SUPREME COURT OF QUEENSLAND

CITATION:	*Daniels v Leggatt & Anor* [2005] QSC 377
PARTIES:	**MARILYN JEANETTE DANIELS** (applicant) **v** **ROSS LEGGATT & ELAINE LEGGATT** (first respondent) **REDLAND SHIRE COUNCIL** (second respondent)
FILE NO/S:	BS No 8996 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	18 November 2005
JUDGE:	White J
ORDER:	**1. The applicant have leave to start a proceeding against the first respondents pursuant to s 59(2)(b) of the *Personal Injuries Proceedings Act* 2002.** **2. The proceedings commenced against the first respondent in BS 1029/03 be struck out.** **3. The proceedings in BS 10892/04 be struck out.** **4. The applicant pay the respondents' costs of and incidental to the application to be assessed on the standard basis.** **5. Until trial or earlier order the respondents not take steps to enforce the order for costs against the applicant.**
CATCHWORDS:	LIMITATION OF ACTIONS – POSTPONEMENT OF THE BAR – EXTENSION OF PERIOD – CAUSE OF ACTION IN RESPECT OF PERSONAL INJURIES –GENERAL MATTERS – interpretation of *Personal Injuries Proceedings Act* 2002 (Qld) ("the Act") – where the alleged injuries arose before the Act came into force – where delivery of the notice of claim was outside the prescribed period – where notice of claim deemed to have been compliant – where claim and statement of claim served and filed thereafter – where no compulsory conference held – where second proceedings brought without an apparent agreement that the compulsory

conference be dispensed with – where failure to comply with the Act could only be attributed to a failure to understand what the Act required

Personal Injuries Proceedings Act 2002 (Qld), s 6, s 7, s 9, s 14, s 36, s 37, s 42, s 43, s 59

Dempsey v Dorber [1990] 1 Qd R 418, followed
Haley v Roma Town Council; McDonald v Romijay Pty Ltd [2005] QCA 3, 4 February 2005, cited

COUNSEL: J W Lee for the applicant
W D Campbell for the first respondents
R T Whiteford for the second respondent

SOLICITORS: John C Dennett & Associates for the applicant
Herbert Geer Rundle for the first respondents
HBM Lawyers for the second respondent

[1] By originating application the applicant seeks leave to institute proceedings against the respondents pursuant to s 59 of the *Personal Injuries Proceedings Act* 2002 ("PIPA"). The first respondents ("the Leggatts") oppose leave being given and the second respondent ("Redland Shire") submits that leave is unnecessary in respect of it.

[2] The Leggatts have filed no material and that filed by the applicant and the Redland Shire does not address some of the factual issues which would have made the resolution of the proceedings more straightforward. The allegations of fact are taken from proceedings which have already been commenced in this court by the applicant.

[3] The applicant and her mother are the registered proprietors of a house property located at 71-73 Spurs Drive, Wellington Point and commenced residence there in October 1993. The Leggatts took up residence at 75-77 Spurs Drive in about July 1996 next door to the applicant's residence. Both residences are within the jurisdiction of the Redland Shire.

[4] After the commencement of their occupation the Leggatts began to operate air-conditioning units installed in their house. The applicant complains that over time those units became noisier and by January 1999 the noise was seriously annoying. The applicant became significantly disturbed by the noise from towards the end of December 1999 being regularly awoken from her sleep and kept awake. She lodged an oral complaint with the Redland Shire on 5 January 2000 followed by a further complaint on 31 March and eventually, in mid-April 2000 an officer of the Redland Shire told the applicant that the Leggatts had been contacted and action was being taken by them to rectify the problem. She first consulted her general practitioner for insomnia said to be due to the neighbour's noise in April 2000.

[5] According to the applicant the noise continued throughout 2000 during which time she so advised the Redland Shire. Notwithstanding information given to the applicant by the Redland Shire in January 2001 that the Leggatts had been ordered not to operate the air-conditioning units at night the noise continued.

[6] On the morning of 10 January 2001 the applicant experienced symptoms of dizziness, shaking, vomiting, emotional lability and pain in the left leg. She consulted with her general practitioner who prescribed medication. Her condition affected her ability to work as a self-employed travel agent.

[7] On many nights throughout 2001 the applicant was disturbed by the noise. This continued through 2002 and 2003 with the applicant regularly complaining to the Redland Shire. She underwent medical treatment from a number of providers and allegedly lost income from her illness induced by the conduct of the Leggatts and the failure of the Redland Shire effectively to regulate the nuisance.

[8] The applicant first consulted Mr John Dennett, solicitor, about these matters on 25 February 2002. He took counsel's advice that medical reports be obtained to ascertain whether the applicant had a valid claim and a report from a forensic accountant. These reports were provided during 2002, the final one from Dr I F Curtis, psychiatrist, in November and from Mr Onus Maynes, forensic accountant, in December. A conference was held with counsel followed by his advice that the applicant had a valid claim and that a notice of claim pursuant to the PIPA should be prepared.

[9] On 4 April 2003 the notice of claim was served on the Redland Shire and on 6 April 2003 on the Leggatts. The notice of claim is directed to both respondents. On 10 April the Leggatts' liability insurers advised that the notice of claim was regarded as compliant.

[10] By virtue of s 9 of the PIPA a claimant, before starting a proceeding in the court based on a claim, must give written notice of the claim in the approved form, which is in two parts, to the person against whom the proceeding is proposed to be started. By s 9(3) part 1 of the notice must be given within the period ending on the earlier of the following days –

> (a) the day 9 months after the day the incident giving rise to the personal injury happened or, if symptoms of the injury are not immediately apparent, the first appearance of symptoms of the injury;
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> (b) the day 1 month after the day the claimant first instructs a lawyer to act on the person's behalf in seeking damages for the personal injury and the person against whom the proceeding is proposed to be started is identified."

[11] Because the alleged injuries arose out of incidents happening before 18 June 2002 the transitional provision in s 77A as amended by the *Personal Injuries Proceedings Amendment Act* 2002 applied and the applicant was required to deliver her notice of claim no later than 29 December 2002. Accordingly, delivery of her notice of claim outside the prescribed period needed to be accompanied by a reasonable excuse for the delay. The Redland Shire indicated that it did not regard the explanation for the delay as constituting a reasonable excuse within the meaning of s 9(5). That explanation read

> "Pursuant to section 9(5) of the *Personal Injuries Proceedings Act* 2002 ("the Act") the claimant has obtained medical and legal advice to identify if she has a cause of action and what if any obligations she had under the Act."

[12] As a consequence, the applicant filed an application pursuant to s 18(1)(c)(ii) of the PIPA on 16 May 2003 seeking leave to proceed further with the claim against the Redland Shire despite failure to comply with the requirement to give a complying claim.

[13] The Redland Shire opposed the granting of leave on the ground that no reasonable explanation had been given for the failure to give the notice of claim within the extended time limited by the Act. Muir J made the order giving leave on 23 June 2003. By virtue of s 20(2)(b) the notice of claim was deemed to have been a complying notice of claim on 23 June 2003 when the court made the order authorising the applicant to proceed further with her claim.

[14] As noted above, so far as the Leggatts are concerned there was a complying notice of claim as at 10 April 2003 when their insurer notified the applicant's solicitor to that effect.

[15] The applicant commenced proceedings – BS 1029/03 – on 14 November 2003 by filing a claim and statement of claim claiming damages for nuisance against the Leggatts and negligence and breach of statutory duty against the Redland Shire. Service was affected on the Leggatts on 20 November and on the Redland Shire on 24 December 2003.

[16] Thereafter, so far as the material reveals, the parties progressed the claim. Mr Dennett deposes that the respondents' solicitors took issue with the validity of the court proceedings filed on 14 November 2003 on the ground that the pre-court provisions of the PIPA had not been complied with. A non-compulsory conference was held between the parties on 30 August 2004 and at that conference it appears that the parties discussed whether or not it would be appropriate to dispense with the need for a compulsory conference pursuant to s 36(4) of the PIPA. Redland Shire's solicitors proposed formally by letter dated 13 October 2004 to the applicant's solicitor that there should be no compulsory conference. The solicitors wrote that they had also sought the attitude of the Leggatts. The applicant's solicitors agreed. The material does not reveal if the Leggatts ever responded.

[17] On 14 December 2004 the applicant commenced proceedings – BS 10892/04 – in this court against the respondents in the same terms as BS 1029/03. The applicant's solicitor deposes that these proceedings were commenced on the mistaken view that agreement had been reached to dispense with the compulsory conference.

[18] The applicant's solicitor wrote to both respondents' solicitors on 31 March 2005 referring to the decision of the Court of Appeal in *Haley v Roma Town Council; McDonald v Romijay Pty Ltd* [2005] QCA 3 in support of the contention that either the proceedings had been validly commenced or that the respondents ought to consent to an order pursuant to s 59 of the PIPA. The Leggatts' solicitors responded that the proceedings were a nullity and therefore leave of the court was required pursuant to s 59(2)(b) of the PIPA. Similarly the Redland Shire's solicitors indicated that leave pursuant to s 59(2) to issue proceedings outside the limitation period was necessary. Some further correspondence ensued. By letter dated 22 September 2005 Redland Shire's solicitors conceded that the first proceedings – BS 10293/03 – had been validly commenced but proposed pleading the limitation defence which would be determined in the ordinary way at trial.

[19] Notwithstanding this concession from the Redland Shire the applicant's solicitors wrote to the solicitors acting for the Leggatts and the Redland Shire on 13 October 2005 that there was doubt whether either proceeding had been validly commenced because of the failure to serve a complying notice of claim or to obtain leave under s 43 before the end of the limitation period or leave under s 59 after the end of the limitation period and seeking consent to orders for leave to commence proceedings under s 59.

[20] It is quite unclear from the material whether there ever was an agreement by the Leggatts that the compulsory conference was to be dispensed with as envisaged by s 36(4) of the PIPA but it should be inferred that there was not. It may also be inferred that none of the material required to be exchanged prior to the compulsory conference by s 37 was exchanged and no mandatory final offers made.

[21] It is necessary to consider the relevant provisions of the Act in order to find some path through the less than satisfactory progress of the applicant's claim. Section 42(1) provides that a proceeding in a court based on a claim should be started within 60 days after the conclusion of the compulsory conference or within a further period agreed by the parties. By s 42(2) if the parties dispensed with the compulsory conference a proceeding in a court based on the claim should be started

> "(a) within 60 days after the later of the following -
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> (i) if there is only 1 respondent to the claim the day 6 months after the day on which the claimant gives the respondent a complying part 1 notice of claim, or if there is more than one respondent to the claim, the day 6 months after the day the claimant last gave a respondent part 1 of a notice of claim under s 14(1);
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> (ii) the date of the agreement ... dispensing with the conference; or
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> (b) within a further period –
>
> (i) agreed by the parties ..."

[22] Since there is no apparent agreement dispensing with the compulsory conference the process set out in s 42 cannot apply. Furthermore, although there are two respondents with different dates for the complying notice of claim – 10 April 2003 and 23 June 2003 respectively – nonetheless on its plain construction s 42(2)(a)(i) does not apply since the notice of claim was a joint notice and not a subsequent notice of claim as envisaged by s 14(1). This may be the result intended by the legislature but it does lead to some awkwardness when there are different compliance dates for several respondents to a single notice of claim. It is unnecessary to consider this point further.

[23] Although Mr Lee for the applicant sought to amend the originating application to seek leave to start a proceeding pursuant to s 43 this was opposed and there was no obvious urgency as envisaged by the section and which the cases describe to bring it into play. The application was refused.

[24] That then leaves s 59. It provides

> "(1) If a complying part 1 notice of claim is given before the end of a period of limitation applying to the claim, the claimant may start a proceeding in a court based on the claim even though the period of limitation has ended.
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> (2) However, the proceeding may be started after the end of the period of limitation only if it is started within –
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> (a) six months after the complying part 1 notice is given or leave to start the proceeding is granted; or
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> (b) a longer period allowed by the court.
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> (3) Also, if a proceeding is started under (2) without the claimant having complied with part 1, the proceeding is stayed until the claimant complied with the part or the proceeding otherwise ends.
>
> (4) ..."

[25] As has been conceded by the Redland Shire when this application was mooted, the proceedings commenced on 14 November 2003 – BS 1029/03 – were within the period allowed by s 59(2)(a) and no leave is required. By operation of s 59(3) since the claimant has not complied with part 1 in unspecified ways but certainly with respect to either the holding of a compulsory conference and the matters that flow therefrom or from an agreement to dispense with the compulsory conference, the proceedings are stayed until the applicant complies with that part.

[26] So far as the Leggatts are concerned, the proceedings already instituted against them lie outside the six month period in s 59(2)(a) and are therefore void and of no effect, *Haley v Roma Town Council*; *McDonald v Romijay* per McMurdo P at [6].

[27] The question then is ought a longer period be allowed by the court. Mr Campbell submitted that the delay is "gross and inexcusable" and that no satisfactory explanation has been given for it.

[28] The explanation is rather stark. It can only be attributed to a failure to understand what was meant by the provisions of the PIPA. The provisions are certainly confusing for those unfamiliar with their Byzantine complexities but there is now a sufficient body of authority to assist in understanding the PIPA and the processes which must be carried out by a claimant who wishes to commence proceedings in a court. When the applicant first attended upon Mr Dennett in February 2002 the Act had not commenced. It did so on 18 June 2002 amid considerable agitation amongst both branches of the legal profession and it applied to all personal injury arising out of an incident happening before, on or after 18 June 2002, s 6(1) and s 7.

[29] In granting leave to appeal in *Haley* the President said

> "The construction of the Act has caused uncertainty, confusion and anxiety not only to claimants, their families and friends but also to the legal profession and, indeed, judges."

That decision was given on 4 February 2005. Nonetheless it is painful to travel through the correspondence which has been exhibited to the affidavits demonstrating a continuing difficulty with grasping the essentials of the scheme. There is no prejudice alleged nor to be inferred against the Leggatts due to the delay. The medical reports relating to the applicant's condition have been with both respondents since the notice of claim was delivered in April 2003. The detailed forensic report of Mr Maynes is rather more than would normally be expected in respect of the damages claimed. The lengthy correspondence between the parties does not suggest that this matter was allowed to fall into abeyance. It is important to remember that the discretion to extend time which reposes in the court by virtue of the several Acts which govern claims for damages relating to personal injury are not to be exercised on a punitive or even on a cautionary basis, *Dempsey v Dorber* [1990] 1 Qd R 418 per Connolly J at 422.

[30] That is not to say that an extension is an applicant's for the asking. The main purpose of the PIPA is to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury. The legislature has effected that object by procedures for the speedy resolution of claims; by promoting settlement of claims at an early stage whenever possible; and by ensuring that a person may not start a proceeding in a court based on a claim without being fully prepared for resolution of the claim by settlement or trial. Achieving that object has been significantly hindered by the manner in which this applicant's claim has been progressed. But that is not a sufficient basis for refusing the applicant relief.

[31] I propose to give leave to the applicant to start a proceeding in court within 14 days of this order being made. It is unnecessary expressly to stay the proceedings since s 59(3) makes clear that the proceeding is stayed until part 1 – the pre-court procedures – has been complied with. All parties need to address these matters.

[32] The Redland Shire seeks its costs as it was an unnecessary respondent to the applicant's application. That was made plain to the applicant well in advance of the filing of the application. The applicant must pay the first respondents' costs of the application. I am disposed to follow the order of Muir J in the earlier application against the Redland Shire that until trial or earlier order the first respondents not take steps to enforce the order against the applicant. Since the applicant seeks a favourable exercise of the court's discretion and it was not inappropriate to oppose the application, unless there are submissions which persuade me to the contrary, the applicant should also pay the second respondents' costs.

[33] The orders are:

1. The applicant have leave to start a proceeding against the first respondents pursuant to s 59(2)(b) of the *Personal Injuries Proceedings Act* 2002.
2. The proceedings commenced against the first respondent in BS 1029/03 be struck out.
3. The proceedings in BS 10892/04 be struck out.
4. The applicant pay the respondents' costs of and incidental to the application to be assessed on the standard basis.
5. Until trial or earlier order the respondents not take steps to enforce the order for costs against the applicant.