DISTRICT COURT OF QUEENSLAND

CITATION:	*Spring v Sarina Russo Job Access (Australia) Pty Ltd* [2009] QDC 93
PARTIES:	**DARRYL JOHN SPRING** Applicant **AND** **SARINA RUSSO JOB ACCESS (AUSTRALIA) PTY LTD** Respondent
FILE NO/S:	OA 763/09
DIVISION:	
PROCEEDING:	Originating application
ORIGINATING COURT:	District Court, Brisbane
DELIVERED ON:	17 April 2009.
DELIVERED AT:	Brisbane
HEARING DATE:	26 March 2009
JUDGE:	McGill DCJ
ORDER:	**Order the applicant pay the respondent's costs of the application fixed at the sum of $500.**
CATCHWORDS:	NEGLIGENCE – Personal Injuries – pre-litigation procedures – extension of limitation period – when time begins to run for statutory extension *Personal Injuries Proceedings Act* 2002 ss 20(2), 59(1). *Di Carlo v Dubois* [2002] QCA 225 – applied. *Dunn v Lawrence* [2005] QSC 291 – considered. *Haley v Roma Town Council* [2005] QCA 3 – considered.
COUNSEL:	R. A. Myers for the applicant R. M. Parcell (Solicitor) for the respondent
SOLICITORS:	Shine Lawyers for the applicant Bradleys Lawyers for the respondent

[1] This is an application under s 59(2)(b) of the *Personal Injuries Proceedings Act* 2002 ("the Act"). On 18 January 2008 the applicant gave a Part 1 notice of claim to the respondent in respect of an injury alleged to have been suffered on 20 January

2006. Proceedings had not been commenced, but the pre-litigation steps required under the Act before proceedings are commenced had all been taken when the application was heard, and the matter was at a stage where a proceeding could be commenced by the applicant against the respondent.

Submissions

[2] It was common ground that the limitation period expired on 20 January 2009, and *prima facie* any such proceeding would be out of time. The applicant sought to overcome that by obtaining an order under s 59(2)(b) of the Act giving leave to commence a proceeding in this court within a time allowed by the court, being a time in the near future. On behalf of the respondent, however, it was submitted that such an order was unnecessary, as the applicant was still within the extended limitation period allowed by s 59(2)(a), and was therefore entitled to commence without leave a proceeding which would not be outside the limitation period, so long as the proceeding was commenced no later than 9 April 2009. Accordingly, the order sought was opposed on the ground that it was unnecessary.

[3] The solicitor for the respondent, however, did concede that, if the order were necessary, there was no reason why the order should not be made, and indeed that, if I did not accept his submission that the order was unnecessary, he did not oppose the order sought by the applicant. He also conceded that the case was one where the requirements of s 59 for the court to grant leave under s 59(2)(b) had been met, so that the power existed; his argument was simply that the power should not be exercised because it was unnecessary to do so.

[4] The issue between the parties arose in this way: it was conceded on behalf of the applicant that the notice of claim was not a complying notice of claim at the time it was given. Various matters were raised on behalf of the respondent, and additional steps were taken on behalf of the applicant, and eventually on 9 October 2008 the respondent accepted in substance that the applicant had taken reasonable steps to remedy the non-compliance. The applicant's submission was that the effect of that was that thereafter the notice of claim was taken to be a complying notice of claim, particularly for the purpose of s 59, for which proposition *Haley v Roma Town Council* [2005] QCA 3 at [24] was authority. However, it was submitted that this did not affect the date on which the notice was given, for which proposition *Haley (supra)* was also cited, in particular the passage at [28] where the President said:

> "The ordinary meanings of the words of s 59(2)(a) is that claimants within s 59(1) of the Act … may bring proceedings in court as a right within six months of the notice being given or leave being granted."

[5] Counsel for the applicant relied on the fact that her Honour spoke of the time when the notice was given rather than the time at which the notice was taken to be compliant. The submission for the respondent, however, was that in the circumstances of this matter, where a notice of claim was initially non-compliant but the respondent subsequently accepted that the applicant had taken reasonable steps to remedy the non-compliance, the notice of claim is taken to have been given at the point when it is taken to be a complying notice of claim. He relied on *Haley*, but also on the decision in *Dunn v Lawrence* [2005] QSC 291.

[6] It was there held that the applicant did not satisfy the requirements of s 59 because, although a notice of claim had been given before the expiration of the limitation period, it was not a complying notice of claim, the respondent had not stated that he was satisfied that the notice had been given as required or that the claimant had taken reasonable action to remedy non-compliance, or waived non-compliance, and no declaration or order had been made under s 18(1)(c). It followed that there had not been a complying notice of claim given before the end of the limitation period, so that the requirements of s 59(1) had not been satisfied: [20]. Counsel for the applicant, however, sought to distinguish that case on the basis that in the present case it had been accepted before the expiration of the limitation period that the notice of claim had become compliant.

Analysis

[7] The short answer to this debate may be found in s 20(2) of the Act. Subsection (1) imposes a requirement on the respondent to do something within six months after a respondent receives a complying Part 1 notice of claim, and subsection (2) then identifies the point at which that period of six months begins to run in circumstances where the notice of claim was not a complying notice of claim when given:

> "If Part 1 of a notice of a claim is not a complying Part 1 notice of claim, a respondent is taken to have been given a complying Part 1 notice of claim when:
>
> (a) the respondent gives the claimant notice that the respondent waives compliance with the requirement that has not been complied with or is satisfied the claimant has taken reasonable action to remedy the non-compliance; or
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> (b) the court makes a declaration that the claimant is taken to have remedied the non-compliance, or authorises the claimant to proceed further with the claim despite the non-compliance."

[8] This covers the various different matters listed in s 18(1), but not all the ways in which a Part 1 notice of claim which is initially non-compliant can in effect become compliant; the other way is if s 13 has the effect that the respondent is conclusively presumed to be satisfied that it was a complying Part 1 notice of claim. In that circumstance of course it is treated as being a complying Part 1 notice of claim from the time it was given. That, however, is not the situation in the present case. Here, the Part 1 notice of claim which was initially not complying became a complying notice of claim as a result of the actions of the respondent (in the light of further steps taken by or on behalf of the applicant), and s 20(2)(a) has the effect that the complying Part 1 notice of claim was taken to have been given at that point.

[9] Section 20(2) does not operate simply for the purpose of s 20(1); on its face it operates generally for the purposes of the Act. Accordingly, it also serves to fix the point at which a complying Part 1 notice of claim is given for the purpose of s 59. In the present case s 59 is to be applied on the basis that the complying Part 1 notice of claim was given on 9 October 2008. Accordingly, the applicant was entitled to commence the proceeding after the expiration of the period of limitation (on 20 January 2009) pursuant to s 59(2)(a) so long as the proceeding was commenced

by 9 April 2009. The submission on behalf of the respondent was correct, and the extension of time under s 59(2)(b) was unnecessary.

[10] Unfortunately, I was not referred to s 20(2) of the Act during the hearing. Although I thought there was a provision to that effect, I had forgotten where it was, and did not myself locate it during the hearing. In circumstances where it was conceded that I had power to make an order, and where the only ground for opposition to the order was that it was unnecessary, it seemed to me at the time that the safer course was to make an order under s 59(2)(b) allowing a period which was slightly longer than the period which on the respondent's submission was provided anyway under s 59(2)(a), in order to avoid the risk of the applicant's missing out. I therefore made an order allowing the proceeding to be started on or before 16 April 2009. Ultimately that course was not opposed by the solicitor for the respondent, and the argument developed into one in relation to costs. Having now considered the matter further, it seems to me that the situation was clear enough, and, had I been aware of s 20(2) of the Act at the time, I would not have made the order.

Costs

[11] It remains, however, to deal with the question of costs. Counsel for the applicant submitted that there should be no order as to costs, conceding that the situation was one where the applicant required the indulgence of the court, and relying on the fact that in matters of this nature orders are not infrequently made without opposition or by consent without any order for costs being made. He also pointed out that, although notice had been given of the fact that the application was opposed, the basis upon which it was opposed was not disclosed until the morning of the hearing after counsel had arrived at court. In particular, it had not been said prior to that time that leave was unnecessary and the applicant was entitled to commence a proceeding without leave which would not be liable to be met with the defence that the proceeding was barred under the *Limitation of Actions Act*, provided that it was commenced before 9 April 2009. Had that representation been made, and relied upon by the applicant, the respondent would have been estopped from pleading the limitation period even if the respondent's interpretation of the effect of the Act had been erroneous.

[12] The solicitor for the respondent, however, submitted that the applicant should pay the costs of the application, indeed on an indemnity basis. It was submitted that the respondent should not be put in the position of having to incur costs because the applicant had pursued an application which was unnecessary, and misconceived. It was also pointed out that, as it happened, in this matter the parties had completed the pre-litigation steps with sufficient efficiency that the proceeding could have been commenced even within the unextended limitation period, that is before 20 January 2009. This was because the compulsory conference, held as a mediation, took place on 17 December 2008, and the proceeding could have been commenced after the expiration of the 14 days during which the mandatory final offers were open for acceptance. That does seem correct. In response, the applicant pointed out that the 14 day period expired on 31 December 2008, and that between then and the expiration of the limitation period was a time when ordinarily solicitors are not operating, or are operating to only a limited extent.

[13] But for the fact that the respondent did not disclose his position in relation to the application prior to the hearing of the application, but had merely said that it

opposed the application, there would I think be force in the argument that in all the circumstances the applicant should pay the respondent's costs of the application, on the ground that it was unnecessary, and that the respondent should not be put to additional costs because the applicant had made an unnecessary application. On the other hand, to some extent those costs were incurred because the respondent did not clearly communicate its position in relation to the application under s 59. Had that been communicated more effectively sooner, the applicant may well have chosen not to proceed with the application, or, had he chosen to proceed with it, would have been more clearly at risk in terms of costs.

[14] Even in those circumstances, however, I do not consider that indemnity costs would have been justified. Although the proceeding was not conducted as efficiently as it could have been, I do not consider that there is anything in the nature of misconduct on the part of the solicitors for the applicant, nor do I consider that there was a wilful disregard of known facts or an imprudent refusal of an offer of compromise or other unreasonable conduct.[1] The applicant's solicitors were I think proceeding under a genuine misapprehension as to the law; at least there is no material before me on the basis of which I could make a finding to the contrary. It is therefore not a situation for indemnity costs.

[15] On balance, however, I do consider that, in circumstances where the application was in fact unnecessary, and where the respondent has been put to some additional costs as a result of the making of the application, it is appropriate that that be reflected in an order for some costs in favour of the respondent. I will moderate those costs bearing in mind the considerations referred to earlier, and accordingly propose to fix them at a modest sum. I do not consider that the usual practice in relation to applications where it is appropriate to make an order under s 59 should be followed, nor that this matter should be treated as an indication of an appropriate order in relation to costs in matters which are more usual in that sense. In the circumstances I order the applicant to pay the respondent's costs of the application fixed at the sum of $500.

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1 *Di Carlo v Dubois* [2002] QCA 225 at [37] to [40].