



Transcript of Proceedings

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Date: 31 January, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DUTNEY J

No S455 of 2002

ROBERT JOHN LUNNEY

Applicant

and

RICHARD FLANAGAN & CO PTY LTD

Respondent

ROCKHAMPTON

..DATE 28/01/2003

JUDGMENT

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: The plaintiff seeks leave to proceed nunc pro tunc pursuant to Section 306(3)(b) of the WorkCover Queensland Act 1996 in respect of a claim filed on the 19th of September 2002 notwithstanding that the claim was served on the employer more than 60 days after the compulsory conference was held. The defendant's applications are for leave to withdraw an admission made in the defence in which the defendant admitted that the incident in respect of which the plaintiff sues occurred on the 23rd of September 1999 when it, in fact, occurred on the 23rd of March 1999.

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Further the defendant seeks summary judgment pursuant to Rule 293 of the Uniform Civil Procedure Rules or alternatively pursuant to Rule 171 for failure to comply with Section 306 subsection 3 of the WorkCover Queensland Act.

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Briefly, the facts are these. The incident is now said to have occurred on the 23rd of March 1999. A Notice of Claim was delivered to the defendant in late 2001. The Notice of Claim incorrectly stated the date of the incident as the 23rd of September 1999.

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Some matters of non-compliance were raised by the defendant in relation to the Notice of Claim but no reference was made to the date. Ultimately the Notice was deemed to be a Complying Notice of Claim by WorkCover. A compulsory conference was then held on the 30th of May 2002.

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ORDER

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HIS HONOUR: Proceedings were not commenced until the 19th of September 2002. If the date of the incident was the 23rd of March 1999, then the proceedings commenced in September 2002 were out of time as the limitation for that event would have expired.

The principal issue it seems to me is whether the Notice of Claim was in fact a Complying Notice of Claim within section 280 of the WorkCover Act. Mr Crow, for the plaintiff, argues that the defendant failed to comply with its statutory obligations under section 282 by failing to identify the incorrect date as a matter of non-compliance.

In order for him to succeed, leaving aside for the moment the argument under section 291, it seems to me that the Notice of Claim must be declared non-complying so that his client can start again from the section 280 stage.

I cannot see anything in section 282 of the WorkCover Queensland Act which requires WorkCover to correct a factual error as to the date of an incident in relation to which the plaintiff claims relief.

It seems to me that having identified those matters with which it was not satisfied, and subsequently declaring that it was satisfied that the Notice of Claim complied with section 280, WorkCover is estopped from thereafter taking issue with it.

There does not seem to me to be any breach of any statutory obligation imposed by the section on WorkCover and, consequently, I am not satisfied that the notice was a non-complying notice.

If the notice was deemed to be complying then the conference on the 30th of May 2002 was correctly held and because the limitation period had expired by then, section 308 seems to me to be the operative section. That section extends the limitation period until 60 days after the compulsory conference is held.

. . .

HIS HONOUR: Irrespective of what date is subsequently put in the statement of claim in proceedings commenced outside the limitation period, it seems to me that the WorkCover Act does not permit an extension of time beyond that 60 day period for commencing the proceedings. Section 291 does not seem to me to be of any assistance to the plaintiff. In *Narayan v S-Pac Pty Ltd*, (2002) QSC 373. Jersey CJ considered the effect of the section in paragraphs (6) and (7). In section 7 he says this,

"This is a limitation period where the legislature intends that a limitation period may be extended. It tends to accord the discretion directly. That has not been done. Further, the power under section 291 to ensure compliance is not apt to facilitate extension of a limitation period for a commencement of proceedings, simply because there is no obligation to commence proceedings. The relevant requirement is that if proceedings are to be commenced, that occur within the prescribed period."

It follows that in fact the action was commenced out of time. The defendant defended the proceedings which were commenced and admitted the date of the accident as September 1999. That is the admission that the defendant seeks leave to withdraw.

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Notice of the erroneous admission was given to the plaintiff five days' after the defence was delivered so that the admission itself has not caused any prejudice to the plaintiff. There does not seem to me, in any event, any practical purpose in holding the defendant to the admission.

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The incident in respect of which the plaintiff in fact wishes to sue was in March 1999. If it wishes to do that it would need to amend the application and statement of claim. Once it does that, then the admission would go with the changing date and the action itself would fail as being outside the limitation period. It thus seems to me that I should give leave to withdraw the admission. I have no power to extend time nunc pro tunc for the proceedings to be commenced.

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HIS HONOUR: Because in view of the real date of the incident the action has no prospect of success because the limitation period has expired I consider it appropriate that judgment be given for the defendant in the action pursuant to Rule 293 of the Uniform Civil Procedure Rules.

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ORDER

I therefore order that judgment be given in the action for the
defendant against the plaintiff together with costs of and
incidental to the action to be assessed on the standard basis.

. . .

I make no order in relation to the costs of the applications
before me today. They are interlocutory and not attended by
unreasonable delay. The legislation therefore precludes any
amount of costs.
