[2003] QSC 231

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No 5001 of 2003

OMAR FAROOQ SULTAN — Applicant

and

NEW ASIAN SHIPPING CO LTD — Respondent

BRISBANE

..DATE 30/06/2003

ORDER

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HIS HONOUR: This is an application for declarations of compliance in relation to the Personal Injuries Proceedings Act 2002. The applicant was a marine cargo surveyor. He claims that he was injured in a fall which took place on the vessel "Cleopatra Dream" at Hay Point in Queensland on the 15th of March 2000.

As a result of those injuries he wishes to commence proceedings against the owner of the vessel in respect of what is alleged to be the deficient state of the vessel at the time of the fall which it is alleged was the cause of the fall.

The applicant was working in Queensland at the time that he fell. He consulted a medical practitioner shortly after the fall in March 2000 and in December of that year underwent an arthroscopy on his left knee for medial meniscus derangement. He was at the time apparently having some dealings with WorkCover presumably on the basis that he was an employee of the cargo survey company which was his employer. That fact is relevant because there will no doubt be documentation in existence regarding his accident. In that respect, the situation has some resemblance to that which applied in the case of Miller v. The Nominal Defendant (2003) QSC 81.

He continued to consult medical practitioners although by November 2001 he was living in Tasmania. It is not clear from the material when he moved to Tasmania.

ORDER

He first contacted his solicitors in that month and precisely what happened in regard to that contact is unclear. However, it is accepted that the solicitors were retained for the purposes of a possible action for personal injuries.

In June 2002 he moved to Adelaide to live because of a difficulty in tolerating the Tasmanian climate as a result of the accident. In August 2002 assent was given to the Personal Injuries Proceedings Act 2002 of this State and that Act commenced retrospectively on the 18th of June.

Under transitional provisions in the Act, it is common ground, notice of claim was required to be given to the respondent by the 29th of December 2002. By that date the applicant had not even met his Brisbane solicitors. Their first meeting occurred in February this year.

It resulted in a notice under the PIPA Act being signed on the 24th of February and that notice was served on the 6th of March. I say that the notice was served in this sense, that a copy of it was given to the Master of the "Cleopatra Dream" at Port Hedland in Western Australia. It might be doubted whether that amounted to giving notice to the owner of the ship but no point has been taken about that, and the proceedings have been conducted on the basis that the notice was given on that date.

Thereafter there was some correspondence between the parties. There was initially a dispute about whether the Personal

Injuries Proceedings Act 2002 applied to the case. Curiously, the applicant asserted that it did, and the respondent, that it did not. That disputation was the foundation for the first declaration sought in the application today. However, it is unnecessary to make a determination about that because the respondent has abandoned its contention that the Act does not apply. There is, therefore, no dispute between the parties, and it would be inappropriate to make a declaration.

The first declaration in issue is that referred to in paragraph 2 of the application, that is, a declaration that the applicant's notice of claim is a complying notice of claim.

Various arguments were addressed to me in respect of that declaration. Some descended into the detail of the notice. However, the first argument, which Mr Newton, on behalf of the applicant, advanced was that the notice was deemed to be a complying notice by reason of section 13 of the Act.

That section provides:

> "If a claimant gives notice of a claim under this division, or purportedly under this division, to a person against whom a proceeding is proposed to be started, and the person does not respond to the notice, under section 12, within the prescribed period under that section, the person is conclusively presumed to be satisfied the notice is a complying notice of claim."

There is no doubt that the applicant has given a notice of claim purportedly under the division of the Act which contains section 13. Nor is there any doubt that it was given to a person against whom a proceeding is proposed to be started.

The issue is whether the person, that is, the present respondent, responded to the notice under section 12 within the prescribed period under that section.

To explain that, it is necessary to go back to the provisions of the Act regarding the notice. Section 9, which is deemed to be relevant under section 77A of the Act, provides that:

> "Before starting a proceeding in a Court based on a claim, a claimant must give written notice of the claim in the approved form to the person against whom the proceeding is proposed to be started."

The period within which the notice was to be given expired, as I have said, on the 29th of December 2002. I take it that subsection 9(5) then applies, as if the reference to the period prescribed under subsection (3) were a reference to the period expiring on that date.

That subsection provides that if the notice is not given within that period, as is the present case, the obligation to give the notice continues, and a reasonable excuse for the delay must be given in the notice, or by separate notice, to the person against whom the proceeding is proposed to be started.

The continuing obligation was, as I have said, purportedly complied with on the 6th of March.

Section 10 of the Act provides that:

> "A person to whom notice of a claim is given must, in writing, within the period prescribed under a regulation, or if no period is prescribed, within one month after receiving the notice--

> (a) if the person considers that the person is a proper respondent to the claim, give notice to the claimant under section 12; or
>
> ...
>
> (c) if the person considers that the person is not a proper respondent to the claim, give to the claimant, in writing--
>
> (i) the reasons why; and
>
> (ii) any information identifying who is the proper respondent."

Subsection 4 provides that if the person advises the claimant that the person considers himself or herself not a proper respondent to the claim, the claimant must advise the person in writing, of the claimant's acceptance on the available information of that fact, or that the claimant considers the person to be a proper respondent, and requires the person to give notice to the claimant under section 12.

In the present case, the respondent did two things after having received the purported notice of claim. It did those things in a letter responding to the notice dated the 1st of April 2003, sent by its solicitor to the solicitors for the plaintiff.

The letter is a somewhat curious letter in that it asserts the solicitor to be the marine insurers for the vessel. However, I take it that that is a mistaken reference to the unnamed client for whom the solicitors were acting. It is, however, curious, to say the least, that the solicitors would not reveal the identity of their client. It may be that this was

associated with the fact that for some period, the respondent denied its ownership of the vessel. I say that on the basis of the evidence before me, because it is said in that material that that was so, on behalf of the applicant. I was told from the Bar table that that is not accepted by the respondent, but no challenge was made to the evidence, either by contrary evidence or by objection or cross-examination.

The letter went on to do two things. First, it asserted, purportedly under section 10(1)(a) of the Act that the respondent was not a proper respondent to the claim. It purported to give the reasons why that view was taken.

The letter then went on:

> "Additionally, pursuant to section 12 of the Personal Injuries Proceedings Act 2002, we consider that your notice is non-compliant with section 9 for a number of reasons."

It then set out at some length, by way of list, a number of reasons. It continued:

> "We provide you with this advice and notify you of same if it so arises during the course of any proceedings that may be instituted by you for the determination of these issues referred to above, that we have duly complied with paragraph 12, if it is adjudged that we are a proper and correct respondent.
>
> We would therefore require you to comply with the provisions of the Act, specifically referring to the reason why there has been non-compliance, and/or delay, with respect to the provision of notice and when it was that your client consulted you for the provision of legal advice or services."

It was submitted on behalf of the respondent that that letter should be interpreted simply as a letter under section

10(1)(c), asserting that the respondent was not a proper respondent.

It was submitted by Mr Griffin QC that the result of so reading the letter was that the applicant had not complied with subsection 10(4) of the Act.

That submission may also have been advanced on the basis of a reading of the letter to the effect that it was a letter asserting not only the matters in section 10(1)(c), but in the alternative, those in section 10(1)(a).

It seems to me that the latter option is clearly the correct interpretation of the letter. The syntax of the concluding paragraph leaves something to be desired, but it is, I think, quite clear that the requirement for the claimant to comply with paragraph 12 is purportedly fulfilled in the letter.

That being so, it would be wholly redundant to have a further requirement placed upon the claimant to give a notice requiring compliance with section 12 under subsection 10(4).

In my view, reading the letter as a whole, it is one which adopts alternative positions. It is unnecessary to say whether or not it is legally correct to do so, but those provisions did not trigger any obligation on the claimant under section 10(4), having regard to the terms of the letter.

The claimant, the present applicant, responded to the letter by a letter dated 8 April 2003. That dealt with the various allegations of non-compliance seriatim. It is for the moment unnecessary for me to consider whether these responses were adequate.

The letter was plainly given in response to the matters required to be raised under section 12(2) of the Act. That subsection required the respondent to give a notice stating whether the respondent was satisfied that the claimant's section 9 notice was a complying notice of claim, and if it was not so satisfied, identifying the non-compliance, and stating whether it waived compliance, and if it did not waive compliance, allowing a reasonable period of at least a month for the claimant either to satisfy the respondent that it had, in fact, complied, or to take reasonable action specified in the notice to remedy the non-compliance.

As I have said, the claimant responded, in fact, within a week, by the letter of the 8th of April. Subsection 12(3) provides that if a respondent is not prepared to waive compliance with the requirements in the first instance, it must, within one month after the end of the period for the claimant's notice under section 12(2)(c), give the claimant a written notice stating either that it is satisfied that the claimant has complied, or stating that it is not satisfied that the claimant has taken reasonable action to remedy the non-compliance, and giving full particulars.

No such notice has ever been given by the respondent. The question is whether or not the respondent's failure to give the notice under section 12(3) makes the respondent a person who does not respond to the notice under section 12, within the prescribed period under that section.

It seemed to me when I initially looked at that matter, that the question was whether section 13 required compliance with both of the notices required to be given by section 12 to the claimant, or whether it was sufficient to trigger section 13 that there was a non-response in respect of any one notice.

For that reason, I heard Mr Griffin on the question, after having heard Mr Newton. No argument was addressed to me precisely on that point, and I did not call on Mr Newton in response.

However, it seems to me now, looking at the wording of section 13, that the notice about which it speaks is a notice not given within the prescribed period, that is, one which was supposed to be given within the prescribed period.

That is a defined term under section 12(4) and applies only to the notice under section 12(2). It therefore seems to me that I ought to have called on Mr Newton to respond to the argument, and that I ought not to proceed to determine the question on this basis without hearing from him.

In the event that I am against him on the basis of section 13, it will become necessary to examine the particular non-compliances to see whether they have been complied with.

For those reasons, I shall hear Mr Newton.

...

HIS HONOUR: Mr Newton did not press the argument that s.13 applies to a notice under s.12(3). I have now heard argument on specific details of non-compliances by the claimant. Although, in Mr Griffin's outline of argument, a number of points were raised, in the end, he did not press all of them. Those which ultimately were pressed were those raised in sub-paragraphs (a),(f) and (h) of his outline.

He also pressed, to some extent, paragraph (d), but it seemed, I think, in argument that he conceded that really, his complaint in respect of that fell under paragraph (f).

The three matters referred to arose under the original form which was filled in by the applicant in connection with questions 5, 36 and 50 of the form. Those questions do not exactly match the relevant provisions of section 3 of the Personal Injuries Proceedings Regulation 2002, but in any event, I have reached the conclusion that they ought not to be allowed to inhibit an action proceeding.

Section 10(2) required the respondent, if it did not waive compliance with requirements of the Act, to allow the claimant a reasonable period of at least a month either to satisfy the respondent that it had complied with the requirements, or to take reasonable action to remedy the non-compliance.

The respondent did not do that. Its letter of the 1st of April 2003 did not allow any such period. The difficulty that that gives rise to is that the period under subsection 10(3) is therefore not triggered. More importantly, the respondent did not give any notice under subsection 10(3). Consequently, there was no specification of the way in which it was alleged that there was non-compliance, strictly in accordance with that subsection.

However, the letter of the 1st of April did set out in some detail, in fact, what was said to be the non-compliance, and it may be that it was intended to wrap up subsections 2 and 3 in the one letter.

That being so, it seems to me that it would be inappropriate for the respondent to be allowed to use the procedural provisions to prevent a claim. It may well be that the respondent has waived the requirements, notwithstanding its failure expressly to say that it has waived the requirements which have not been fulfilled, to the extent, if any, that they have not been fulfilled.

However, it seems to me more prudent to simply order under section 18 that the claimant proceed further with the claim, despite any non-compliance. Such an order may be made on conditions, and I would be prepared to impose a condition that the requested information set out in the regulation which has not been supplied to date, if any, be provided within 14 days or such further period as the Court may allow, as a condition of the order.

As regards the matter of the alleged failure of the claimant to give a reasonable excuse, under subsection 9(5), I am satisfied, in the circumstances, that the excuse which has been put forward is reasonable. It is notorious that it is difficult to identify the person responsible for mishaps on board ships. It may or may not be the owner.

In the present case, the applicant has selected the owner and had difficulty in tracking who the owner was. That was occasioned, in part, by a denial by an employee of the respondent that the respondent owned the vessel in question.

The delay was a delay, in my view, of only a few months, and in this respect, I would apply in this context the reasoning of the Court of Appeal in Thomas v. Transpacific Industries Proprietary Limited [2003] 1 Qd. R. 328 at 338.

When that view is taken, it is evident that there has been no substantial prejudice suffered by the respondent in the relevant period.

In any event, even taking into account the matters sworn to by the respondent, I am not satisfied that there has been, in fact, any real prejudice.

The respondent has not deposed to an inability to find the actual crew people involved in running the vessel at the time of the alleged incident, only in general terms to the difficulty that one sometimes has in such inquiries.

It is therefore my view that the discretion would be appropriately exercised to declare that a reasonable excuse has been given.

...

HIS HONOUR: In my judgment, the appropriate order for costs is that the costs should be costs in the cause. The applicant needed to come to Court, but should not get its costs, I think, unless it is ultimately successful in the action.

The respondent ought to have adopted a much more reasonable approach and is in default with compliance with the Act, which is at the root of most of this morning's difficulties. Costs should be costs in the cause. That can be embodied in a draft order.
