

SUPREME COURT OF QUEENSLAND

CITATION: *Wright v Sirrom Corporation (Aust) Pty Ltd* [2019] QSC 26

PARTIES: **DARREN WRIGHT**
(applicant)
v
SIRROM CORPORATION (AUST) PTY LTD
(ACN 074 914 560)
(respondent)

FILE NO/S: SC No 967 of 2018

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Rockhampton

DELIVERED ON: 21 February 2019

DELIVERED AT: Rockhampton

HEARING DATE: 10 December 2018

JUDGE: Crow J

ORDER: **1. It is declared that the Part 1 Notice of Claim given by the applicant to the respondent on 15 April 2018 is a complying Part 1 Notice of Claim within the meaning of the *Personal Injuries Proceedings Act 2002***
2. Costs of and incidental to the application be reserved to the proceedings instituted by leave pursuant to the orders made 10 December 2018.

CATCHWORDS: PERSONAL INJURY CLAIMS - STATUTORY INTERPRETATION - PRACTICE – COMPLIANT CLAIMS – where applicant suffered injury at mine site – where there was delay in identifying the proper respondent – where proper respondent was identified after limitation period in the *Personal Injuries Proceedings Act 2002* (Qld) - whether Part 1 Notice provided is a compliant Part 1 Notice of Claim within the meaning of the *Personal Injuries Proceedings Act 2002* (Qld) - whether applicant is presumed to be satisfied that the Part 1 Notice of Claim is a compliant Part 1 Notice of Claim
Personal Injuries Proceedings Act 2002 (Qld) s 9, s11, s 12, s 13, s 14, s 43, s 18
Uniform Civil Procedure Rules 1999 (Qld) r 27(3)

COUNSEL: SJ Deaves for the applicant
B Heath, solicitor for the respondent

SOLICITORS: Taylors Solicitors for the applicant
Carter Newell for the respondent

- [1] On 10 December 2018 in this matter, the following orders were made:
1. Time for the service of the Originating Application be abridged pursuant to rule 27(3) of the *Uniform Civil Procedure Rules 1999*.
 2. Pursuant to section 43 of the *Personal Injuries Proceedings Act 2002* the Applicant have leave to start a proceeding in the Court against the Respondent for damages based on a liability for personal injuries suffered by the applicant on 2 July 2014, despite non-compliance with Part 1 of Chapter 2 of the Act.
 3. The proceedings be stayed until the provisions of Part 1 of Chapter 2 of the *Act* are complied with.
 4. Costs reserved.
- [2] The balance of the application concerning the relief sought in Paragraphs 2, 3, 4, and 5 of the originating application filed 4 December 2018 are the subject of these reasons.
- [3] The applicant applies for orders pursuant to Paragraphs 2, 3, 4, and 5 of the originating application as follows:-
2. A declaration that the Part 1 Notice of Claim given by the applicant to the respondent on 15 April 2018 is a complying Part 1 Notice of Claim within the meaning of the *Personal Injuries Proceedings Act 2002* ('PIPA').
 3. In the alternative, a declaration that pursuant to section 13 of PIPA the respondent is conclusively presumed to be satisfied that the Part 1 Notice of Claim given by the applicant to the respondent on 15 April 2018 is a complying Part 1 Notice of Claim within the meaning of PIPA.
 4. Further, in the alternative, pursuant to section 18(1)(c)(ii) of PIPA, the Applicant have leave to proceed further with the claim despite non-compliance with Division 1 of Part 1 of Chapter 2 of the *Personal Injuries Proceedings Act 2002*.
 5. Pursuant to s 14(2) of PIPA the Applicant be granted leave to join the respondent *nunc pro tunc*.
- [4] On 2 July 2014, Mr Wright was employed by Newlands Northern Underground Pty Ltd and was required to perform work at the Newlands Northern Colliery. Mr Wright says that it was at approximately 6:45pm on 2 July 2014 when Mr Wright was walking from a residential facility to a communal laundry in the residential facility when he fell into an open drain pit. The open drain pit ought to have had a cover, however, it had been removed.
- [5] Mr Wright has brought proceedings (S73 / 2017) issued out of the Supreme Court at Mackay on 22 December 2017 against Newlands Coal Pty Ltd as first defendant, and Glencore Coal Queensland Pty Ltd as second defendant as the occupiers of the property,

and FK Gardner & Sons Pty Ltd as the third defendant. By proceeding S 73/2017 it was alleged that FK Gardner & Sons Pty Ltd was the body responsible for the property and yard maintenance work at the facility where Mr Wright sustained his injury. The pleading is based upon information provided by Newlands Coal and also the fact that in a *PIPA* notice of claim issued to FKG Group Pty Ltd on 4 May 2017, FKG Group Pty Ltd responded pursuant to s 12 of *PIPA* confirming that it was a proper respondent.

- [6] A part 1 notice of claim was forwarded to FKG Group Pty Ltd on 9 May 2017 and ten days later, 19 May 2017, a letter was received from Carter Newell Lawyers advising they acted on behalf of FKG Group Pty Ltd and that that entity was a proper respondent to the applicant's claim and pursuant to s 12 of the *PIPA* the part 1 notice of claim was compliant. At that stage, Mr Wright's claims were conducted by all parties in a routine and efficient manner as required by the *PIPA*.
- [7] Messrs Norton Rose Fulbright on 13 June 2017 advised Mr Wright that they were acting on behalf of FKG Group Pty Ltd and the usual steps, including disclosure of documentation, occurred. In response to repeated requests from the solicitor for the applicant for an actual copy of the maintenance contract, at 11:19am on 30 June 2017, Norton Rose Fulbright attached what was said to be the relevant supply contract (Exhibit CAW 1) which in fact showed the proper respondent having the name FK Gardiner & Sons Pty Ltd (and not FKG Group Pty Ltd).
- [8] In rapid response to the misnomer, at 12:46pm on 30 June 2017, the applicant's solicitor emailed Norton Rose Fulbright specifically requesting them to advise whether it was necessary for a further part 1 notice of Claim to be served upon FK Gardiner & Sons Pty Ltd to remedy the misnomer. As there was no satisfactory response, the applicant's solicitor in fact drafted and delivered a further part 1 notice of Claim addressed to FK Gardiner & Sons Pty Ltd and did so promptly, that is, by 1:54pm on 30 June 2017.
- [9] At 3:09pm on 30 June 2017, the applicant's solicitor received a letter from Norton Rose Fulbright advising, amongst other things, that they could not confirm whether FKG was a proper respondent to the claim. Twenty-three minutes later, at 3:34pm on 30 June 2017, the applicant's solicitor sought, because of the difficulties that FKG had in obtaining the information, an extension of the limitation period until 22 December 2017. That reasonable request was confirmed promptly by return correspondence, i.e. letter received 3:56pm on 30 June 2017. All appeared to be in order.
- [10] However, on 1 August 2017, Norton Rose Fulbright sent a letter stated that "FKG was not a proper respondent to the claim" advising that "Morris Corporation may have held the yard maintenance contract with Glencore at one point in time." There was then a great deal of further correspondence. The applicant's solicitor made multiple requests for information to attempt to clarify the issue as to the correct entity of the proper respondent.
- [11] The solicitors acting for the Newlands group of companies, Barry Nilsson, responded on 11 December 2017 suggesting that it was possible that Morris Corporation or an associated entity was in fact retained to perform the maintenance, and acting quickly, on the very next day, 12 December 2017, the contract was disclosed showing Morris Corporation held the contract for maintenance at the relevant time. Morris Corporation has changed its name to the respondent, Sirrom Corporation (Aust) Pty Ltd ("Sirrom Corporation").

- [12] Despite Mr Wright having, since 19 May 2017, the benefit of a s 12 response by FKG Group Pty Ltd confirming they were the maintainer, it has transpired that in fact they were not, but rather it was Morris Corporation by its current name, Sirrom Corporation.
- [13] Mr Wright, acting through his solicitors, has dealt with this difficulty and confusion by, on 10 April 2018, forwarding a *PIPA* part 1 notice of Claim to Sirrom Corporation. That is Exhibit CAW16. It is apparent that the part 1 Notice of Claim was received by the respondent on 15 April 2018 and yet the respondent Sirrom Corporation has not provided a response. The applicant argues that, by virtue of s 13 of the *PIPA*, he has the benefit of his notice of claim being deemed compliant.
- [14] The applicant argues firstly that the *PIPA* Form 1 was provided under s 9 and because of the failure to respond as required by s 12, pursuant to s 13 it is deemed to be a complying notice of claim. Alternatively, the applicant argues that it is a notice of claim validly provided pursuant to s 14 and with the failure to respond, it ought to be considered a complying notice of claim pursuant to s 13.
- [15] The respondent argues that the document which has been provided as a part 1 notice of Claim is in fact provided pursuant to s 14, and is therefore out of time, and accordingly it cannot be deemed pursuant to s 13 of the *PIPA* or otherwise to be a complying notice of claim.
- [16] The relevant provisions of the *PIPA* are as follows:

9 Notice of a claim

- (1) Before starting a proceeding in a court based on a claim, a claimant must give written notice of the claim, in the approved form, to the person against whom the proceeding is proposed to be started.

[...]

- (2) The notice must—
- (a) contain a statement of the information required under a regulation; and
 - (b) authorise each of the following to have access to records and sources of information relevant to the claim specified under a regulation—
 - (i) the person;
 - (ii) if the person is insured against the claim, the person’s insurer for the claim; and
 - (c) be accompanied by the documents required under a regulation.

(2A) A regulation may require information or other material to accompany a particular part of a notice of a claim.

- (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;
 - (b) the day 1 month after the day the claimant first instructs a law practice 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.

[...]

- (5) If part 1 of the notice is not given within the period prescribed under subsection (3) or section 9A (9) (b), the obligation to give the notice under subsection (1) continues and a reasonable excuse for the delay must be given in part 1 of the notice or by separate notice to the person against whom the proceeding is proposed to be started.

[...]

- (7) If a proceeding based on a claim may be started against 2 or more persons, the person to whom part 1 of a notice of a claim is given must, within the period prescribed under a regulation or, if no period is prescribed, within 1 month after receiving it—
- (a) give a copy of it to each other person known to the person who may be a person against whom a proceeding might be started by the claimant based on the claim; and
 - (b) advise the claimant of each other person to whom a copy of it has been given and give the claimant a short statement of the person's reasons for considering the other person may be a person against whom a proceeding might be started based on the claim.

- (7A) Subsection (7) (a) does not require the person (the *first person*) to whom part 1 of the notice is given by a claimant to give a copy of it to another person if the claimant has advised the first person in writing that the claimant has given, or will give, a copy of it to the other person.

[...]

11 Acknowledgement that a person is a proper respondent to a claim is not an admission of liability

- (1) Notice by a person that the person considers that the person is a proper respondent to a claim is not an admission of liability by the person in relation to the claim.
- (2) Also, a person does not breach a term or condition of any relevant insurance policy only because the person gives notice under subsection (1).
- (3) Further, an insurer does not agree to indemnify a person under any relevant insurance policy only because the insurer gives notice on behalf of the person under subsection (1).
- (4) Subsection (2) or (3) has effect whether the notice under the subsection was given before or after the commencement of the subsection

12 Respondent's response to part 1 of a notice of a claim

- (1) This section applies to a person (*respondent*) to whom part 1 of a notice of a claim is given under this division or purportedly under this division and who—
 - (a) considers himself, herself for itself to be a proper respondent to the claim; or
 - (b) is given notice under section 10(2)(b) or (4)(b) that the claimant considers the person to be a proper respondent to the claim.

- (2) The respondent must, within the prescribed period, give the claimant written notice—
- (a) stating whether the respondent is satisfied that part 1 of the notice is a complying part 1 notice of claim; and
 - (b) if the respondent is not satisfied, identifying the noncompliance and stating whether the respondent waives compliance with the requirements; and
 - (c) if the respondent does not waive compliance with the requirements, allowing the claimant a reasonable period, of at least 1 month, specified in the notice either to satisfy the respondent that the claimant has in fact complied with the requirements or to take reasonable action specified in the notice to remedy the noncompliance.
- (3) If the respondent is not prepared to waive compliance with the requirements in the first instance, the respondent must, within 1 month after the end of the period specified under subsection(2)(c), give the claimant a written notice—
- (a) stating that the respondent is satisfied the claimant has complied with the relevant requirements, is satisfied with the action taken by the claimant to remedy the noncompliance, or waives the noncompliance in any event; or
 - (b) stating that the respondent is not satisfied that the claimant has taken reasonable action to remedy the noncompliance, and giving full particulars of the noncompliance and the claimant's failure to remedy it.
- (4) In this section—

prescribed period means—

- (a) if the respondent responds directly to the claimant under this section as contemplated by section 10(1)(a)—the period prescribed under section 10(1); or
- (b) otherwise—
 - (i) the period prescribed under a regulation; or
 - (ii) if no period is prescribed, the later of the following—
 - (A) if the respondent gives notice to the claimant under section 10(3)(a) that the respondent is a proper respondent to the claim—1 month after the respondent is given the further information under section 10(2)(a);
 - (B) if the claimant advises the respondent under section 10(2)(b) or (4)(b) that the claimant considers the person to be a proper respondent to the claim and requires the person to give notice to the claimant under this section—1 month after the claimant advises the respondent under the paragraph.

13 Consequences for respondent of failure to respond to part 1 of a notice of a claim

If a claimant gives part 1 of a notice of a claim under this division or purportedly under this division to a person against whom a proceeding is proposed to be started, and the person does not respond to it under section 10 or 12 within the prescribed period under the section, the person is conclusively presumed to be satisfied it is a complying part 1 notice of claim.

14 Claimant may add other respondents

- (1) A claimant may, within the time prescribed under a regulation, add someone else as a respondent by giving the person—
 - (a) part 1 of a notice of a claim mentioned in section 9; and
 - (b) copies of other documents given to or received from any other respondent under this Act.
- (2) If the time prescribed under subsection (1) for adding a respondent has ended, the claimant may add someone else as a respondent only with the person's agreement and the agreement of the parties or with the court's leave.
- (3) If a claimant adds someone as a respondent under this section—
 - (a) the person must respond to part 1 of the notice as if it were given under section 9; and
 - (b) the claimant must notify each other party of the addition by written notice within the time prescribed under a regulation

[...]

18 Claimant's failure to give part 1 of a notice of a claim

- (1) A claimant's failure to give a complying part 1 notice of claim prevents the claimant from proceeding further with the claim unless—
 - (a) the respondent to whom part 1 of a notice of a claim was purportedly given—
 - (i) has stated that the respondent is satisfied part 1 of the notice has been given as required or the claimant has taken reasonable action to remedy the noncompliance; or
 - (ii) is conclusively presumed to be satisfied it is a complying part 1 notice of claim under section 13; or
 - (b) the respondent has waived compliance with the requirement; or
 - (c) the court, on application by the claimant—
 - (i) declares that the claimant has remedied the noncompliance; or
 - (ii) authorises the claimant to proceed further with the claim despite the noncompliance.

- [17] The respondent argues that there is no need for a declaration that the notice of claim is deemed compliant because the noncompliance has been remedied and the respondent has consented to being joined.
- [18] The respondent argues that the applicant has served the Part 1 notice of claim on the respondent in accordance with s 14 of the *PIPA* but outside of the time period allowed in the *PIPA* for adding another respondent to the claim, and accordingly pursuant to s 14(2), the respondent could only be added with the agreement of the respondent or other parties with the court's leave.
- [19] The respondent's substantial argument is that s 13 has not been engaged so as to conclusively presume the part 1 notice of claim to be compliant. Underlying the applicant's desire to have a declaration of compliance as at an earlier date, i.e. April 2018, is the currently-unresolved issue as to whether the applicant will succeed in an application pursuant to s 31 of the *Limitation of Actions Act 1974* to extend the time period (presuming that the respondent takes, as it currently does, a limitation defence point).
- [20] Correspondence from the applicant and exhibit 3, an unfiled copy of the originating application dated 26 November 2018, suggests that the proper characterisation of what has occurred is that the applicant has, pursuant to s 14 of the *PIPA* sought to add the respondent as a party.
- [21] The parties have been unable to locate any case to provide assistance upon the dilemma which has faced both the applicant and the respondent.
- [22] The primary question to be determined is therefore whether CAW16, that is, the part 1 notice of claim is a document which has been provided to the respondent pursuant to s 9 of the *PIPA* or s 14 of the *PIPA*.
- [23] In interpreting the Act, regard also should be had to s 4 of the Act which provides:

4 Main purpose

- (1) The main purpose of this Act is to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury.
- (2) The main purpose is to be achieved generally by—
 - (a) providing a procedure for the speedy resolution of claims for damages for personal injury to which this Act applies; and
 - (b) promoting settlement of claims at an early stage wherever possible; and
 - (c) 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; and
 - (d) putting reasonable limits on awards of damages based on claims; and
 - (e) minimising the costs of claims; and

(f) regulating inappropriate advertising and touting.

- [24] The procedure in s 14 for the giving of a notice of claim with the effect of adding “someone else as a respondent” reflects the purpose of the Act as set out in s 4(2)(a), (b), (c) and (e). By its terms, s 14 makes it plain that someone else may be added as a respondent to a claim by the giving to the person a part 1 notice of claim which is the same as first such notice which is given (ie a copy of the first part 1 notice), together with a copy of all documents given to or received by the other or original respondent. The s 14 procedure does not require the drawing of a new part 1 notice of claim at all. So much is made plain by the clear words of ss 14(1), (2), and (3).
- [25] Exhibit CAW16, the form 1 notice of claim, is not the original notice of claim provided to the original respondents, Newlands Coal Pty Ltd, Glencore Coal Queensland Pty Ltd, FKG Group Pty Ltd, or FK Gardner & Sons Pty Ltd. The form 1 is addressed to and provided to the respondent, Sirrom Corporation. Furthermore, by the answer to question 4 of the *PIPA* form 1 and by the reference to annexure “AA” in the reasons for delay, it is made plain that Mr Wright has not attempted to utilise s 14 but rather had in fact issued his *PIPA* form 1 notice of claim pursuant to s 9.
- [26] The explanation for the reason for the delay runs to nine pages of information. Paragraph 32, 34 and 35 of Annexure “AA” Reasons for Explanation of Delay provides:
- “32. Part 1 Notices of Claim under the *Personal Injuries Proceedings Act* 2002 (PIPA) against each of the Newlands Coal Pty Ltd (Newlands) and Glencore Coal Queensland Pty Ltd (Glencore) were executed by the claimant on 4 May 2017 in respect of the injuries.
34. Each of the part 1 notice of claim were forwarded to respective respondents at their registered address on 9 May 2017.
35. A further part 1 notice of claim pursuant to PIPA against the form FKG Group Pty Ltd was executed by the claimant on 4 May 2017 and forwarded to that firm’s registered address on 9 May 2017.”
- [27] It is plain then, on the proper construction of Exhibit CAW16, that the form 1 notice of claim given to Sirrom Corporation was given pursuant to s 9 of the Act and not s 14 of the Act. The part 1 notice of claim was forwarded to Sirrom Corporation’s registered address on 10 April 2018 by express mail. Notwithstanding that the form 1 notice of claim was received by Sirrom Corporation, the Sirrom Corporation had not responded pursuant to s 10 nor s 12 of the *PIPA* within the required prescribed time periods.
- [28] By email of 10 July 2018, Mr Riley of ProClaim advised that ProClaim managed the public liability claims on behalf of the respondent and their associated insurer, and confirmed that the *PIPA* form 1 notice of claim was received and “were investigating the incident”.
- [29] Despite the requirements in s 10 for the respondent to reply, it did not do so. The effect of the failure to respond under s 10 or s 12 is set out in s 13, namely the respondent is conclusively presumed to be satisfied that the notice of claim is a complying part 1 notice of claim.

- [30] Exhibit CAW21 is the response of ProClaim confirming receipt of the *PIPA* form 1 on 14 May 2018. Whilst one may readily appreciate that the respondent faced the practical difficulty of dealing with an extremely detailed part 1 notice of claim, it must be acknowledged that the *PIPA*, in attempting to achieve its aims, does place time frames on parties to act, and s 13 is specific in its effect. Namely, where a respondent, whether it be a proper respondent or not a proper respondent (as the case may be after full investigation) fails to respond within the time periods prescribed by the regulation (1 month), then a claimant, having the burden of having to comply with the pre-proceedings process set out under the Act, may receive the benefit of s 13 of the Act.
- [31] In the present case, practically, it may be seen that difficulties arose quite some time ago, i.e. on 19 May 2017, when FKG Group Pty Ltd specifically affirmed that they were a proper respondent. The positive affirmation from FKG Group Pty Ltd that they were a proper respondent, coupled with a lack of early and complete disclosure from the Newlands companies (the disclosure requirements not having been properly met until 12 December 2017 when the actual maintenance contract was disclosed) has in this case, placed both the applicant and the respondent in a difficult position, not of their own making.
- [32] Nonetheless, the effect of s 13 is clear, and the applicant is entitled to a declaration in terms of paragraph 2 of its originating application.
- [33] With respect to costs, as I have said, the practical difficulty in this case was not caused by any default of the applicant nor the respondent and accordingly I order that the costs of and incidental to the application be reserved to the proceedings instituted by leave pursuant to the orders made 10 December 2018.