[2005] QSC 383

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Date: 28 November, 2005

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

JONES J

Application No 486 of 2005

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| STEPHEN MICHAEL HETHERINGTON | Applicant |
| and | |
| TOWNSVILLE TURF CLUB<br>ABN 75 509 244 921 | First Respondent |
| and | |
| QUEENSLAND THOROUGHBRED RACING BOARD<br>(t/a QUEENSLAND RACING)<br>ABN 512 360 566 196 | Second Respondent |

CAIRNS

..DATE 08/11/2005

JUDGMENT





1st Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HIS HONOUR: The applicant suffered personal injuries as a result of a fall from a horse at Cluden Park Racecourse at Townsville on 25 January 2000. He was at the time exercising a racehorse which he alleged had taken fright when jump-out barriers were activated at a time which made his presence in the vicinity unsafe.

On 23 December 2002, his solicitors, pursuant to the Personal Injuries Proceedings Act 2002 (the Act) delivered notices of claim in Form 1 to the respondents. By letters dated respectively 30 December 2002 and 15 January 2003, the respondents acknowledged receipt of those notices but the latter letter pointed out certain deficiencies in the information contained.

Notwithstanding this, the applicant commenced proceedings in the Supreme Court by filing a claim and statement of claim on the 24th of January 2003. Thereafter there was an exchange of correspondence between the applicant's solicitors and solicitors for the respondents which culminated in a letter from the respondents' solicitors dated 25 November 2003 confirming that the notice of claim was a complying notice.

The action was commenced without leave of the Court and it is accepted by all parties that it is a nullity. The applicant is now in the position of having to rely upon the provisions of section 59 of the Act to commence new proceedings notwithstanding that the limitation period has expired.

It has been established that a complying notice of claim was given before the end of the limitation period. What is now sought is the exercise of the Court's discretion to allow, pursuant to section 59(2)(b) a longer period than the six months within which to commence the proposed new proceedings.

In this regard the time of the extension sought is almost two years. Against this long delay, the applicant points to the fact that witnesses employed by the respondents did in fact observe the incident as witnesses, being stewards or holding official positions with the respondent organisation, that ambulance officers were called and can speak to the injuries. Further, that a WorkCover claim was lodged with the consequential details of the incident and the inquiries made by that organisation which included medical examinations, are all matters of public record.

The respondents do not point to any specific matter which gives rise to prejudice to their interest, other than the general consequence of delay of this order. There has been quite detailed exchange of information between the parties in the intervening two years. Although a compulsory conference has not yet been held, I accept that the respondents are well informed of the circumstances of the applicant's injuries and the consequences flowing from them.

In notifying that the claim was complying on the 25th of November 2003, the respondent acknowledged that the applicant had taken reasonable action to remedy non-compliance. Beyond

that some of the delay can be explained by inaction in the offices of solicitors rather than at the hands of the applicant personally.

Mr Philp also raised the fact that the applicant as at January 2003 when limitations were about to expire, could have taken different steps. For example, the applicant could have applied pursuant to section 43 of the Act to seek the Court's leave at that time to proceed. Alternatively, the applicant could have availed himself of the transitional provisions, particularly section 47D of the Act.

Whilst these are relevant considerations, I do take account of the fact that the Act had only newly come into force on the 18th of July 2002. The profession of course at that time, was still coming to grips with the limitations and barriers which the Act provided to persons proceeding with claims which previously could have been made readily to a Court. So whilst the Act provided provisions to which Mr Philp referred, it also provided the provision of section 59 which the applicant quite rightly now relies upon for relief.

The considerations proper to be made in an application of this kind were discussed by Justice McMurdo in Kash v. S N and T J Crederin Builders and Others, (2003) QSC 426. The relevance of those considerations was confirmed by the Court of Appeal in Haley and Another v. Roma Town Council (2005) QCA 3.

I have had regard to those matters and particularly to the fact that whilst the delay is of a relatively long term, it has to be weighed against the fact that there is substantial public record of the incident and its consequences.

In circumstances where the respondent does not refer to any specific matter of prejudice, it seems to me that the applicant ought not to be denied its right to pursue a claim of which it gave to the respondents quite timely initial notice.

In those circumstances, I will allow the application.

...

HIS HONOUR: I order that the applicant have leave until the 22nd of December 2005 to commence the claim for damages arising from the incident occurring on the 25th of January 2000. Such proceeding will be stayed until the applicant complies with the requirements of part 1 of the Personal Injuries Proceeding Act 2002.

Costs gentlemen?

MR PHILP: Your Honour, I'd ask for costs.

HIS HONOUR: Can you resist that, Mr Lafferty?

MR LAFFERTY: Not really, your Honour.

HIS HONOUR: I don't think so. I order that applicant pay the respondent's costs of and incidental to this application to be assessed on the standard basis.

MR LAFFERTY: Your Honour, we were here before you on the 8th of November and on that occasion, my learned friend asked that the matter be put over until a time such as today to allow his clients to search their records and put your own house - to determine whether or not they wanted the files, the material - further new material.

HIS HONOUR: Right.

MR LAFFERTY: So if the costs could be-----

MR PHILP: There was a cost order made on that, your Honour. We will pay the costs thrown away by any adjournment.

MR LAFFERTY: Your Honour, I'm reminded an order was made, so in that case, we-----

HIS HONOUR: Okay. There's no further order required.

MR LAFFERTY: Thank you, your Honour.

HIS HONOUR: Yes, thank you, Mr Lafferty. Thank you, Mr Philp.

MR PHILP: Thank you, your Honour.

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