



Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

CULLINANE J

No S177 of 1999

CSR LIMITED
(ACN 000 001 276)

Applicant/Defendant

and

GREGORY GEORGE MOSHNOGORSKY

Respondent/Plaintiff

TOWNSVILLE

..DATE 05/03/2002

JUDGMENT

HIS HONOUR: (1) This is an application by the defendant for an order that the action be struck out.

(2) The proceedings were instituted by the plaintiff by writ of summons of the 5th of March 1999. A conditional notice of intention to defend was filed by the defendant on the 4th of December 2001. This application was made at about the same time and first came before the Court on the 12th of December 2001.

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(3) Briefly, the applicant contends that the action must be struck out because the plaintiff did not obtain a certificate from the Board, as required by section 182D of the Workers Compensation Act 1990, which was in force at the time.

(4) Section 182D provides, so far as is relevant, as follows:

"(1) A worker who has not received an offer of lump sum compensation under section 132²¹ may seek damages at law for an injury suffered after the commencement only if the board gives to the worker a certificate under this section.

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(2) The worker must apply in the approved form to the board for a certificate."

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(5) The applicant had earlier made an application to WorkCover seeking to be recompensed in respect of certain medical expenses.

(6) This application was rejected on the grounds that WorkCover could not conclude that the plaintiff had sustained an injury. This view was confirmed upon a review by a senior officer. An appeal to the Industrial Magistrates Court was dismissed.

(7) At the outset the respondent/plaintiff contends that the applicant was not entitled to make this application. The argument advanced was that the circumstances did not permit the filing of a conditional notice to defend. It is convenient to assume without deciding the issue that the defendant was entitled to file a conditional notice of appearance.

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(8) For the plaintiff, it was contended that the evidence raises two arguable issues and thus that the application should be dismissed.

(9) The first of these concerns an alleged estoppel. This is said to be based upon a conversation which counsel for the plaintiff had with an officer at WorkCover. This is said to have occurred on the 4th of March 1999, the day prior to the expiration of the limitation period. According to the affidavit of the barrister concerned, he spoke to an officer at WorkCover and asked him to issue a conditional damages certificate under section 182D(4) of the Act as the limitation period expired on the 5th of March 1999. He says he was told that a certificate would be immediately issued. The solicitor instructing him arranged to have a writ of summons filed immediately.

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(10) The estoppel relied upon then must be that the promise made was that prior to the institution of proceedings by the plaintiff a conditional damages certificate would issue and that relying upon this promise the plaintiff acted to his

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detriment by instituting proceedings or by not taking some other course.

(11) I do not think that what is said goes as far as supporting such a representation. The solicitor instituted the proceedings without satisfying himself that such a certificate had issued and the terms of the alleged representation do not unequivocally amount to a representation of the kind relied upon in support of the estoppel.

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(12) The second ground relied upon concerns the approved form contemplated by section 182D(2).

(13) This issue, in one form or another, has come before the Courts on a number of occasions. The issues in those cases concerned whether, for one reason or another, there was in existence an approved form as provided for in section 182D(2) of the Act.

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(14) The principle said to be applicable here is that since the Act has the effect of preventing the institution of proceedings for damages if a certificate has not been obtained and since an application for such a certificate must be made in terms of the Act in the approved form, then, if there is no approved form, the obligation to obtain a certificate is impossible of performance and a defence based upon a failure to obtain such a certificate must fail. See Neuss v. Roche Bros Pty Ltd (2000), Q.C.A. 130.

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(15) In Meers v. Coles Myer Ltd (2000), Q.C.A. 342 the Court of Appeal rejected an argument that there was not an approved form and place at the time relevant on this application. That judgment, which is, of course, binding, might seem, on its face, to dispose of the point raised by the plaintiff here. However, it is made clear in the judgment of her Honour Justice Holmes, with whom his Honour Mr Justice Davies agreed, that no argument was advanced before the Court that there were 10 any deficiencies in the form relied upon by WorkCover.

(16) The relevant approved form has been placed before the Court as an exhibit to an affidavit of Denice Hamblyn, an officer of WorkCover. It is headed, "Application for Damages Certificate", and then goes on in a sub-heading to state: "This form is to be completed by persons considering seeking damages who have not previously lodged an application for compensation." The plaintiff had, in fact, lodged an application for compensation, but it was nonetheless contended 20 on behalf of the defendant that this did not prevent the form having effect as an approved form for the purposes of the Act.

(17) My attention was drawn to two judgments of the District Court in which this issue has been considered on applications to dismiss actions. They are Stanley v. NOEA Australia Pty Ltd and another (2000), Q.D.C. 336 Bradley DCJ, and McConnell v. Kewcliff Pty Ltd and another District Court Brisbane Robin QC DCJ 134 of 1999, the 2nd of October 2000.

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(18) In each case the Court refused the application to strike out the action holding that a triable issue arose as to

whether a document in such a form satisfies the requirement for a statutory form. The issue was identified, I think correctly, as whether a defence based upon a failure by a worker to make application by a particular document and to obtain a certificate pursuant to that application might fail where the document relied upon is expressly stated not to apply to the worker concerned. I think the plaintiff does raise an issue in this regard which warrants the refusal of the application.

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(19) Finally, the applicant contended that the action must fail in any case since the plaintiff was held not to have suffered an injury upon his application for workers' compensation. I am not persuaded that the determination by the board upon an application for compensation in the form of a payment of his medical expenses must necessarily be fatal to the plaintiff's claim for damages as was contended. The result will be that the application is dismissed with costs to be assessed.

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HIS HONOUR: I vacate the order I just made as to costs. I order that the applicant pay the respondent's costs limited to the costs of the appearance on the 1st of March 2002 to be assessed. I order that the respondent pay the applicant's costs of and associated with the appearance on the 12th of December 2001 to be assessed.

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