwort Benson Ltd v Barbrak Ltd supra.*

*“4. The discretion should only be exercised adversely to the plaintiff where the plaintiff’s default has been intentional and contumelious or where there has been inordinate or inexcusable delay on the part of the plaintiff or its solicitors giving rise to a substantial risk that a fair trial is not possible or to a substantial risk of serious prejudice to the defendant: Birkett v James (1978) AC 297; Van Leer Australia Pty Ltd v Palace Shopping K.K. and Another (1981) 34 ALR 3; Mahon v Frankpile (Australia) Pty Ltd (1990) 157 LSJS 52.*

*“Applying these principles to the present case, the application in my opinion must be granted. Firstly, the reason for the delay was ignorance, incompetence and oversight by the Plaintiff’s solicitor; not by a deliberate or contumelious decision on its part or that of its solicitor. Secondly, there is no risk of prejudice to the defendant in this case; indeed, none has been alleged. Thirdly, there is no substantial risk that a fair trial may not be had. The issues to be debated are still able to be litigated – certainly the Defendant has not attempted to show otherwise. Although the onus of showing good reasons for granting the extension rests on the Applicant, the Defendant in this regard bears an evidentiary onus to raise facts which it says amount to prejudice, or an inability to obtain a fair trial and if it does not do so, the court may assume that there are none: Williams v F.S. Evans, supra, at 249 per Bollen J. Although the delay here is very considerable, and the correspondence between the parties did not in specific term alert the Defendant that the Plaintiff intended to sue the Defendant for damages for breach of contract, in the absence of any submission from the Defendant that there was a substantial risk of prejudice or an inability to get a fair trial, the balance of hardship favours the granting of the extension”.*

30. I am satisfied that the principles identified by Master Luppino in each of *May* and *Fryer* above and by Mildren J in *D.K.B. Investments* are relevant in the exercise of my discretion whether to extend time pursuant to subsection 20(5)(a) of the Act in the present matter.

## **Analysis**

31. The First Plaintiff Dale Marshall gave evidence explaining why he had not commenced proceedings within the two year limitation period. In short, he had chosen to rely upon the outcome of investigations by the Australian Maritime Safety Authority into the alleged collision at sea between the vessel and the other vessel, which investigations he understood would establish both the identity of the other vessel and its responsibility for the collision and lead to the commencement of criminal proceedings against the other vessel and its owners. Once these matters would have been established, the First Plaintiff intended to commence civil proceedings against the Defendant.
32. However, for reasons outside the control of the First Plaintiff, the Australian Maritime Safety Authority eventually took the decision not to commence any proceedings against the other vessel and its owners. By the time this was made known to the First Plaintiff, the two year limitation period had already expired. The First Plaintiff then sought legal advice. The First Plaintiff did not know of the existence of the two year limitation period at any time before its expiry. There was no direct evidence before me whether his legal advisers knew of the existence of the two year limitation period when the First Plaintiff first consulted them, however I infer that they did not because these proceedings were commenced on the last day of the three year limitation period prescribed by subsection 12(1)(b) of the Act.
33. I note that the insurance proceedings were also commenced within three years but outside the two year limitation period. From this I infer that HWL Ebsworth Lawyers, the legal practitioners for the Plaintiffs in the insurance proceedings, were unaware of the two year time limit in this matter. I note that these legal practitioners are a national firm which has an office in Darwin as well as in most Australian State capitals.
34. It is not usual for a court to extend a limitation period solely because a party was ignorant of the law imposing that period. It is more common for courts to extend limitation periods where a party has consulted lawyers within time and justifiably relied on their professional expertise but the lawyers for some reason not attributable to the party have failed to take a step within time. In such a case the courts will often prefer to extend time rather than to leave the party to seek a remedy by suing the lawyers for professional negligence – see the reasoning of O’Byrne J of the Victorian Supreme Court in *Zappelli* as adopted by Mildren J in *D.K.B. Investments* above.

35. In this case, it is not simply a question of the Plaintiffs' ignorance of the limitation period established by subsection 20(3) of the Act. That issue must be considered in the light of the uncommonness of causes of action in the Northern Territory of Australia which attract the operation of the two year limitation period in subsection 20(3) of the Act. I have already noted in paragraph 19. above that there are no reported Decisions by a Northern Territory court involving any part of section 20 of the Act.
36. Master Luppino in *Fryer* noted in his list of relevant matters (2), (4) and (5) in paragraph 26. above that the fact that the operation of the time limit there under consideration was not ordinary, and that particular time limit was rarely encountered, were relevant in his consideration of an extension of time.
37. We also have the additional factor that the First Plaintiff had an explanation for his delay in instructing his legal advisers. This was that he personally had received frequent communications from Mr Stephen Harris, the lead investigator for the Australian Maritime Safety Authority and he understood from him and believed that upon the completion of the investigation proceedings would be commenced against the other vessel and its owners. He believed that he, the First Defendant, would be in a position to take advantage of the results of those investigations in his own civil proceedings against the Defendant. When some time after January 2019 he learned that there would be no proceedings brought by the Australian Maritime Safety Authority against the other vessel and its owners the First Plaintiff took steps to instruct his legal advisers. However, the two year limitation period had already expired on 21 May 2018.
38. The First Plaintiff might be regarded as naïve or at least unwise in pinning his expectations on the outcome of the investigation which after all was not being conducted with his interests in mind. With the clarity of hindsight, it would have been better for him to have consulted his own legal advisers much earlier, although even if he had done so it is by no means certain that the legal advisers would have been aware of or would have become aware in time of the two year limitation period.
39. I am satisfied however that in proceeding in this fashion, the First Plaintiff's delay was neither intentional nor contumelious. I am satisfied that the commencement of these proceedings 12 months out of time but still within the much more usual three year limitation period rather than the actual two year limitation period did not give rise to an inordinate or inexcusable delay on the part of the First Plaintiff or his legal advisers.
40. Mr Nell SC for the Defendant submitted that there is always a prejudice to a defendant when a time bar is extended. This is plainly true, however it is also plainly true that where the legislation which creates the time bar simultaneously creates a discretion to extend that time then the prejudice is greatly minimised. This is particularly so when the Court's discretion to extend the time bar is unfettered, as in

this case.

41. Other than this general prejudice, there was no evidence before me of any specific prejudice which might be suffered by the Defendant if the time bar is extended in this case. As noted by Mildren J in *D.K.B. Investments* set out towards the end of paragraph 28. above - “*Although the onus of showing good reason for granting the extension rests on the Applicant, the Defendant in this regard bears an evidentiary onus to raise facts which it says amount to prejudice, or an inability to obtain a fair trial and if it does not do so, the court may assume that there are none*”. In this matter in the absence of any specific evidence of prejudice to the Defendant, or of any inability to obtain a fair trial, I do presume that there is no such evidence and I find that the Defendant will not suffer any specific prejudice or any inability to obtain a fair trial if the time bar is extended.
42. I am satisfied and I find that there will be a hardship to the First and the Second Plaintiffs if the time bar is not extended – they will lose their right to seek recovery of the value of the diesel engine and the First Plaintiff will lose any entitlement to damages for his personal injury allegedly suffered in the collision. I note that the Plaintiffs do not on the facts before me have the fall-back option of being able to make a claim against their legal advisers if the time bar is not extended.
43. Applying the foregoing principles and findings to the present case, the application in my opinion must be granted.

## **Costs**

44. The Defendant was successful on the first issue, namely that section 20(3) of the Act establishes the relevant time limit in the circumstances of this case. The Plaintiffs have been successful on the second issue of obtaining an extension of the time within which to commence the proceedings. However, in obtaining this extension of time the Plaintiffs have had to seek and be granted an indulgence. The time spent at the hearing of these preliminary issues on 5 December 2019 was not equally divided – far more time was spent on the second issue than on the first issue.
45. Part 38 of the *Local Court (Civil Jurisdiction) Rules* deals with the question of costs. It does not specifically deal with costs arising out of the granting of an indulgence generally or an extension of time specifically. Rule 38.02 provides that Order 63 of the *Supreme Court Rules* applies with the necessary changes to Part 38 of the *Local Court Rules*. Rule 63.11 of the *Supreme Court Rules* provides a list of circumstances where no costs order is required because costs will follow automatically. Subrule 63.11(5) applies to circumstances similar to those in this case, however it is limited to an extension or abridgement of a time “*fixed by these Rules or by an order fixing, extending or abridging time*”. I am satisfied there are no applicable Local Court or Supreme Court costs rules which automatically entitle the

Defendant in this case to its costs occasioned by the Plaintiffs' application for an extension of time.

46. In the exercise of my discretion I shall make an order for costs which will benefit the Defendant, but only if it is successful in the proceedings, and which will not benefit the Plaintiffs even if they are successful.

### **Orders**

1. Pursuant to subsection 20(5)(a) of the *Limitation Act* the time for the commencement of these proceedings is extended to 21 May 2019.
2. The proceedings are referred to the Judicial Registrar on a date and at a time to be notified to the legal representatives of the parties for case management and to list the remaining issues between the parties for hearing.
3. The costs of and incidental to the hearing of the preliminary issues on 5 December 2019 are to be the Defendant's costs in the cause to be taxed in default of agreement and certified fit for senior counsel.

Dated this Fourteenth day of February 2020

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JOHN NEILL  
LOCAL COURT JUDGE