

SUPREME COURT OF QUEENSLAND

CITATION: *Scott v Q Catering Ltd & Anor* [2011] QSC 326

PARTIES: **WILLIAM ANDREW SCOTT**
(applicant)
v
Q CATERING LTD ACN 003 530 685
(first respondent)
QANTAS AIRWAYS LTD ACN 009 661 901
(second respondent)

FILE NO/S: BS5335/11

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 4 November 2011

DELIVERED AT: Brisbane

HEARING DATE: 12 July 2011

JUDGE: Douglas J

ORDER: **Declare that the applicant is entitled to bring a proceeding for damages for personal injury against the first respondent after the expiration of the limitation period and after compliance with the requirements set out in s 295 of the *Workers' Compensation and Rehabilitation Act 2003 (Qld)* despite non-compliance with condition 3 of the conditions imposed by the second respondent pursuant to section 276 of the Act.**
That the second respondent comply with the procedural requirements of chapter 5 of the Act.

CATCHWORDS: *WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – PRELIMINARY REQUIREMENTS – NOTICE OF INJURY – EFFECT OF INACCURACY, DELAY OR FAILURE TO GIVE NOTICE – where applicant injured at work – where applicant's solicitors delivered defective notice of claim but insurer conditionally waived compliance subject to delivery of a fresh notice – where applicant accepted waiver before expiration of limitation period but fresh notice of claim delivered in breach of condition imposed by insurer – where applicant's solicitors delivered fresh notice of claim to second respondent one day after required by insurer's condition – whether waiver complete on agreement pursuant to statute or*

on performance of conditions imposed by insurer – whether one day’s mistake in delivery of notice to first respondent rather than second respondent affects applicant’s rights to commence proceedings after expiration of limitation period

Workers’ Compensation and Rehabilitation Act 2003 (Qld), ss 275, 276(6), 276(8), 287, 295, 298, 302(1)(a)(ii)

Handover v Consolidated Meat Group Pty Ltd [2009] 2 Qd R 133 referred;

Roberts v Australia and New Zealand Banking Group Ltd [2006] 1 Qd R 482 referred;

Wilkinson v Stevensam Pty Ltd & Ors [2006] QCA 88 referred;

Greengrass v Margach Builders Pty Ltd [2010] QDC 396 referred

COUNSEL: DC Rangiah SC and SJ Cleary for the applicant
WDP Campbell for the respondents

SOLICITORS: Maurice Blackburn for the applicant
HWL Ebsworth Lawyers for the respondents

- [1] **Douglas J:** Mr Scott was an employee of Q Catering Ltd, the first respondent, which is insured by the second respondent, Qantas Airways Ltd. Q Catering had previously been known as Qantas Flight Catering Ltd. Mr Scott says he was injured at work on 24 May 2008 when he slipped and fell on some stairs. On 3 May 2011, shortly before the limitation period for his cause of action was due to expire on 24 May 2011, his solicitors lodged an urgent notice of claim with Qantas Airways pursuant to s 276 of the *Workers’ Compensation and Rehabilitation Act 2003 (Qld)* (“the Act”).
- [2] Qantas Airways’ solicitors responded on 9 May 2011 proposing conditions for waiving compliance with the Act which included the following passage:
- “3. Within 28 days of the date of your client’s acceptance of the Agreement, he will deliver to Qantas’ office, with a copy of all documents served on Qantas to us, a fresh Notice of Claim (**fresh NOC**) in the approved form in accordance with section 275 of the Act. The fresh NOC will include an Authority, Offer of Settlement and copies of documents as required under section 275(8) of the Act.”
- [3] The letter then went on to provide:
- “Time is of the essence in respect of paragraph 3 of the Agreement.
- Furthermore, your client acknowledges Qantas is not required to agree to any extension of time for compliance with paragraph 3 of the Agreement.

In the event your client fails to comply with paragraph 3 of the Agreement within the time limits prescribed by that paragraph, Qantas will take the view he has breached the Agreement and the Agreement will be terminated immediately such that Qantas' conditional waiver of compliance will be void ab initio without the need for it to give further notice to your client. In those circumstances, Qantas will plead the limitation period as a defence to this claim.

If either party fails to comply with any of the other paragraphs of the Agreement, the parties acknowledge the non-defaulting party is entitled to seek an order of the Court pursuant to section 287 of the Act to enforce the Agreement and the Court may make consequential or ancillary orders that may be desirable in the circumstances of the case. In the event Qantas applies to the Court seeking an order for the enforcement of the Agreement, it will seek the costs of any such Application.

Qantas otherwise reserves its right to rely on section 302 of the Act and the *Limitation of Actions Act 1974*.

In order for your client to comply with section 302 of the Act, Qantas requires written confirmation he agrees to comply with the conditions and timeframe of the Agreement by return mail.”

- [4] The “Qantas” referred to in the letter was Qantas Airways, the second respondent. Mr Scott’s solicitors agreed to the proposed conditions on 10 May 2011 but, on 7 June 2011, instead of delivering a fresh notice of claim to Qantas Airways with a copy to its solicitors, they delivered the fresh notice of claim to Qantas Airways’ solicitors and posted the original to Q Catering. When their error was pointed out to them by a letter of 8 June 2011 the solicitors delivered the fresh notice of claim to Qantas Airways on that day.
- [5] The issue is whether Qantas’ conditional agreement to waive compliance, accepted by the applicant, had the effect that the one day’s mistake by the applicant in delivering the fresh notice to the first respondent rather than the second respondent removed Mr Scott’s rights to commence proceedings after the expiration of the limitation period.

The Legislation

- [6] Section 275 of the Act requires a claimant to give notice of a claim for damages under the section within the limitation period but s 302(1)(a)(ii) provides for the alteration of the limitation period if, before the end of the limitation period, “the claimant gives a notice of claim for which the insurer waives compliance with the requirements of section 275 with or without conditions.”
- [7] In that context s 276 provides:

“(2) Without limiting section 297 or 298, if the claimant alleges an urgent need to start a proceeding for damages despite

noncompliance with section 275, the claimant must, in the claimant's notice of claim –

- (a) state the reasons for the urgency and the need to start the proceeding; and
- (b) ask the insurer to waive compliance with the requirements of section 275.

...

- (5) The insurer must, before the end of 3 business days after receiving the notice of claim, advise the claimant that the insurer agrees or does not agree that there is an urgent need to start a proceeding for damages.
- (6) If the insurer agrees that there is an urgent need to start a proceeding for damages, the insurer may, in the advice to the claimant under subsection (5), impose the conditions the insurer considers necessary or appropriate to satisfy the insurer to waive compliance under section 278(2)(b).
- (7) The claimant must comply with the conditions within a reasonable time that is agreed between the insurer and the claimant.
- (8) The claimant's agreement to comply with the conditions is taken to satisfy section 302(1)(a)(ii)."

The Opposing Arguments

[8] The applicant made four related submissions:

- First, that s 276(6) allowed the insurer to impose the conditions it considered necessary or appropriate to satisfy it to waive compliance under s 278(2)(b) of the Act, but it did not allow the insurer to impose the consequences of failing to comply with those conditions;
- Secondly, that s 276(8) and s 302(1)(a)(ii) have the effect that the claimant's agreement to comply with the insurer's conditions enabled the claimant to commence proceedings after the expiration of the limitation period: regardless of whether the claimant subsequently actually complied with the conditions;
- Thirdly, the benefit of s 276(8) cannot be contracted away or waived by the claimant;
- Fourthly, s 287 of the Act, empowering the court to enforce compliance with a provision of that chapter of the Act, provided a discretionary basis for the court granting relief to the applicant from the consequences of his late compliance with the relevant condition imposed by the insurer; and that discretion should be exercised in favour of granting appropriate relief.

[9] The respondents' submissions relied on the terms of the agreement and pointed out that the respondents' solicitors reminded the applicant's solicitors that its terms required "the fresh NOC to be served on Qantas, with a copy to us" on the morning of 7 June 2011. The respondents also argued that the relevant decisions required an application pursuant to s 298 to be brought before the end of the period of limitation and that the any waiver of compliance by the insurer with s 275 must also occur before the end of the limitation period: see *Handover v Consolidated Meat Group*

Pty Ltd [2009] 2 Qd R 133; *Roberts v Australia and New Zealand Banking Group Ltd* [2006] 1 Qd R 482; *Wilkinson v Stevensam Pty Ltd & Ors* [2006] QCA 88 and *Greengrass v Margach Builders Pty Ltd* [2010] QDC 396. In particular, the respondents argued that any waiver of compliance by the insurer had to occur before the end of the limitation period relying upon a passage in the decision in *Handover v Consolidated Meat Group Pty Ltd* at [24] and on the decision of Judge Reid in the District Court in *Greengrass v Margach Builders Pty Ltd*.

- [10] The application sought a declaration that the applicant was entitled pursuant to s 298 of the Act to bring a proceeding for damages for personal injury against the first respondent after the expiration of the limitation period and after compliance with the requirements set out in s 295 of the Act despite non-compliance with condition 3 of the conditions imposed by the second respondent in the letter to which I have already referred sent pursuant to s 276 of the Act. During argument Mr Rangiah SC submitted that it should be treated more appropriately as one for a declaration under the inherent jurisdiction of the court that the applicant is entitled to bring a proceeding for damages after the expiration of the limitation period.

Discussion

- [11] There is some attraction in the applicant's first argument that the insurer is able to impose conditions it considers necessary or appropriate to satisfy it to waive compliance but not to impose the consequences of failure to comply, particularly because of his fourth point, the court's power to enforce compliance with a provision of the relevant chapter in the Act in s 287: see, eg, *WorkCover Queensland v Lucas* [2003] 2 Qd R 456, 458 at [7]. The third argument, that the benefit of s 276(8) cannot be contracted away by the claimant is also attractive in denying the effect of the agreement purporting to make Qantas Airways' conditional waiver of compliance void ab initio because of the public and private dimension disclosed in the objects of the legislation and the policy against permitting the applicant's statutory rights to be contracted away; see *Roberts v Australia and New Zealand Banking Group Ltd* [2006] 1 Qd R 482, 488 at [21].
- [12] The primary argument, that seems to be me to be correct, however, is the applicant's second point, that the right to bring a proceeding after the limitation period arises if, before the end of the period of limitation, the claimant gives a notice of claim for which the insurer waives compliance, with conditions, and the claimant agrees to comply with those conditions. The explicit language of s 276(8) is that *agreement* to comply satisfies s 302(1)(a)(ii) of the Act, not *compliance* with the conditions. The attempt in the conditions to render the agreement void ab initio does not seem to me to negate the effect of the earlier agreement as satisfying s 302(1)(a)(ii). That section anticipates that the insurer may waive compliance conditionally but the Act does not provide that non-compliance with the conditions negates the effect of the agreement previously reached.
- [13] That makes sense in the overall context of the Act as it permits greater certainty in ascertaining the date of the agreement to comply and allows a comparison of that date with the date of expiration of the limitation period. It is likely to be easier to determine the date of any agreement to comply pursuant to s 276(8) and whether that date precedes the expiration of the limitation period than to ascertain whether or when there had been compliance with the conditions imposed by the insurer pursuant to s 276(6). In this case the non-compliance was clear if trivial but, in

other cases, there may be legitimate and detailed debate over whether, for example, any fresh notice of claim complied with the Act's requirements under s 275. It would be undesirable for an applicant's rights to commence proceedings within time to depend upon the possibly uncertain outcome of such a debate.

- [14] Although the facts are not similar to those in *Handover v Consolidated Meat Group Pty Ltd*, the conclusion of MA Wilson J that waiver occurred on the claimant's acceptance of the relevant conditions is consistent with this approach: see at [2009] 2 Qd R 133, 140 at [23].
- [15] Here, the acceptance of the conditions occurred on 10 May 2011 well before the limitation period expired on 24 May 2011. That distinguishes the case quite clearly from *Greengrass v Margach Builders Pty Ltd* where the claimant, although invited to accept the terms proposed by the insurer, failed to agree to comply before the expiration of the limitation period.

Order

- [16] Accordingly, I shall declare that the applicant is entitled to bring a proceeding for damages for personal injury against the first respondent after the expiration of the limitation period and after compliance with the requirements set out in s 295 of the *Workers' Compensation and Rehabilitation Act 2003* despite non-compliance with condition 3 of the conditions imposed by the second respondent pursuant to section 276 of the Act. I shall further order that the second respondent comply with the procedural requirements of chapter 5 of the Act and hear the parties as to costs.