SUPREME COURT OF QUEENSLAND

CITATION:	*Gillam v State of Qld & Ors* [2003] QCA 566
PARTIES:	**GORDON WILLIAM GILLAM** (applicant/respondent) **v** **STATE OF QUEENSLAND through Q BUILD** (first respondent) **WATPAC LIMITED** ACN 010 562 562 (second respondent) **ALLDRILL PTY LIMITED** ACN 010 899 528 (third respondent/applicant) **WORKCOVER QUEENSLAND** (fourth respondent)
FILE NO/S:	Appeal No 6586 of 2003 DC No 2126 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	19 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	12 September 2003
JUDGES:	Jerrard JA and Dutney and Philippides JJ Separate reasons for judgment of each member of the Court, Dutney and Philippides JJ concurring as to the orders made, Jerrard JA dissenting in part
ORDERS:	**1. Application for leave granted** **2. Appeal allowed to the extent of deleting from Order No 5 made 27 June 2003 all the words from "including as accompanied by" down and to the words "under the meanings of s.9 (5)" and inserting instead the words "including any reasonable excuse for the delay"** **3. The appellant pay the respondent's costs of the appeal**
CATCHWORDS:	PROCEDURE – INFERIOR COURTS – QUEENSLAND – DISTRICT COURTS – CIVIL JURISDICTION – PRACTICE – PROCEDURE BEFORE TRIAL – COMMENCEMENT OF ACTION AND PLEADINGS – where respondent failed to comply with notice provisions under s 9 of the *Personal Injuries Proceedings Act* 2002 (Qld) within the time prescribed by the Act – where respondent did not provide a "reasonable excuse" for his

delay – where appellant contends that the absence of such an explanation for the delay renders the grant of leave futile by reason of s 18(1) of the Act – whether learned primary judge erred in exercising the discretion under s 43 of the Act to grant leave to the respondent to commence proceedings

Personal Injuries Proceedings Act 2002 (Qld), s 9, s 18(1), s 43

COUNSEL: S C Williams QC, with J H Dalton, for the applicant
G R Mullins for the respondent

SOLICITORS: Gadens Lawyers for the applicant
Scott's Lawyers for the respondent

[1] **JERRARD JA:** In this matter Alldrill Pty Ltd seeks leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) from orders made in a judgment delivered on 27 June 2003. The respondent Gordon Gillam concedes that the appeal concerns the construction of sections of the *Personal Injuries Proceedings Act* 2002 (Qld) ("*PIPA*"), that the provisions to be construed are new, that there are no appellate decisions dealing with their construction, and that they are of general importance. Nevertheless, the respondent submits that the reasoning of the trial judge was correct; and that either leave to appeal should not be granted, or if granted, the appeal should be dismissed. Because of the concession made it is appropriate to grant leave to appeal.

General background matters

[2] Mr Gillam was injured on 29 June 2000, when carrying out his duties as a Superintendent Representative for Project Services, a division of the Department of Public Works ("Q Build"), in which department he had been employed for some 34 years. On 29 June 2000 he was performing duty at the construction site of the Wacol Youth Detention Centre, at Wacol. Those duties, on his description of them, included the administration of the building contract and to conduct environmental and safety inspection audits, and to pass his findings onto the main contractor for its attention.

[3] That main contractor was Watpac Limited. Mr Gillam's statement providing his instructions to his original solicitors (exhibit 1 before the learned trial judge)[1] gives his opinion of the role Watpac played as principal contractor, which was that it was to construct the facility, and to "oversee all issues on site, which included management of staff employed by Watpac, environmental management, and workplace health and safety".

[4] On 29 June 2000 Mr Gillam was inspecting the site in company with a Mr Bruce McPherson, the project manager for Watpac, that inspection being "in relation to construction issues, environmental issues and Workplace Health and Safety issues".[2] At about 9.00 a.m. during that jointly conducted inspection – apparently conducted once each fortnight – Mr Gillam observed a sub-contractor's employee not wearing personal protective equipment, that being earmuffs. That employee

1 It is reproduced at AR 202 – 206.
2 Statement of Mr Gillam AR 202.

was operating a large borer rig without them, and Mr Gillam considered this conduct constituted "a breach of workplace health and safety". It appears that Mr McPherson went to speak with that person and Mr Gillam went with or followed Mr McPherson. Mr Gillam at first stood near Mr McPherson and then stepped back into an area of shadow thrown by the large borer rig being used by the employee, and into an uncovered and open pier hole, not protected by any safety barricading, which was one of a line of eight holes dug by that rig.[3]

[5] The worker was an employee of the appellant Alldrill Pty Ltd, itself a sub-contractor to Watpac. Mr Gillam realised the worker was a sub-contractor's employee, but did not inquire at all about the sub-contractor's identity. As his statement to his then solicitors in exhibit 1, and his evidence before the learned trial judge, both made clear, he was firmly of the view that liability for the injuries he received from falling into that hole rested solely with Watpac. Those injuries included a fractured right ankle and associated pain and discomfort, both immediate and long term.[4]

[6] Mr Gillam consulted solicitors in approximately October 2000 and his application for compensation was accepted by WorkCover Queensland, which issued him with a Notice of Assessment on 20 March 2002. On 26 May 2003 a Notice of Claim issued against Watpac was served on WorkCover Queensland, signed 17 February 2003.[5] In that notice he expressed the opinion that Watpac was 100% liable, it having "failed to install protective safety barriers around bored piers (bored for perimeter fence)";[6] that attitude was consistent with an earlier notice given on or about 26 November 2002 to Watpac, served under the *PIPA*. That earlier notice declared that he held Watpac liable, it being the principal contractor, for its "failure to install safety barricades around bored piers for perimeter fence".[7]

[7] Mr Gillam's evidence before the learned trial judge was that when he provided his statement to his original solicitors he thought Watpac was to blame for his injury, which view he had given to his solicitors, and in cross-examination explained he held that view because:

> "Watpac were given possession of the site and are the principal contractor and they managed the site activities as far as – you know, their sub-contractors, their time and their progress."

He further explained that:

> "Watpac should have covered the holes in the first instance or gave Alldrill – I think it is Alldrill … the instruction to maintain safety."[8]

He agreed that he had told his solicitors "basically" that.[9]

[8] Mr Gillam thus presented to his solicitors and the court as a plaintiff with considerable experience in supervising the conduct of others to ensure workplace health and safety, and both with clear views on liability and with experience

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3 These descriptions of what occurred are taken from Mr Gillam's statement.

4 The actual injuries Mr Gillam claims, their asserted consequences, and the economic and other loss claimed is described in his Statement of Claim at AR 24 – 25.

5 Issued pursuant to s 280 of the *WorkCover Queensland Act* 1996 (Qld).

6 See AR 36.

7 See AR 49.

8 See AR 153.

9 See AR 154.

justifying those. Steps taken by way of the notices given under the *WorkCover Queensland Act* and the *PIPA* prior to June 2003 were consistent with those views.

What Mr Gillam did not know

[9] Watpac had apparently queried the contents of the notice under the *PIPA* delivered on or about 26 November 2002, and its solicitors received on 21 May 2003 a letter from Mr Gillam's solicitors dated 20 May 2003, responding to whatever matters had been raised.[10] On 26 May 2003 Watpac's solicitors confirmed to Mr Gillam's solicitors that Watpac's solicitors accepted that Mr Gillam's Notice of Claim delivered pursuant to s 9 of the *PIPA* complied with the provisions of that Act, and that Watpac's solicitors took the date of compliance to be 21 May 2003. They noted that they had until 21 November 2003 to respond formally to Mr Gillam's Notice of Claim, and added that:

> "In accordance with our client's ongoing obligation of disclosure, we **enclose** copies of the following:-
>
> 1. Investigative report of G Hughes & Associates dated 24 December 2002;
> 2. Investigative report of G Hughes & Associates dated 3 February 2003;
> 3. Records of Doctor Field – Deagon Medical Centre;
>
> Would you also please advise us whether your client intends to pursue a common law action against his employer and/or Alldrill Pty Ltd in relation to the alleged incident."

[10] Those reports dated 24 December 2002 and 3 February 2003 contained information and opinions potentially providing a different view of liability for Mr Gillam's injury than the one held by him. The report included a description of Mr McPherson's apparently strong view that it was Alldrill's responsibility, before commencing to drill, to ascertain "who would cover the holes as they were drilled"; and Watpac's safety officer on site, a Mr Mark Huston, was described by the report writer (from G Hughes & Associates, "legal liability consultants") as having:

> "informed that a staff member of the Insured [Watpac] whose identity he cannot recall, arranged for secondhand pallets to be brought onto the subject site to cover the holes being drilled by Alldrill Pty Ltd. He also informed that on previous job sites, he had experienced problems with Alldrill Pty Ltd in relation to covering holes."

and further that:

> "He [Mr Huston] considers that Alldrill Pty Ltd should not have drilled the holes until its staff ensured that there was a system in place to cover each hole as it was drilled.
>
> Mr Huston spoke with Alan Roberts from Alldrill Pty Ltd at the commencement of the project regarding his expectation that the holes would be covered by Alldrill Pty Ltd and he cannot recall if he followed up with written instructions. It is hopeful that when Alldrill Pty Ltd's safety plan is located, it will include these written instructions.

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10 See AR 72.

> Mr Huston is adamant that Alldrill Pty Ltd should not have left the holes uncovered."

and that:

> "Mr Huston informed that he overruled Alan Roberts and insisted that they should have a system in place to cover the holes."

[11] If that information was accurate then it could at least be argued on behalf of Watpac that it had done what was reasonably necessary to ensure the holes were covered, and that Alldrill simply refused to make use of covers provided to it by Watpac and to follow instructions clearly given by Watpac. Prudence would suggest that Alldrill be at least joined, and senior counsel for the appellant conceded readily enough on the appeal that those reports would indicate that there might be at least a concurrent liability in Alldrill.

[12] The letter dated 26 May 2003 from Watpac's solicitors which enclosed those reports may have gone astray in the office of Mr Gillam's then solicitors. In any event, a second copy of that letter, together with the enclosures, was sent on 17 June 2003 to Mr Gillam's original solicitors; and then for whatever reason, Mr Gillam instructed new solicitors on 20 June 2003, who received the file on 23 June 2003. Those new solicitors brought the application heard 27 June 2003 for leave pursuant to s 305 of the *WorkCover Queensland Act* to start proceedings against the State of Queensland despite non-compliance with s 280 of that Act, and for leave pursuant to s 43 of the *PIPA* to start proceedings against Watpac and Alldrill despite non-compliance with Chapter 2 of the *PIPA.* The learned trial judge hearing those applications granted them; Alldrill appeals against the orders made against it when granting the second.

Relevant provisions of the *PIPA*

[13] That Act commenced on 18 June 2002.[11] Section 6 provides that it applies in relation to all personal injury arising out of an incident whether happening before, on or after 18 June 2002; but not to certain excluded personal injury, such as that defined under the *Motor Accident Insurance Act* 1994 (Qld) and to which that Act applied or to injury defined under the *WorkCover Queensland Act*; nor to personal injury in relation to which a proceeding was started in a court before 18 June 2002, nor personal injury that is a dust related condition. None of those exceptions apply with respect to Alldrill.

[14] Section 9 provides by s 9(1) that:

> "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."

Section 9(2) provides that the notice must contain the information required by a regulation, and Regulation 3 of the *Personal Injuries Proceedings Regulation* 2002 (Qld) ("*PIPR*") extensively provides for required information. Section 9(3) provides that the notice must be given within the period ending on the earlier of either the day nine months after the day the incident giving rise to the injury happened, (or if symptoms are not immediately apparent, the first appearance of symptoms of the injury) (s 9(3)(a)), or else (s 9(3)(b)) the day one month after the day the claimant

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11 This is provided by s 2 of the *PIPA.*

first consulted a lawyer about the possibility of seeking damages for the personal injury and the person against whom the proceeding was proposed to be started was identified. Section 9(5) provides that if the notice is not given within the period prescribed under sub-section (3), the obligation to give the notice continues and a reasonable excuse for the delay must be given in the notice or by separate notice to the person against whom the proceeding is proposed to be started.

Steps which might have been taken

[15] Section 10 provides:

> "**(1)** A person to whom part 1 of a notice of a claim is given must, in writing and within the period prescribed under a regulation or, if no period is prescribed, within 1 month after receiving the notice –
>
> (a) if the person considers that the person is a proper respondent to the claim, give notice to the claimant under section 12; or
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> (b) if the person is unable to decide on the information contained in the notice whether or not the person is a proper respondent to the claim, advise the claimant of the further information the person reasonably needs to decide whether the person is a proper respondent to the claim; or
>
> (c) if the person considers that the person is not a proper respondent to the claim, give the claimant, in writing –
>
> (i) reasons why the person considers the person is not a proper respondent to the claim; and
>
> (ii) any information the person has that may help the claimant to identify a proper respondent to the claim.
>
> …"

[16] Although events did not in fact unfold that way, that section would have entitled Watpac to provide Mr Gillam with reasons why it considered it was not a proper respondent and information (such as the report it did give to his solicitors) helping Mr Gillam identify a proper respondent (such as Alldrill, had Watpac so contended). Watpac would have had one month from 21 May 2003 within which to do that; the limitation period expired on 29 June 2003. As it happened Watpac seems both to have accepted it was a proper respondent **and** provided Mr Gillam with information suggesting there might be a better, different, and proper respondent. The *PIPA* does not make any specific provision for this circumstance, although it does allow claimants to add other respondents.

[17] Had Watpac acted as s 10(1)(c) provided, then s 14 of the *PIPA* would have allowed Mr Gillam to give Alldrill a notice of a claim one month after receiving information from Watpac under s 10(1)(c)(ii).[12] This means that had Watpac so acted, Mr Gillam could have complied with the Act by giving a notice to Alldrill by 21 July 2003. The fact that sequence of sections did not come into force in his favour extending the time within which to give a s 9(3) notice to Alldrill, whereas it might have, is relevant to the exercise of the judicial discretion provided by s 18 of the *PIPA*.

Critical sections of the *PIPA*

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[12] This time period is provided by regulation 7(1)(b) of the *PIPR* 2002, as in reprint number 1C of the regulations.

[18] Section 18 of the *PIPA* provides:

> "**(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 the notice is a complying part 1 notice of claim under section 13; or
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> (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.
>
> **(2)** An order of the court under subsection (1)(c) may be made on conditions the court considers necessary or appropriate to minimise prejudice to a respondent from the claimant's failure to comply with the requirement."

[19] The apparent object of the provisions requiring notice of a claim to a person against whom the proceeding is proposed (s 9), the provisions requiring the recipient to respond in specified ways (ss 10, 12), the provision that a respondent who does not respond as required under s 12 is conclusively presumed to be satisfied the notice is a complying Notice of Claim (s 13), the provision allowing a claimant to add someone else as a respondent (s 14), the provisions allowing a respondent to add another person as a "contributor" from whom an indemnity or contribution towards the respondent's liability is claimed (s 16), and the provision describing the contributor's permitted responses (s 17), all appear designed to encourage the disclosure of information likely to assist in identifying loss and damage actually suffered by a claimant and the existence or non-existence of liability for that damage, and whose. Those legislative objects are relevant to the exercise of the discretion granted by s 18, with s 18(2) providing for orders reducing prejudice to respondents from a claimant's non-compliance, rather than preventing such a claimant from proceeding further. Obviously enough, orders designed to achieve imparting of relevant information as promptly as possible would help minimise prejudice.

[20] Section 43 of the *PIPA*, in the parts relevant to these proceedings, provides as follows:

> "**(1)** The court, on application by a claimant, may give leave to the claimant to start a proceeding in the court for damages based on a liability for personal injury despite noncompliance with this part if the court is satisfied there is an urgent need to start the proceeding.
>
> **(2)** The order giving leave to start the proceeding may be made on conditions the court considers necessary or appropriate having regard to the particular circumstances of the case.

> **(3)** However if leave is given, the proceeding started by leave is stayed until the claimant complies with this part or the proceeding is discontinued or otherwise ends.
> …"

[21] A transitional provision (s 77A) in the *PIPA*[13] makes specific provision for personal injury arising out of incidents happening before 18 June 2002 and in relation to which a period of limitation has not ended. Section 77A(2) provides that for the purposes of s 9(3)(a) (i.e. the day when the nine months commences to run) the day the incident giving rise to the personal injury happened is taken to be 1 August 2002. Further, s 77A(3) provides that for the purposes of s 9(3)(b) (the date for calculating the day one month after a claimant first consulted a lawyer) that consultation is taken not to have occurred earlier than three months after the day on which the *Personal Injuries Proceedings Amendment Act* 2002 (Qld) receives assent. The effect of those provisions is that the earliest date on which a s 9 notice under the *PIPA* need have been given to Watpac or Alldrill would have been 29 December 2002.

Submissions made on appeal

[22] The application filed by Mr Gillam's solicitors relevantly sought as against Alldrill that Mr Gillam have leave pursuant to s 43 of the *PIPA* to start proceedings against it despite non-compliance with the s 9 provisions requiring notice. Alldrill submitted on the appeal that the learned judge erred in granting that leave in Order No 4 of the orders made on 27 June 2003 because, it was submitted, such leave should not be given unless an applicant such as Mr Gillam has a reasonable excuse for the delay. The appellant submitted that otherwise an order under s 43 would be futile, and the court simply should not entertain such an application. It would be futile because the stay imposed by s 43 could never be removed, so the submission ran, in the absence of a reasonable excuse for delay in provision of that notice.

[23] That submission must be rejected for a number of reasons. Section 43 contains no restrictions on the discretion it grants, and certainly none requiring the court be satisfied a reasonable excuse exists for delay or other non-compliance with Part 1 of Chapter 2 of the *PIPA*, which part contains s 9 to s 43. Further, s 43(3) contemplates the making of orders granting leave to claimants to commence proceedings when that may ultimately prove a futile step, since the section envisages leave being given in proceedings which are then stayed and ultimately discontinued. Next, some claimants may not know whether they have a reasonable excuse for delay, such as claimants who have recently terminated instructions to a solicitor who has failed to give notice, when those claimants have not yet received the file from that solicitor and are therefore unable to ascertain if any legitimate basis existed for the solicitor not having earlier given notice. (Assuming, without deciding, that the solicitor's negligence was not itself a "reasonable excuse").[14]

[24] Senior counsel for the appellant readily enough conceded during argument that, if it was permissible to make an order under s 43(1) without considering whether or not a reasonable excuse existed for delay, then the appellant would have no sustainable complaint about Order No 4. It was conceded that the imminent end of a limitation

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13 Introduced by the *Personal Injuries Proceedings Amendment Act* 2002 (Qld) (Act No 38 of 2002, assented to 29 August 2002).

14 But now see *Perdis v The Nominal Defendant* [2003] QCA 555 at [11]-[12]; [25]-[26]; [36-[37].

period could provide an urgent need to start a proceeding, although the submission was made that in this matter it should not be enough to engage the court's discretion, because of the futility of such an order absent a reasonable excuse for delay. It was, of course, submitted that there was no reasonable excuse; and that Mr Gillam and his solicitors had simply ignored the possibility of liability in Alldrill.

[25] Section 43 contains no requirement that the court look for an excuse, reasonable or not, for non-compliance with Chapter 2 Part 1, and the learned judge made no error in granting leave. The judge referred to the fact that Mr Gillam had engaged legal assistance and satisfied all other proposed defendants of the appropriateness of his instituting a claim at that stage, and the fact that Mr Gillam had given notice within the relevant time limit against the other proposed *PIPA* defendant. The judge might have added, but did not, that the manner in which the information was supplied to Mr Gillam's solicitors and which identified Alldrill as having a potential liability for Mr Gillam's injuries, was actually an example of the beneficial effects of the *PIPA* system of providing information. It seems unlikely that solicitors acting for Mr Gillam would otherwise have learnt **before** litigation commenced that Watpac might demonstrate compliance with whatever duty was cast on it, and that all or a shared liability lay with another party. It would ordinarily be inappropriate to exercise the s 43 discretion by refusing leave to commence proceedings just before the expiration of the limitation period against that party only recently identified by the *PIPA* processes as potentially liable.

[26] The appellant's submissions on s 43, regarding the need for demonstration of a reasonable excuse, were predicated upon the proposition that s 43 leave would be futile in proceedings in which s 18 would prevent a claimant from proceeding further with the claim by reason of a failure to give a complying notice. Behind that proposition lay the further argument, urged on the court by the appellant's senior counsel, that the discretion given to a court by s 18(1)(c)(ii) would not be exercised in a claimant's favour in the absence of a reasonable excuse for delay. This was said to be the result of the scheme of the *PIPA*, with the submission being that s 9(3), requiring a reasonable excuse, should be imported into s 18.

[27] The obvious difficulty that argument faces is that s 18(1)(c)(ii) empowers a court to authorise a claimant to proceed *despite* non-compliance.[15] The argument is accordingly inconsistent with the Act and should be rejected. Where the lack of compliance is the failure to give a reasonable excuse for delay in provision of a s 9(1) notice, the appellant's argument would result in a court reimposing, as a requirement of being excused, the provision of that from which a claimant sought to be excused.

[28] The appellant's final attack was upon the terms of Order No 5 actually made by the learned trial judge. That order was as follows:

> "Pursuant to s 43(2) of the Personal Injuries Proceedings Act 2002 the Applicant must within seven days give to the Third Respondent a Notice of Claim under s 9 of that Act including as accompanied by an [explanation][16] in writing of the delay in terms of his oral evidence given on 27 June 2003, which [explanation] the court

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15 The *PIPA* has no provision similar to s 39(8) of the *Motor Accident Insurance Act* 1994 (Qld), considered in *Miller v The Nominal Defendant* [2003] 39 MVR 548.

16 The order actually said "application" but clearly meant "explanation" wherever the term "application" appeared.

> declares, in the absence of any other evidence, to be 'reasonable' under the meanings of s 9(5)."

[29] There are a number of oddities about that specific order, of which one is that Mr Gillam's evidence did not in terms describe any reasonable excuse for delay in providing a notice to Alldrill. His evidence asserted Watpac was responsible. It was the reports obtained by Watpac received by his solicitors, together with Mr Gillam's strong opinions disclosed in his own evidence and documents, which provided the material capable of being a reasonable excuse. Next, that declaration of a reasonable excuse provided by Mr Gillam's oral evidence was not actually an order for which Mr Gillam had applied, although his counsel at the hearing below did make what was described as a "s 18 application" toward the end of argument.[17] Since s 18 does **not** require a court to declare or find whether a reasonable excuse exists or not, and since the drafting of s 18(1)(c)(ii) actually assumes, if anything, the absence of a reasonable excuse for delay where delay is the non-compliance, there appears no need to make an order as to the existence of a reasonable excuse. Where there has been delay, and where at the time an application under s 18 is heard a reasonable excuse for that delay exists, then whether that excuse has been provided as required by s 9(5) or not, its existence will be relevant to the exercise of the s 18(1)(c)(ii) discretion in a claimant's favour; but demonstrating that one exists is not mandated by the section.

[30] Mr Gillam's counsel in the proceedings below seems not to have articulated what the reasonable excuse was, which task Mr Gillam's different counsel on the appeal did discharge. The circumstances that Mr Gillam through his solicitors learnt only very close to the end of the limitation period, and through appropriate *PIPA* processes taken within time, of grounds upon which Watpac might successfully defend proceedings brought against it, and which grounds could demonstrate liability in Alldrill, are capable of providing a reasonable excuse for Mr Gillam's not having envisaged taking proceedings against Alldrill before learning that information.

[31] In the circumstances, which include that the learned trial judge clearly intended that Mr Gillam provide Alldrill with the information required by s 9(1) and (2), and clearly intended that Mr Gillam provide Alldrill with a reasonable excuse for the delay, the appropriate order this court should make is simply that the words from and including "including as accompanied by" down to and including "under the meanings of s 9(5)" in Order No 5 made 27 June 2003 be deleted, and in lieu thereof the words be inserted "including any reasonable excuse for the delay." Alldrill will then have available for exercise the various options given by the *PIPA*.

[32] I would order:

1. That leave be granted; and
2. That the appeal be allowed to the extent of deleting from Order No 5 made 27 June 2003 all the words from "including as accompanied by" down to the words "under the meanings of s.9(5)" and inserting instead the words "including any reasonable excuse for the delay"; and
3. That each party bear its own costs of the appeal.

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[17] See AR 172.

[33] **DUTNEY J:** I agree for the reasons expressed by Jerrard JA that leave to appeal should be granted.

[34] The appeal purports to be against the whole of the orders made below. In fact only orders 4 and 5 concern the appellant. Orders 1, 2 and 3 relate to another respondent. Order 7 which deals with costs is relevant only if the appeal against order 4 succeeds.

[35] The principal issue on the appeal is whether leave could properly be granted to a claimant under s 43 of the *Personal Injuries Proceedings Act* 2002 (Qld) ("the *PIPA*") to issue proceedings where the claimant had neither served a notice of claim under s 9 of the *PIPA* within the time prescribed by subsection 9(3) of that Act nor provided a "reasonable excuse for the delay" pursuant to subsection 9(5). On the assumption that there was in fact no reasonable excuse for the delay, the appellant argued that to grant leave in such circumstances would be futile because the proceedings commenced pursuant to the leave would be permanently stayed by reason of s 18(1) of the *PIPA*. It was submitted that the application for leave to commence proceedings ought not to be entertained for that reason.

[36] In my view, the appellant's argument can be quickly disposed of.

[37] There is nothing in s 43 of the *PIPA* itself which either expressly or impliedly limits the exercise of discretion by the court before which the application is brought.

[38] The submission that the absence of an explanation for the delay in serving the s 9 notice of claim renders the leave futile ignores s 18(1)(c)(ii) of the *PIPA*. It is premature on the application for leave under s 43 to pre-empt a subsequent application under s 18(1)(c)(ii) to excuse non-compliance with the requirement to provide a reasonable explanation for delay.

[39] In view of the concession made by senior counsel for the appellant identified by Jerrard JA in paragraph [24] of his reasons the appeal against order 4 must fail. The concession was that if the explanation for delay was not critical under s 43, the order granting leave could not be criticised.

[40] For the reasons given by Jerrard JA I agree that the appeal against order 5 should be allowed to the extent indicated by him.

[41] I would order the appellant to pay the respondent's costs of the appeal. The real substance of the appeal concerned the requirement to provide a reasonable excuse for delay as a precondition of leave under s 43. As appears from the transcript[18] the offending part of order 5 originated from the learned primary judge's frustration with the approach taken by the appellant. It was not part of the application filed, even though its suggested inclusion was taken up by counsel for the respondent. The extent of the appellant's victory on this appeal is, in my view, minimal and certainly insufficient to deprive the respondent of the costs to which he would otherwise be entitled.

[42] My orders would be as follows:

1. That leave be granted;

[18] AR 172.

2. That the appeal be allowed to the extent of deleting from Order No 5 made 27 June 2003 all the words from "including as accompanied by" down to the words "under the meanings of s.9(5)" and inserting instead the words "including any reasonable excuse for the delay";
3. The appellant pay the respondent's costs of the appeal.

[43] **PHILIPPIDES J:** I agree for the reasons stated by Jerrard JA and Dutney J that the appellant's contentions concerning s 43 of the *Personal Injuries Proceedings Act* 2002 (Qld) ought to be rejected. There is nothing in the wording of s 43 of the Act, nor in the scheme of the Act to support the approach to s 43 contended for by the appellant.

[44] Leave to appeal should be granted. The appeal should be allowed, but only to the limited extent identified by Jerrard JA in respect of Order No 5. As regards the question of costs, I agree for the reasons stated by Dutney J that the appellant should pay the respondent's costs of the appeal.