

SUPREME COURT OF QUEENSLAND

CITATION: *New Asian Shipping Co Ltd v Omar Farooq Sultan* [2005] QSC 228

PARTIES: **NEW ASIAN SHIPPING CO LTD**
(applicant)
v
OMAR FAROOQ SULTAN
(respondent)

FILE NO: BS 4222/05

DIVISION: Trial Division

PROCEEDING: Originating application

DELIVERED ON: 9 August 2005

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 14 July 2005

JUDGE: Wilson J

ORDER: **That the application be dismissed.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – AMENDMENT – where plaintiff has amended statement of claim without leave of the court – where amended statement of claim purported to join a second defendant - whether claim and statement of claim should be struck out as vexatious or an abuse of process

Personal Injuries Proceedings Act 2002 (Qld), ss 18(1)(c)(ii), 42, 77D(2)(b)
Personal Injuries Proceedings Regulation 2002 (Qld), ss 3(5)(b), 3(5)(c)
Supreme Court of Queensland Act 1991 (Qld), s 81
Uniform Civil Procedure Rules 1999 (Qld), rr 8, 69, 74(4), 171, 371, 373, 377, 379
WorkCover Queensland Act 1996 (Qld) , ss 293, 305(1)

Bates v Queensland Newspapers Pty Ltd [2001] QSC 083, cited
Perez v Transfield (Qld) Pty Ltd [1979] QdR 444, cited
Re Cameron [1996] 2 QdR 218, considered

COUNSEL: RJ Clutterbuck for the applicant
C Newton for the respondent

SOLICITORS: Cleary & Lee for the applicant
WT McMillan & Co for the respondent

- [1] **WILSON J:** This is an originating application –

“that the claim and statement of claim in proceeding no 2356 of 2003 be struck out as against the applicant pursuant to rule 171 of the *UCPR*.”

- [2] The respondent Omar Farooq Sultan ("Mr Sultan") is a marine surveyor. On 15 March 2000 he sustained personal injuries while inspecting the vessel MV Cleopatra Dream which was moored at Hay Point in Queensland.
- [3] Mr Sultan wished to bring a claim against his employer Carbon Consulting International Australia Pty Ltd. On 11 March 2003 a Deputy Registrar of this Court gave him leave pursuant to s 305(1) of the *WorkCover Queensland Act* 1996 to commence a proceeding against his employer despite non-compliance with the requirements of s 280 of that Act (proceeding no S 2187 of 2003). Such a proceeding was commenced on 14 March 2003 (proceeding no S 2356 of 2003). It was stayed pending compliance with various requirements of the *WorkCover Queensland Act*.
- [4] Mr Sultan wished also to sue the owner of the vessel, New Asian Shipping Co Ltd. On 30 June 2003 Fryberg J made the following orders in proceeding no S 5001 of 2003:-

- “1. Pursuant to section 18(1)(c)(ii) of the *Personal Injuries Proceedings Act* 2002, the applicant is authorised to proceed further with the claim despite any failure to give a complying notice of claim, upon the condition that within 14 days of the date hereof, or such further time as the court may allow, he supply the following information to the respondent:
 - (a) the approximate time of the incident;
 - (b) the details referred to in s 3(5)(b) of the *Personal Injuries Proceedings Regulation* 2002, including such details in respect of any period of self-employment;
 - (c) the details referred to in s 3(5)(c) of the *Personal Injuries Proceedings Regulation* 2002.
2. It is declared that the applicant has given a reasonable excuse for the delay in providing the notice of claim.
3. Grant the applicant leave pursuant to section 77D(2)(b) of the *Personal Injuries Proceedings Act* 2002 to commence proceedings on or before 18 December 2003 in relation to personal injury arising out of the incident the subject of the notice of claim exhibit WTM 1 herein.
4. Each party’s costs of and incidental to this application are to be that party’s costs in the personal injuries proceedings.
5. Each party has liberty to apply on two days written notice to the other.”

- [5] On 9 December 2003 Mr Sultan filed an amended claim and statement of claim in proceeding no S 2356 of 2003. In the amended claim New Asian Shipping Co Ltd was named as second defendant, and the following words appeared on the face of the claim:-

"The claim against the second defendant is issued by order of Fryberg J made 30 June 2003 in Number 5001 of 2003."

In the left hand margin the following endorsement appeared:-

"Amended pursuant to rule ~~378~~ 377 of the Uniform Civil Procedure Rules."

This endorsement was signed and dated by the solicitors for Mr Sultan.

- [6] On 5 December 2003 Mr Sultan's solicitors inquired of New Asian Shipping Co Ltd's solicitors whether they would accept service of "our client's Claim and Statement of Claim (filed pursuant to the Order of Fryberg J)". Then on 16 December 2003 Mr Sultan's solicitors advised New Asian Shipping Co Ltd's solicitors that –

"our client's Statement of Claim will not be served on you at this time as s 77D(3) *PIPA* provides that if a proceeding is started under s 77D(2) - as our client's proceeding was - the proceeding is stayed until the claimant complies with the pre-court procedures set out in *PIPA*."

- [7] In fact no action was taken to serve the amended claim and statement of claim until early March 2005. The claim was renewed for 12 months from 14 March 2004 and for 12 months from 14 March 2005.
- [8] In the meantime there had been an unsuccessful mediation on 28 October 2004. That mediation was apparently regarded as fulfilling both the compulsory conference requirements of s 293 of the *WorkCover Queensland Act* and those of s 42 of *PIPA*.
- [9] The claim against the employer (the first defendant) in proceeding no S 2356 of 2003 was discontinued on 31 March 2005.
- [10] The originating application now before the court (proceeding no BS 4222 of 2005) was filed on 25 May 2005.
- [11] The principal submissions of counsel for New Asian Shipping Co Ltd were -
- (a) that leave was required before a further party could be added to an existing proceeding;
 - (b) that the Registrar lacked power to grant such leave;
 - (c) that there had been non-compliance with the order of Fryberg J;
 - (d) that proceeding no S 2356 of 2003 as against his client is a nullity;

- (e) that his client could not now be joined as a party to proceeding no S 2356 of 2003 as that proceeding is no longer live, having been discontinued against the only defendant properly a party to it;
- (f) that Mr Sultan is now out of time to commence a proceeding against his client;
- (g) that as against his client proceeding no S 2356 of 2003 should be struck out as vexatious or an abuse of the process of the court.

[12] The principal submissions of counsel for Mr Sultan were -

- (a) that the failure to obtain leave was a mere irregularity which did not render the proceeding against New Asian Shipping Co Ltd a nullity (rule 371);
- (b) that if an incorrect originating process had been pursued, the proceeding could not be set aside for that reason (rule 373);
- (c) that any application to set aside the amendment that was made without leave ought to have been brought within 8 days of service (rule 379).

[13] Fryberg J having given him leave pursuant to s 77D(2) of *PIPA* to commence a proceeding against New Asian Shipping Co Ltd, Mr Sultan could have -

either

commenced a fresh proceeding by filing a claim and statement of claim - which would have commenced when the claim was filed (r 8);

or

obtained an order adding New Asian Shipping Co Ltd as a defendant in the existing proceeding no S 2356 of 2003 – in which case the proceeding against it would have commenced on the filing of an amended copy of the claim (r 74(4)).

[14] But of course he filed an amended claim without an order of the Court for the joinder of New Asian Shipping Co Ltd as a defendant. What he did was not authorised by r 377, which provides –

“ Amendment of originating process

377 (1) An originating process may not be amended except –

- (a) if the amendment is a technical matter – with the leave of the registrar or the court; or
- (b) otherwise – with the leave of the court.

(2) Subrule (1) does not apply to a pleading or particular included in an originating process.”

[15] Rule 371 provides –

“Effect of failure to comply with rules

371(1) A failure to comply with these rules is an irregularity and does not render a proceeding, a document, step taken or order made in a proceeding, a nullity.

(2) Subject to rules 372 and 373, if there has been a failure to comply with these rules, the court may –

- (a) set aside all or part of the proceeding; or
- (b) set aside a step taken in the proceeding or order made in the proceeding; or
- (c) declare a document or step taken to be ineffectual; or
- (d) declare a document or step taken to be effectual; or
- (e) make another order that could be made under these rules (including an order dealing with the proceeding generally as the court considers appropriate); or
- (f) make such other order dealing with the proceeding generally as the court considers appropriate.”

- [16] From a procedural standpoint the filing of an amended claim without an order for joinder was contrary to the rules, but it was and remains valid unless the Court orders otherwise: r 371; *Perez v Transfield (Qld) Pty Ltd* [1979] QdR 444; *Bates v Queensland Newspapers Pty Ltd* [2001] QSC 083.
- [17] New Asian Shipping Co Ltd has not applied for an order pursuant to r 371 setting aside the proceeding against it; rather it has applied purportedly pursuant to r 171 for an order striking out the claim and the statement of claim as vexatious or an abuse of process.
- [18] Rule 171 is concerned with striking out pleadings (ie the statement of claim) but not a proceeding. In *Re Cameron* [1996] 2 QdR 218 at 220 Fitzgerald P considered what makes legal proceedings vexatious. He said -

“It is also necessary to decide what makes legal proceedings vexatious. Although there are sometimes statutory indications, the broad test potentially concerns such factors as the legitimacy or otherwise of the motives of the person against whom the order is sought, the existence or lack of reasonable grounds for the claims sought to be made, repetition of similar allegations or arguments to those which have already been rejected, compliance with or disregard of the court’s practices, procedures and rulings, persistent attempts to use the court’s processes to circumvent its decisions or other abuse of process, the wastage of public resources and funds, and the harassment of those who are the subject of the litigation which lacks reasonable basis: see, for example, *Attorney-General v Wentworth* (1988) 14 NSWLR 481; *Jones v Skyring* (1992) 66 ALJR 810; *Jones v Cusack* (1992) 66 ALJR 815; and *Attorney-General (NSW) v West* (NSW Common Law Division No 16208 of 1992), 19 November 1992, unreported, BC9201474).”

I do not consider that the amended statement of claim (or indeed the amended claim) falls within this category. Even if the pleading were properly characterised as such, merely to strike out the pleading under r 171 would still leave the claim on foot.

- [19] New Asian Shipping Co Ltd contends that this is more than a case of procedural irregularity. It contends that there has been non-compliance with the order of Fryberg J and that because Mr Sultan is now out of time to commence a proceeding against it, the Court could not now make an order for its joinder as a defendant in proceeding no S 2356 of 2003 even if it were still live (and he contends that it ceased to be so when the claim against the employer, the only defendant properly joined, was discontinued.). This is necessarily premised on the invalidity of the filing of an amended claim in the absence of an order for joinder. However, that is contrary to the very terms of r 371.
- [20] It is not necessary for me to determine whether the Court could now make an order for the joinder of New Asian Shipping Co Ltd as a defendant (as to which see *Supreme Court of Queensland Act 1991* s 81 and *UCPR* r 69). Even if the present application were treated as one to set aside the proceeding under r 371, I would decline to do so in the exercise of my discretion, and declare the filing of the amended claim and the amended statement of claim to be effectual. New Asian Shipping Co Ltd has not been disadvantaged in its defence of the claim by what has occurred; on the contrary the parties have worked through the pre-litigation processes contemplated by *PIPA*, including a compulsory conference which was conducted as a mediation and which involved also the employer Carbon Consulting International Australia Pty Ltd.
- [21] The application is dismissed.