



---

## Commercial and Consumer Tribunal

---

**CITATION:** GRANT V EVANS [2007] CCT PE013-07

**PARTIES:** GRANT Alan & Monica

v

Evans Owen

**APPLICATION NUMBER:** PE013-07

**DELIVERED ON:** 8 April 2008

**DELIVERED AT:** Brisbane

**HEARING DATE:** 18 March 2008

**DECISION OF:** Mr J Thomas AM QC

**CATCHWORDS:** Extension of time for claim on Fund – contravention by real estate agent – awareness of loss in 1994 – District Court action commenced in 1995 and not complete when PAMD Act came into force in 2000 – claim on Fund made in September 2007 within a month of final judgment in District Court – effect of section 119 of *Auctioneers and Agents Act 1979* and *PAMD Act* section 604(3) – Claim held commenced in time, and no need for extension

**REPRESENTATION:**

**APPLICANT:** Mr G Lynham of Counsel for the applicant

**RESPONDENT:** No appearance by the respondent

**DECISION CATEGORY CLASSIFICATION:** C

**NUMBER OF PARAGRAPHS:** 21

## REASONS FOR DECISION

### Introduction

1 This is an application for extension of time for the making of a claim against the Fund established by section 408 of the *Property Agents and Motor Dealers Act 2000*.

2 By notice dated 10 September 2007 (received by the applicant on 3 October 2007) the Chief Executive of the Department of Tourism, Fair Trading and Wine Industry Development advised the applicant that the claim as filed was not made within the time allowed under section 472 of the *Property Agents and Motor Dealers Act 2000*. The applicants were provided with the necessary forms to apply for an extension of time, and hence the present application. It is appropriate that I treat the present application as a review of the Chief Executive's determination of 10 September 2007.

3 In July 1994 the respondent (Evans) agreed to purchase the applicant's farm, but the agreement did not proceed and a few months later the respondent agreed to purchase from the applicants their milk quota and various items of plant and equipment for \$200,000.00. Arrangements were made for the respondent to sell the milk quota and plant and equipment by auction and the respondent guaranteed that the applicants would receive \$200,000.00 free of commissions and charges.

4 The auction failed to achieve \$200,000.00 for those items, but proceeded to charge commission. The applicants retook possession of their farm, but without plant and equipment could not do so effectively, and in time the applicant's bank foreclosed on the property.

5 In August 1995 the applicant instituted district court proceedings against the respondent for damages, and obtained default judgement on 5 January 2001.

6 By this time the Fund established by the *PAMD Act of 2000* had replaced a similar Fund that had been established under the *Auctioneers and Agents Act 1971* (as amended). On 2 February 2001 the applicant made the present claim against the Fund.

7 On 8 August 2005 the District Court interlocutory judgement was made final by the assessment of the applicant's loss, and on 15 September 2005 the applicant forwarded a copy of the judgement to the Department. In September 2001 the Office of Fair Trading ("the Department") asked for further claim forms to be filled out, and this was duly done by 18 January 2002, lifting terms on this as it is clear that a claim was made on the Fund on 2 February 2001.

8 On 3 October 2007, as indicated above, the applicant was advised of the Department's decision that their claim was filed out of time.

9 The respondent, Evans, was served but did not participate in the present application.

### Discussion

10 The Department's decision is based upon the fact that the event giving rise to the claim occurred on 15 October 1994 and that the applicant became aware of that loss on 13 December 1994, the date when the shortfall in payment occurred.

11 Section 472 of the PAMD Act states

**“472 General time limit for making claims**

- (1) *This section applies to a claim against the fund other than a claim because of, or arising out of, a marketeering contravention in relation to the purchase of a non-investment residential property.*
- (2) *A person may make the claim against the fund only if the person makes the claim within the earlier of the following—*
  - (a) *1 year after the person becomes aware that the person has suffered financial loss because of the happening of an event mentioned in section 470(1);*
  - (b) *3 years after the happening of the event that caused the person’s financial loss.*
- (3) *However if the person starts a proceeding in a court to recover the person’s financial loss within the time permitted to make a claim under subsection (2), the person may make the claim within 3 months after the proceeding in the court ends.*
- (4) *Subsection (3) does not limit the time allowed under subsection (2) to make a claim.*
- (5) *...”*

12 In fact both the relevant contravention on which the claim is based and the applicant’s financial loss occurred prior to the passing of the PAMD Act. Their claim arose pursuant to the Auctioneers and Agents Act 1971.

13 Section 604(3) of the PAMD Act provides *“if, before the commencement, a person could have made a claim against the former fund but did not make the claim, the person may make the claim against the claim fund”*.

14 The Auctioneers and Agents Act 1971 created a scheme for compensating claimants for pecuniary loss suffered by reason of breaches of that Act. Section 119 of that Act describes the scheme (somewhat similar to the present scheme) and proceeds to permit a person to claim against the Fund by giving written notice of the substance of the claim.

15 Importantly, subsections 5 and 6 of section 119 of the Auctioneers and Agents Act 1971 provide

*“(5) The notice must be given within –*

- (a) *6 months after the person becomes aware that the person has suffered pecuniary loss; or*
- (b) *3 years after the commission of the breach that caused the person’s pecuniary loss;*

*whichever occurs sooner.*

- (6) *However, if, within the period (mentioned in subsection 5(a) or 5(b)) otherwise applicable to the making of a claim, the claimant commences an action in a court of competent jurisdiction for the recovery of the claimant's pecuniary loss, the claimant may, within a period of 3 months after the action concludes or is terminated, make a claim against the fund by notifying the registrar in writing of the substance of the claim."*

16 Clearly the notice that was given by the applicants to the Department complies with that requirement.

17 The application of section 604 of the PAMD Act and section 119 of the Auctioneers and Agents Act 1971 arose in *Hewitt and Hosking versus The Property Agents and Motor Dealers Tribunal and Others* [2003] QSC 101.

18 Wilson J stated at paragraph 11

*"[11] By s604(3) a person who could have made a claim against the former fund may make the claim against the new claim fund. It is the same claim as might have been brought under the A & A Act, and not a new species of claim under the PAMD Act. The question is whether immediately before the repeal of the A & A Act and the commencement of the PAMD Act the claimant could have made a claim under the A & A Act."*

19 In my opinion the applicants in this matter complied with all necessary provisions of both Acts, and in particular with section 119 of the Auctioneers and Agents Act 1971, and section 604 of the PAMD Act, subsection 3 of the latter section authorises the making of the present claim against the present Fund.

20 It may also be mentioned that a similar conclusion was reached in this Tribunal in *Kerwin versus Royal Mirage Realty Pty Ltd 2004 QTCCPAMD 15*, where the member concluded at paragraph 18

*"As their claim was received by the Chief Executive within three months of the finalisation of their Supreme Court proceedings, I am satisfied that their application was within time under section 472 of the PAMD Act."*

21 I conclude therefore that the applicants' notice of claim was given in time, and that they do not need any extension. If extension were necessary I would be prepared to extend time up to the present day. However, I think the appropriate course is to treat the application as one for review of the Department's decision, and to set aside the decision of the Chief Executive of the Department of Tourism, Fair Trading and Wine Industry Development, contained in notice stated 10 September 2007, and replace it with a

determination that the notice of claim was given within the time permitted by section 472 of the PAMD Act.

---

Mr J THOMAS AM QC  
**MEMBER**  
**Commercial and Consumer Tribunal**  
Date: 8 April 2008