

# DISTRICT COURT OF QUEENSLAND

CITATION: *Webb v De Vere* [2019] QDC 157

PARTIES: **ADRIAN JAMES WEBB**  
(applicant)

v

**CHRISTOPHER DE VERE**  
(respondent)

FILE NO/S: 1746/19

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: District Court, Brisbane

DELIVERED ON: 23 August 2019

DELIVERED AT: Brisbane

HEARING DATE: 12 July 2019

JUDGE: Sheridan DCJ

ORDER:

- 1. The originating application filed 20 May 2019 and the application filed 5 July 2019 are dismissed.**
- 2. There is no order for costs in relation to the originating application filed on 20 May 2019.**
- 3. The applicant is to pay the respondent's costs of and incidental to the application filed on 5 July 2019 on the standard basis to be assessed if not agreed.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INTERLOCUTORY PROCEEDINGS – GENERALLY – where applicant had made two separate requests for information and documents pursuant to s 27 of the *Personal Injuries Proceedings Act 2002* (Qld) – where applicant filed separate applications seeking the information and documents requested – where information and documents had been provided prior to hearing the applications – whether applicant entitled to its costs of each application

*Personal Injuries Proceedings Act 2002* (Qld) s 27, s 22,

COUNSEL: MJ Smith for the applicant  
RR Ivessa for the respondent

SOLICITORS: Carter Capner for the applicant  
GSG Legal for the respondent

## **Introduction**

- [1] This is an application for costs arising from two applications seeking orders, amongst other things, pursuant to the *Personal Injuries Proceedings Act 2002* (Qld) (*PIPA*) for the respondent to provide certain information and documents in compliance with his obligations pursuant to s 27 of *PIPA*.
- [2] The applicant is the claimant in a personal injuries claim pursuant to *PIPA*. In reciting the history of the matter, the applicant shall be referred to as the claimant. The claimant was the passenger in a small aircraft and the respondent was the pilot of the aircraft. Both the claimant and the respondent suffered personal injuries consequent upon the aircraft landing at an airstrip on 9 June 2016.
- [3] The first of the applications was filed on 20 May 2019. A consent order was made by the deputy registrar of the court on 30 May 2019. Pursuant to the terms of the consent order, the application so far as it sought orders pursuant to s 27 of *PIPA* was adjourned to 12 July 2019. The costs of and incidental to the application in relation to those orders was reserved. Importantly for the claimant, the terms of the consent order included the extension of the limitation period.
- [4] The second application filed on 5 July 2019 sought the provision of information under s 27 of *PIPA*, namely the answer to four questions detailed in the application to be verified by statutory declaration.
- [5] By the date of hearing of the applications on 12 July 2019, all information and documents sought had been satisfactory provided. The only issue remaining was the appropriate costs order to be made.
- [6] It is accepted that, the quantum of the claimant's claim will be within the jurisdiction of the District Court based on the medical evidence of the claimant's orthopaedic surgeon and that this court has jurisdiction to hear the claim and these applications. It is further accepted that the claimant has complied with his obligations to deliver a notice of claim pursuant to *PIPA*.

## **Submissions on costs**

- [7] Counsel for the claimant seeks a costs order in the following terms:
  - (a) The respondent pay the claimant's costs of and incidental to the applications in paragraphs 1 and 2 on a standard basis including the appearance on 31 May 2019 but save for the appearance on 12 July 2019 which costs are sought on an indemnity basis; and
  - (b) The respondent pay the claimant's costs of and incidental to the application on a standard basis, save for the appearance on 12 July 2019, which costs are sought on an indemnity basis.
- [8] The respondent's position is that:
  - (a) There should be no order as to costs in relation to the first application; and
  - (b) The claimant should pay the respondent's costs of the second application because it was precipitously filed.

- [9] The determination as to the appropriate costs order will require a careful consideration of the correspondence passing between the solicitors for each of the parties.

## **Correspondence**

### ***The First Application***

- [10] The first request for information and documents was made in a letter dated 6 February 2019 which contained 46 requests for information to be verified by statutory declaration and 14 requests for classes of documents.
- [11] By letter dated 26 February 2019 the respondent's solicitors acknowledged the request and said that they were liaising with their client and will revert shortly. By letter dated 15 March 2019, the claimant's solicitors reminded the respondent's solicitors that the timeframes in *PIPA* allow one month to provide information and documents. By letter dated 25 March 2019, the respondent's solicitors sought a two-week extension.
- [12] By letter dated 29 March 2019, the claimant's solicitors granted an extension until 11 April 2019. It was said, if the information was not supplied by then, "We will file an application to the court seeking orders without further notice".
- [13] No response was forthcoming from the respondent's solicitors and by letter sent by email on 18 April 2019, the claimant's solicitors enclosed a draft application and supporting affidavit, which it was stated would be filed on Tuesday, 23 April 2019.
- [14] The respondent's solicitors sent an email response at 9:50am on Tuesday 23 April 2019. The email noted that the letter and enclosures sent on 18 April 2019 was received at 4pm on that day, which was the last working day before the Easter holidays. It was said they were in the process of finalising their client's responses and the responses "should be served in the week commencing 29 April 2019".
- [15] On 29 April 2019, the respondent's solicitors stated that there had been delay in receiving a response "due to the Easter break and (the respondent's) medical condition".
- [16] On 3 May 2019, the respondent's solicitor provided certain documents and with respect to the request for information stated, "Unfortunately, due to our client's injuries he has still not been able to provide us with answers to your client's questions." It was said the balance would be provided as soon as verified by statutory declaration.
- [17] By letter dated 8 May 2019, the claimant's solicitors said that no satisfactory explanation had been provided as to the respondent's failure to observe his obligations. It was stated the application would be filed as foreshadowed that week.
- [18] By letter dated 10 May 2019, the respondent's solicitors said they had written multiple times outlining the reasons for the respondent's delay and in that letter explained more fully the nature of the respondent's medical condition; making reference to the fact, that, as the claimant was aware, the respondent was rendered unconscious as a result of the incident and said the respondent suffers from severe amnesia and psychological sequelae as a result of the incident. The letter stated, "You are quite possibly underestimating the severity of the respondent's injuries

and the impact that these medical issues have had on the respondent's ability to answer the claimant's questions." It was stated, "As previously advised, we will provide the respondent's responses as soon as they are verified and available to us. We do not envisage this being more than a week." Further documents were provided under cover of the letter.

- [19] Without further correspondence, the claimant's solicitor filed the originating application on 20 May 2019. The application by orders 1 and 2 sought information and documents the subject of the correspondence and by order 4 sought an extension of the limitation period; no request had been previously made for such an order.
- [20] The information and further documents were provided by the respondent on 23 May 2019. At that time, the respondent's solicitors confirmed that they did not oppose the order sought in the originating application to extend the limitation period. Given the provision of all material, the respondent's solicitors requested that the claimant agree to discontinue the originating application on the basis of each party bear their own costs. The respondent's solicitors stated that given that they had explained their client's reasons for delay, the filing of the originating application was completely unnecessary.
- [21] By email dated 29 May 2019, the claimant's solicitors responded that they were currently taking advice as to the sufficiency of the information provided in the statutory declaration by the respondent "given the preponderance of 'I do not remember' responses". The claimant's solicitors stated that they were not prepared to have the substantive application disposed of and proposed an adjournment for six weeks until 12 July 2019. The claimant's solicitor noted the respondent's consent to the extension of time. As noted above, a consent order was agreed.
- [22] It would appear following a request from the claimant's solicitors, the respondent's solicitors provided under cover of a letter dated 5 June 2019 a copy of a medical report dated 5 June 2019. The medical report supported the respondent's medical condition.
- [23] In subsequent correspondence, the medical certificate was not challenged by the claimant nor was the adequacy of the answers given in the statutory declaration. Rather, the position taken by the claimant's solicitor was that the respondent could just have easily stated "I do not recall" three months ago. It was stated that the claimant did not accept that the respondent's brain injury is responsible for the delay in complying with his obligations under *PIPA*. It was confirmed that the claimant would be seeking indemnity costs associated with the originating application filed in May 2019. It was said the costs sought would not include those of any appearance because a consent order was agreed.

### ***Second application***

- [24] The second application arose from a request for information and documents first made by the claimant on 12 June 2019. The request related to the nature of the business operated by the respondent at the property. The letter contained five requests for information, namely the nature of the business conducted by the respondent at Melawondi, the name under which the business is conducted, the personnel engaged at Melawondi, the locations at which the livestock business is conducted and whether the respondent operates any other businesses and four request

for documents, namely for the FY 2014 to FY 2018 the annual financial records of the respondent, of the entity that owns Melawondi property, of the entity that operates the cattle business and of the entity that owns the aircraft.

- [25] By letter dated 18 June 2019, the respondent's solicitors responded stating that their client does not consider the request is compliant with s 27 of *PIPA* and asked as to why the information requested was directly relevant to the matters that are in issue. In response, the claimant's solicitors said that whilst the respondent alleges the injury occurred during the course of a dangerous recreational activity, the further request "pertained to the purpose of the flight and the purposes for which the aircraft was being used by the respondent."
- [26] By letter dated 2 July 2019, the respondent's solicitors said the documents pertaining to the respondent's business activities for the financial years 2014 to 2018 do not assist in ascertaining the purpose of the flight and purposes for which the aircraft is used by the respondent. The letter stated, "We are instructed that the 'purpose of the flight' on 9 June 2019 was a private flight for leisure. Your client is well aware that the flight had no business purpose. If you are instructed to the contrary please provide full particulars of this contention." The letter confirmed that the request is not compliant with s 27 of *PIPA*. It was stated that if you press for the disclosure of the requested documents and information that will be opposed at the hearing of the original application on 12 July 2019.
- [27] By email of the same date, the claimant's solicitor responded stating, "The claimant does contend otherwise as regards the purpose of the flight, namely that it was in connection with the business conducted at the airstrip's location." The email then stated, "Please have your client provide a statutory declaration recording the information we have requested in that regard, on oath." It was then said, "Unless we hear from you by 5 July that the requested information and documents will be provided, we will brief counsel for the appearance on 12/7/19 and seek indemnity costs against your client."
- [28] The claimant's solicitors sent a further letter on 3 July 2019, referring to the previous correspondence and referred to the respondent's request that they particularise what the business was that the respondent was allegedly conducting at the airstrip's location on 9 June 2016. In that letter it was said that the claimant had no obligation to provide the particulars but stated that "their instructions were that the respondent was carrying on a pastoral business – known as Melawondi station – at the location of the Melawondi airstrip as at that date. It was said the business related to cattle fattening and was conducted through the respondent's company, Melawondi Pastoral Company Pty Ltd."
- [29] The letter again said that the respondent was required to provide information that was in the respondent's possession "about the circumstances of...the incident". The letter said that clearly includes whether the flight was for leisure as contended by the respondent or was in connection with the business conducted at the airstrip's location as asserted by the claimant. The letter said that all information and documentary material concerning the purpose for which the aircraft and airstrip were operated should be promptly disclosed. This includes the respondent's financials that have been requested.

- [30] By letter sent by email on 4 July 2019, the respondent confirmed that the financial documentation and information sought by the claimant dating as far back as 2014 “will not provide clarity as to whether the subject flight on 9 June 2016 was for a business or a leisure/private purpose.” It was said “Your client is well aware that the flight had no business purpose.” Again, a request was made for particulars pursuant to s 22, if the claimant maintained that the subject flight was for a business purpose. It was requested that the claimant respond by way of statutory declaration.
- [31] The letter of the respondent noted that the current dispute between the parties regarding the request for further information and documentation dated 12 June 2019 is not part of the claimant’s originating application dated 20 May 2019. It was said that any dispute relating to the request dated 12 June 2019 will not be heard at the hearing of the originating application on 12 July 2019. The letter stated, “If your client presses for the additional documentation and information contained in his request dated 12 June 2019 then an additional Originating Application will need to be filed by your client.”
- [32] By email dated 5 July 2019, a further originating application and supporting affidavit returnable on Friday 12 July 2019 was enclosed. It was said that the application was “in relation to the information that has been requested pursuant to s 27 but which Mr De Vere has stated that he refuses to provide.”
- [33] The respondent’s solicitors responded by letter dated 8 July 2019 sent by email. The letter noted that the original nine requests for information and documentation as sought in the letter of 12 June 2019 had been amended in the originating application filed 5 July 2019 to four requests for information and documentation. It was stated that they assume the additional five requests for information and documentation as contained in the letter dated 12 June 2019 were no longer pressed.
- [34] It was stated that, whilst they were obtaining instructions, they anticipated that their client would provide a statutory declaration in answer to the four questions that are now contained in the originating application. It was said that they were hopeful to be able to provide that before the hearing of the originating application on Friday (that is Friday 12 July 2019). The letter stated that they had only been served with the latest request on 5 July 2019 and so delivery beforehand may not be possible. It was stated that on any view the originating application dated 5 July 2019 was “premature particularly in light of the change of position of your client as to his request for information”; presumably referring to the request for information to be verified by statutory declaration about the purpose of the flight in question.
- [35] The letter of 8 July 2019 provided a detailed response to the statement by the claimant that it would be seeking indemnity costs of both applications. The letter stated that any such request would be strenuously opposed and again invited the claimant to discontinue the originating applications on an each party pay and bear their own costs basis. It was stated that unless it was agreed to discontinue the originating applications on an each party pay and bear their own costs basis then they would instruct counsel to appear at the hearing of the originating application and press for costs of both applications given the claimant’s conduct.
- [36] The statutory declaration of the respondent providing answers to the four requests for information contained in the originating application filed on 5 July 2019 was provided by letter dated 9 July 2019 sent by email.

- [37] The claimant's solicitors sent a letter in reply dated 9 July 2019 which was sent by email. That letter sought agreement from the respondent to pay the claimant's costs of and incidental to the application filed 20 May 2019 as set out in paragraphs 1 and 2 on an indemnity basis and pay the costs of the application filed 5 July 2019 on an indemnity basis. It stated that if the solicitors did not respond they would brief counsel to appear.
- [38] On 10 July 2019, by email at 2.12pm a further offer to settle costs was made by the claimant's solicitors on the basis that the respondent agrees to pay the claimant's costs of each application on a standard basis. It was stated that the offer was open until 10am the next day. It was stated they intended to rely on the principles established in *Calderbank v Calderbank*<sup>1</sup> and bring the correspondence to the attention of the court if the offer were not accepted.
- [39] The matter did not settle and the applications proceeded for the court to determine the question of costs on the two applications.

### **Analysis**

- [40] In terms of the first application, counsel for the respondent acknowledged that up until the letter of 29 April 2019 communication from the respondent explaining the delay in compliance "was less than optimal". That is undoubtedly true, but by the letter of 10 May 2019 and by the time of the filing of the application on 20 May 2019, the delay had been explained.
- [41] The statutory declaration and further documents requested, were provided soon after the filing of the originating application with a request that the originating application be discontinued with no order as to costs. That request was refused, with it being suggested there may be a challenge to the adequacy of the statutory declaration.
- [42] At the hearing, no challenge was made to the medical certificate nor the adequacy of the statutory declaration.
- [43] Given this history, it is my view that the bringing of the first application, and especially the pursuit of the first application for costs was unnecessary. There should be no order as to costs.
- [44] In terms of the second application, the validity of the request for information and documents the subject of the application had always been disputed by the respondent. The parties had exchanged numerous correspondence between 12 June 2019, when the request was first made, and 5 July 2019 when the second application was filed.
- [45] In the course of the exchange of correspondence, on 2 July 2019 the respondent's solicitors clearly stated their client's instructions as to the purpose of the flight. Despite the debate, the claimant maintained the request contained in their initial letter of 12 June 2019 was a valid request for information and documents.
- [46] Curiously, at no time did the claimant, until the application was filed on 5 July 2019, request the respondent to verify by statutory declaration his instructions as to

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<sup>1</sup> [1975] 3 All ER 333.

the purpose of the flight. In my view, it cannot be said, as was suggested in oral submissions by counsel for the claimant, that the email of 2 July 2019 should be interpreted as seeking those particular instructions to be verified by statutory declaration. Any statements contained in that email must be viewed in the context of the request in the final paragraph of the email and in subsequent correspondence where the demand for the information and documents requested in the letter of 12 June 2019 was confirmed.

[47] Ultimately, upon filing the application, the claimant changed its position and changed the information sought and did not pursue the request for documents; though the letter serving the application did not indicate there had been a change. The information verified by statutory declaration was provided two days later and, despite an offer from the respondent at that time for each party to bear their own costs, the applicant pursued its application for indemnity costs; making an offer the afternoon before the hearing of the application that the claimant would accept the payment of its standard costs of each application.

[48] In my view, the second application was precipitously filed and unnecessarily pursued after the information was provided and the offer made. In those circumstances, it is appropriate to make an order for the applicant to pay the respondent's costs of and incidental to the application on a standard basis.

### **Orders**

- [49] Accordingly, the orders of the court will be as follows:
1. The Originating Application filed 20 May 2019 and the Application filed 5 July 2019 are dismissed.
  2. There is no order for costs in relation to the Originating Application filed on 20 May 2019.
  3. The applicant is to pay the respondent's costs of and incidental to the Application filed on 5 July 2019 on the standard basis to be assessed if not agreed.