SUPREME COURT OF QUEENSLAND

CITATION:	*Cousins v Mount Isa Mines Ltd* [2005] QSC 349
PARTIES:	**TRENT JEFFERY COUSINS** (applicant) **v** **MOUNT ISA MINES LTD ACN 009 661 447** (respondent)
FILE NO/S:	SC No 664 of 2005
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	29 November 2005
DELIVERED AT:	Townsville
HEARING DATE:	25 November 2005
JUDGE:	Cullinane J
ORDER:	**Application is dismissed with costs to be assessed**
CATCHWORDS:	LIMITATION OF ACTIONS - CONTRACTS, TORTS AND PERSONAL ACTIONS - PERSONAL INJURY CASES - where the applicant was injured in a work accident in August 2003 - where the applicant first consulted a solicitor in December 2004 - where the required notice under the *Personal Injuries Proceedings Act* 1992 was given to the respondent on 15 August 2005 - where the respondent asserts that the applicant has not provided a reasonable excuse for the delay in providing the notice *Personal Injuries Proceedings Act* 1992, s 9; s 18
COUNSEL:	W Elliott for the applicant S Durward SC for the respondent
SOLICITORS:	Maurice Blackburn Cashman for the applicant CLS Lawyers for the respondent

[1] The applicant seeks by his application a declaration that he has given a reasonable excuse for any delay in giving a notice to the respondent complying with the requirements of s 9 of the *Personal Injuries Proceedings Act* 2002 (Qld) as amended and thus has given a notice compliant with the Act. In the alternative, he seeks an order that he has remedied any non-compliance (s 18(1)(c)(i)), or alternatively that he be authorised to proceed further with the claim despite non-compliance (s 18(1)(c)(ii)). It was the latter rather than the former of the two alternative claims under s 18 which was pressed.

[2] The applicant who was born on 25 April 1977 and has a grade 11 education, was injured in the course of his employment with Sandvik Materials Handling Pty Ltd at Mount Isa on 21 August 2003. The work that he was performing was being carried out on a site of the respondent. In fact it is described in the Notice of Claim as "Old Belt Splicers Workshop, Mount Isa Mines". He was moving a metal plate which was part of a vulcaniser and which is described as being in excess of 100 kilograms. It appears that he was being assisted by another person in manoeuvring it and that when the vulcaniser was put on beams for the purposes of being slid along it slipped and the vulcaniser fell from the top of the beams causing him to bear the whole weight and as a result he suffered an injury.

[3] The applicant was off work for a considerable period, returning to work on light duties on 15 December 2003. He had in the meantime undergone surgery to repair a hernia. He was seen in the latter part of 2003 by a neurosurgeon and it was as a result of his recommendation that the applicant returned to work on light duties from 15 December 2003.

[4] He had received physiotherapy and says that whilst he was performing light duties he was also carrying out exercises provided by his physiotherapist. He says that his injury was slowly improving and that he was able to do more duties at work and at home although he still suffered daily pain in his lower back but believed that his condition was improving and would continue to improve. Whilst the symptoms from his hernia had significantly resolved he was careful to avoid heavy lifting.

[5] He received workers' compensation benefits for his time off work and all of his medical expenses were met.

[6] According to his affidavit he says that in the early part of 2004 (after he had returned to work with his employer) he discussed with his partner the possibility of getting legal advice in relation to his injuries. She expressed the view that it would be more trouble than it was worth and at that time he did not take the matter any further. He ceased his employment with his then employer in May 2004.

[7] He thereafter commenced employment as a fitter with Vritrac Engineering with whom he is still employed.

[8] He performs this work in Papua New Guinea, although it is not clear when he commenced to work there. He was working there according to his Notice of Claim form in August 2004 and I think it a fair assumption that his work with his current employer has always required him to work in Papua New Guinea. He works for three weeks there and returns to his home in Townsville for one week.

[9] On 11 August 2004, solicitors acting on behalf of a person who had sustained personal injuries whilst a co-worker of the applicant, contacted him for the purposes of obtaining a statement from him as a witness. In the course of discussions he mentioned that he had sustained an injury in the course of his employment with the same employer and that he had received workers' compensation for it. The solicitor offered to obtain a copy of his workers' compensation file and to advise him as to his prospects of success in an action. The applicant accepted this.

[10] There is an affidavit from Mr Murphy who is the plaintiff's solicitor. He is the person to whom the applicant spoke on 11 August. He sets out in his affidavit the

progress of the matter thereafter. On the following day he wrote to the applicant enclosing an authority for the applicant to sign to enable the WorkCover file to be obtained. The applicant returned the authority on 15 October. He wrote to WorkCover on 18 October and on 8 November received the file.

[11] Shortly thereafter a principal of the firm, Mr Hodgson, arranged an appointment with the applicant in Townsville. The applicant apparently was unable to make that because of work commitments in Papua New Guinea. On 1 December there was a telephone conversation in which Mr Murphy and Mr Hodgson participated at one end, with the applicant at the other. Mr Hodgson advised the applicant that he should pursue a common law claim against his employer and told him that it was possible that he would also recommend that he pursue an action against the respondent. He told the applicant that he would send him a statement based upon the interview and a client retainer agreement for his consideration. At that time the applicant informed Mr Hodgson that he was due to fly to Papua New Guinea on 8 December and would not be back until just before Christmas. Mr Hodgson advised the applicant that there were no urgent time limits and it would be sufficient for him to get back to him in the new year.

[12] This advice was plainly erroneous in so far as any proceedings against the respondent are concerned. The *Personal Injuries Proceedings Act* requires a notice to be given either nine months after the day on which the incident giving rise to the personal injury occurred or one month after a claimant first consults a lawyer about the matter, whichever is the shorter period. By s 9(5) if notice is not given within the time prescribed the obligation continues and a reasonable excuse for the delay must be given in the notice or in a separate notice to the person against whom the proceedings are proposed to be started.

[13] On 17 November 2004, Mr Murphy sent a letter confirming the verbal advice that Mr Hodgson had given and forwarding a statement and a client retainer agreement and informing him that he would consider the question of whether action should be taken against both the employer and the respondent or the employer alone.

[14] The signed statement and the client retainer agreement were returned signed by the applicant on 23 February 2005. On 19 April 2005 Mr Murphy advised the applicant that action should be taken against both the employer and the respondent and at that time the applicant was provided with a completed Part 1 of the Notice required pursuant to the Act for his signature as well as a Notice pursuant to the *WorkCover Queensland Act* 1996 (Qld) in draft. Both of these were returned on 9 May 2005 although the Notice pursuant to the WorkCover Legislation was not complete and the Notice pursuant to the *Personal Injuries Proceedings Act* was not sworn. The applicant said he had not been told that it had to be sworn. By letter of 31 May the applicant was informed by Mr Murphy that further information was required for the WorkCover Notice and it was necessary to swear the Notice under the *Personal Injuries Proceedings Act.* This was not returned at that time but the applicant informed Mr Murphy that he would attend to these matters on 3 June 2005. When Mr Murphy had not heard from him on 29 July 2005, he contacted him by telephone and was informed that the applicant had spoken to secretarial staff on three occasions and left messages to contact him. Mr Murphy said that he did not have any record of these messages and his secretary at that time is no longer employed by the firm. On 4 August 2005, he provided the applicant with a Notice pursuant to both Acts to be sworn. These documents were sworn on 11 August 2005 and

returned to Mr Murphy shortly thereafter. The Notice under the *Personal Injuries Proceedings Act* was forwarded to the respondent by letter dated 15 August 2005.

[15] The respondent asserts that the applicant's Notice does not comply with the Act because he has not provided a reasonable excuse for delay in providing the Notice. Hence the matter comes before the Court.

[16] The application contains what is said to be an excuse for the delay. It is consistent with what I have outlined above.

[17] The respondent primarily asserts that the delays following the time that the applicant was first spoken to by his solicitor are inexcusable. The respondent says that before that time the applicant had decided not to take action and that whilst it is primarily what occurred or did not occur after he spoke to the solicitors in August 2004 that constitutes the inexcusable delay, this conclusion is strengthened by looking at the inaction of the applicant overall.

[18] There is no doubt that there have been significant delays involved in the matter.

[19] The applicant, not surprisingly, points to his being out of Australia for three weeks in every four as a result of his employment during 2004 and 2005 and to the fact that he had been told by his solicitor that there were no urgent time constraints attendant upon his claim against the respondent. This argument was advanced in relation to the delays after he had had the conversation with Mr Murphy in August 2004 when he accepted Mr Murphy's offer to look into the matter on his behalf. It was not contended that any delay flowing from the solicitors' misapprehension of the position could be attributed to the applicant.

[20] While there is a natural inclination to view such delays with some indulgence when a person's employment prevents him from attending to such matters in the way a resident might be able to, the difficulty is that his regular absences are not on the evidence specifically linked to the delays.

[21] There is a significant delay between 17 December 2004 and 23 February 2005 and no specific explanation is advanced for this. The same can be said about the delay between the letter the solicitor wrote on 12 August 2004 enclosing an authority and his return of the authority signed by him on 18 October 2004.

[22] There is one other delay in June - July 2005 which is greater than would be accounted for by his being out of Australia for three weeks. In relation to this, the solicitor says that the applicant told him that he had on three occasions tried to contact him and had not been able to. Mr Murphy says that the receptionist concerned no longer works for the firm. The applicant does not mention this in his affidavit and there is thus no evidence that he attempted to contact the firm.

[23] Even if one accepts for the moment such an explanation in the absence of direct evidence from the applicant of it, there is no explanation for the delays in late August - October 2004 and in 2004 - early 2005. Nor is there any explanation as to why matters could not have been attended to by fax or by email. I do not lose sight of what he had been told by his solicitor but judging the matter by reference to what I might describe as normal progress, the use of such means of communication and

to transmit documents is common place. If there is any reason why they could not have been used here it has not been placed before me.

[24] There is also the failure to provide a notice prior to 2004 when he spoke to Mr Murphy. As I have said the applicant had decided not to seek advice. This may not be an unreasonable attitude to take in his then circumstances. However this is not a case in which circumstances have changed so that he realised that he was left with a more serious disability than what he had previously thought. The only circumstance that changed was that he happened to speak to a solicitor about another matter and the solicitor offered to look into this matter for him.

[25] His failure to do anything prior to 2004 was as a matter of conscious choice and can hardly be regarded as helpful to him on any consideration of whether a reasonable excuse exists for his failure to give notice.

[26] As I have said the respondent relies primarily upon the delays from August 2004 but says that the delays prior to that time are consistent generally with a failure to properly pursue the matter.

[27] I do not think that the conclusion that the applicant has given a reasonable excuse for his delay in giving notice is justified on the evidence before me.

[28] Nor in my view does the evidence support an exercise of the court's discretion in the applicant's favour under s 18. The notice was not given until almost two years after the accident and was one year and three months out of time. The applicant has instituted proceedings against his employer who owes him a non-delegable duty of care and one would expect that it is to the employer that the applicant would primarily look to be compensated.

[29] The respondent asserts prejudice although no evidence was placed before me on this subject. Nonetheless the fact that the applicant cannot give the surname of the employee who he was working with and that the action arose out of the applicant's employment with another party might, I infer, give rise to a risk of prejudice although the matter should not be put any higher than this.

[30] The respondent accepted for the purposes of the application that the applicant had arguable prospects of success.

[31] The delays in giving the notice are substantial. I have already dealt with what is said by the applicant about those delays and the deficiencies in the evidence in relation to those explanations.

[32] The evidence in my view does not provide an adequate basis for an exercise of the Court's discretion favourable to the applicant under s 18(1)(c).

[33] The result will be that the application is dismissed with costs to be assessed.