

# SUPREME COURT OF QUEENSLAND

CITATION: *Etemovic v Boulderstone Hornibrook Qld Pty Ltd* [2010] QSC 141

PARTIES: **SMAIL ETEMOVIC**  
**(plaintiff)**  
v  
**BAULDERSTONE HORNIBROOK QUEENSLAND**  
**PTY LTD (ABN 61 006 505 559)**  
**(defendant)**  
v  
**WACO KWIKFORM LIMITED (ACN 002 835 396 and**  
**ABN 48 002 835 396)**  
**(third party)**

FILE NO: BS8323 of 2009

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 6 May 2010

DELIVERED AT: Brisbane

HEARING DATE: 13 April 2010

JUDGE: Mullins J

ORDER: **Adjourn the application filed on 29 March 2010 to a date to be fixed**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – PARTIES – THIRD PARTY AND SIMILAR PROCEEDINGS – where plaintiff suffered personal injuries whilst working on a building site controlled by defendant – where plaintiff brought claim against defendant for negligence – where defendant issued third party notice against third party – where plaintiff brings an application to join third party as second defendant in the proceeding pursuant to r 69(1) and in reliance on r 69(2)(iii) or (iv) of the *Uniform Civil Procedure Rules 1999 (Qld)* – where the application is brought after the limitation period for commencing a proceeding against third party has expired – whether third party can be joined when application brought after expiration of limitation period – whether plaintiff’s non-compliance with pre-court procedures under the *Personal Injuries Proceedings Act 2002 (Qld)* precludes joining third party

*Uniform Civil Procedure Rules 1999, r 69, r 74*

*Interline Hydrocarbon Inc v Brenzil Pty Ltd*

[2006] 2 Qd R 454, considered

*Pukeroa v Berkeley Challenge Pty Ltd* [2005] 2 Qd R 46,  
followed

COUNSEL: D Kelly for the plaintiff  
A Pittlik (*sol*) for the defendant  
T Matthews for the third party

SOLICITORS: Gall Stanfield & Smith for the plaintiff  
Sparke Helmore for the defendant  
Bray Lawyers for the third party

- [1] The plaintiff was working as a contractor doing patching/rendering on the concrete on the outside of a high-rise building on a building site at Surfers Paradise on 3 May 2005 which he alleges was controlled by the defendant when he alleges that, as he stepped up from the floor area of one level of the building to the scaffolding on the outside of the building, he came into contact with a piece of protruding pipe and suffered personal injuries.
- [2] The plaintiff's claim and statement of claim against the defendant in this proceeding was filed on 3 August 2009. When the defendant filed its defence in this proceeding on 18 September 2009, it issued a third party notice against the third party claiming a contractual indemnity in respect of the plaintiff's claim on the basis of the terms of the contract between the defendant and the third party pursuant to which the third party had erected the perimeter scaffold around the building on the subject site. The defendant makes an alternative claim against the third party for contribution as a joint tortfeasor. In its defence to the plaintiff's claim, the defendant denies the allegations of negligence made by the plaintiff and alleges that it took reasonable care by engaging the third party under a contract to erect the scaffolding on the site in compliance with certain specified standards and having the scaffolding inspected and approved as being compliant with those standards.
- [3] The third party filed its defence to the defendant's statement of claim on 9 October 2009. The third party denies the defendant's allegations that it had breached its contract with the defendant or was negligent in relation to the erection of the scaffolding on the site.
- [4] The plaintiff now seeks to join the third party as the second defendant in the proceeding pursuant to r 69(1) and in reliance on r 69(2)(iii) or (iv) of the *Uniform Civil Procedure Rules 1999 (UCPR)*, so that the plaintiff can claim against the third party for negligence in similar terms to that alleged against the third party in the defendant's statement of claim against the third party. The limitation period for any action brought by the plaintiff against the third party for the injuries sustained on 3 May 2005 expired on 3 May 2008.
- [5] The plaintiff's application is supported by the affidavit of Mr Beattie who is the managing law clerk at the plaintiff's solicitors who has the conduct of the plaintiff's matter under the supervision of a partner of the firm.

**Third party's opposition to being joined as a defendant in the proceeding**

- [6] The third party argues that, as the plaintiff has not complied with s 9 of the *Personal Injuries Proceeding Act 2002 (PIPA)* in relation to commencing a proceeding against the third party, and that the limitation period for commencing a proceeding against the third party has expired, leave cannot now be given to the plaintiff to join the third party as a defendant in this proceeding.
- [7] The third party relies on the approach to the operation of *PIPA* in *Pukeroa v Berkeley Challenge Pty Ltd* [2005] 2 Qd R 46 (*Pukeroa*). In *Pukeroa* the plaintiff during the course of her employment as a cleaner slipped on a liquid substance as she walked past industrial bins at a shopping centre that was managed by the first third party and where the industrial bins were provided by the second third party. When she sued her employer, the employer joined as third parties both the centre manager and the provider of the industrial bins. The plaintiff was successful at first instance in joining the third parties to her proceeding, but the third parties successfully appealed against that order. This was on the basis that the plaintiff's claim against the third parties was caught by the provisions of *PIPA* and the plaintiff was bound to comply with the pre-court procedures under *PIPA* before starting her proceeding against the third parties.
- [8] In *Pukeroa* the plaintiff had argued that her claim against the employer that was commenced pursuant to the provisions of the *Workers' Compensation and Rehabilitation Act 2003* was the proceeding to which she was seeking to join the third parties and that proceeding did not need to comply with *PIPA*. That argument was rejected by the Court of Appeal on the basis that, where a party was added to a proceeding, r 74(4) of the *UCPR* treated that as a proceeding against the new party that was commenced on the filing of the amended copy of the originating process.
- [9] The third party relies on r 74(5) of the *UCPR* to submit that, if it were joined as a defendant to this proceeding, the commencement date for the proceeding against it for limitation purposes would be deemed to be the date on which the proceeding against the defendant was commenced of 3 August 2009 (which is 15 months after the expiry of the limitation period for the plaintiff to sue the third party), unless the court ordered otherwise which it has not been requested to do. The third party submits that the court should therefore exercise its discretion against the joinder of the third party as a defendant in the proceeding, because the third party could successfully plead a limitation defence. The third party also submits that it is relevant to the determination of this application that the plaintiff has not sought (and would be unlikely to obtain) any extension of the limitation period pursuant to s 31 of the *Limitation of Actions Act 1974*.

#### **Plaintiff's submissions**

- [10] The plaintiff relies on the participation of the third party in the steps required under *PIPA*, as a result of the defendant having given the third party a notice to contributor under s 16 of *PIPA*. The plaintiff seeks to distinguish *Pukeroa* on the basis that the third parties in that case had not been involved in the pre-court procedures under *PIPA* as contributors. The plaintiff therefore argues that the reason for complying with *PIPA* that was the basis of the decision in *Pukeroa* was satisfied by the third party being a contributor and that the third party's receipt of the contribution notice should be treated as compliance by the plaintiff with the giving of a notice under s 9 of *PIPA*.

- [11] The plaintiff relies on the approach in *Interline Hydrocarbon Inc v Brenzil Pty Ltd* [2006] 2 Qd R 454 (*Interline*) where it was held at [21] that r 69(2)(a)(iv) may operate to permit the addition of a defendant in circumstances in which there was and remains a good cause of action against the initial defendant and where the initial defendant remains a defendant in the proceeding. In *Interline* Muir J (as his Honour then was) found that it was doubtful the proceeding was started against the name of the right person as a party when only the initial defendant was sued and that it was appropriate to join another defendant as the second defendant in the proceeding.
- [12] The plaintiff refers to the several extensions of the limitation period for the bringing of the proceeding against the defendant that had been agreed with the defendant, and submits that it was not until after the expiration of the limitation period for bringing its proceeding against the third party, that the plaintiff became aware of a possible action by the plaintiff against the third party. It was upon the issue of the third party proceeding that the plaintiff's legal advisers thought it prudent to include the third party as a defendant. The plaintiff argues that the possibility of a defence by the third party that the plaintiff's claim against it is statute-barred should not preclude the joinder of the third party as a defendant and that any application for an extension of the limitation period should be dealt with when such a defence is raised.
- [13] The plaintiff also relies on the fact that the third party has not put any material before the court to show that it would suffer prejudice by the making of the proposed order.

#### **Steps taken under PIPA**

- [14] The plaintiff's solicitors submitted a notice of claim (incorporating Parts 1 and 2) under *PIPA* to the defendant under cover of the plaintiff's solicitors' letter dated 13 December 2007. By letter dated 19 March 2008 the defendant's solicitors confirmed that the defendant was a proper respondent to the plaintiff's claim and that the *PIPA* notice of claim was compliant. It does not appear at that or any stage that the defendant acted under s 9(7) of *PIPA* by giving a copy of the notice of claim to the third party and providing the advice required under s 9(7)(b) to the plaintiff of the defendant's reasons for considering that the third party may be a person against whom a proceeding might be started based on the claim.
- [15] Mr Beattie had a discussion with a solicitor acting on behalf of the defendant on 2 April 2008 and requested an extension of the limitation period of six months and asked whether the defendant's solicitors had done any investigation in relation to who had put the scaffolding in place on the building. The memorandum made by Mr Beattie of this conversation recorded the request made by him to the defendant's solicitor to "push" for information in relation to the scaffolding on the basis that even if the defendant agreed to extend the limitation period, the plaintiff may have problems with the limitation period against any contributor. By letter dated 14 April 2008 the defendant's solicitors consented to an extension of the limitation period of six months until 3 November 2008.
- [16] By letter dated 17 July 2008 the defendant's solicitors requested further information about the plaintiff's claim from his solicitors and made a request for a statutory declaration pursuant to s 22(1)(b)(i) of *PIPA* relating to the circumstances of the incident. By letter dated 25 July 2008 the plaintiff's solicitors advised the

defendant's solicitors of the instructions they had obtained from the plaintiff about the scaffolding which at that stage had been incorporated in a draft statutory declaration that was not finalised. The plaintiff's instructions to his solicitors were interpreted by the solicitors that the scaffolding may have been constructed by a company that he referred to as "Walker". The plaintiff asserted that if the scaffolding had been adequately inspected by the appropriate person in authority from the defendant, the problem with the protruding pipe would have been found before the plaintiff suffered the injury.

- [17] By letter dated 30 July 2008 the defendant's solicitors advised the plaintiff's solicitors that the scaffolding was installed by "WACO Kwikform". That letter also advised that the defendant's solicitors intended to seek instructions as to whether the third party "can/should be joined to your client's claim as a contributor." By letter dated 20 October 2008 the defendant's solicitors advised the plaintiff's solicitors that the defendant had been unable to locate a signed contract, but had located a draft subcontract with WACO Kwikform that satisfied the defendant that WACO Kwikform was the entity responsible for the installation of the scaffolding. The defendant's solicitors advised that they were seeking instructions from the defendant to join the third party to the plaintiff's claim as a contributor and requested the plaintiff's consent to that step.
- [18] By letter dated 27 October 2008 the defendant's solicitors consented to a further extension of three months of the limitation period to 3 February 2009 to enable the pre-court procedures under *PIPA* to be completed.
- [19] On 7 November 2008, the defendant gave a contribution notice under s 16 of *PIPA* to the third party, with the express agreement given by the plaintiff's solicitors to the joinder of the third party as a contributor. Under cover of the defendant's solicitors' letter dated 14 November 2008, the defendant's solicitors provided to the plaintiff's solicitors a copy of the defendant's contribution notice that was served on the third party. The procedure of issuing a contribution notice under s 16 of *PIPA* did not necessarily require the defendant to comply with s 9(7) of *PIPA*.
- [20] The contribution notice set out in detail the basis on which the defendant claimed an indemnity or contribution from the third party in respect of the plaintiff's claim. On the basis that the plaintiff was alleging that the scaffolding was erected too low and there was no warning or signage of that danger, the defendant claimed that, if it were held liable for the incident, it was because the third party breached one or more terms of its agreement with the defendant or, alternatively, the third party owed the plaintiff a duty of care to ensure the scaffolding at the construction site was erected safely.
- [21] Because the limitation period for bringing a proceeding by the plaintiff against the third party had already expired by the time the defendant gave the contribution notice to the third party, the plaintiff required an extension of the limitation period for the purpose of pursuing a claim against the third party. Apart from s 31 of the *Limitation of Actions Act 1974*, there was also the possibility of the plaintiff obtaining an extension to bring a proceeding after the end of the limitation period in reliance on s 59(2)(b) of *PIPA*.
- [22] On 27 January 2009 the defendant's solicitors agreed to extend the limitation period for a further three months until 3 May 2009. On 2 February 2009 the plaintiff's

solicitors forwarded to the defendant's solicitors the finalised statutory declaration of the plaintiff that was signed on 2 February 2009.

- [23] On 1 May 2009 the defendant's solicitors consented to a further extension of the limitation period of three months. The defendant endeavoured to obtain documents from the third party relating to the incident and provided the plaintiff's solicitors with a copy of the defendant's solicitors' letter of 25 June 2009 to Proclaim Management Solutions (which was acting on behalf of the third party) in which the defendant's solicitors repeated the demands that had already been made for the third party to make disclosure before the compulsory conference.
- [24] The plaintiff, the defendant and the third party attended a compulsory conference appointed for the purpose of *PIPA* on 3 July 2009, at which the plaintiff's claim did not resolve. This proceeding was commenced by the plaintiff against the defendant, before the expiry of the limitation period that was extended by agreement between the plaintiff and the defendant.
- [25] At the time Mr Beattie swore his affidavit on 23 March 2010, the plaintiff's solicitors still had not received a copy of the contract between the defendant and the third party relating to the installation of the scaffolding.

### **Compliance with *PIPA***

- [26] Despite the participation of the third party in the compulsory conference held under s 36 of *PIPA*, the third party participated only as a contributor and was never the recipient from the plaintiff of a claim, even though the third party was provided with a copy of the plaintiff's notice of claim by the defendant. Section 9(1) of *PIPA* therefore presently precludes the commencement of a proceeding by the plaintiff against the third party: *Pukeroa* at [3] and [31]. The structure of *PIPA* which requires the respondent to a notice of claim to give information to the claimant under s 9(7) about other possible respondents to the claim or under s 16(3) about the issue of a contribution notice means that the claimant should be provided with the information to enable the claimant to make appropriate decisions about what parties should be pursued in respect of the claim. There is no justification for construing s 9(1) of *PIPA* as being satisfied by the plaintiff where the copy of the notice of claim was provided by the defendant to the third party with the contribution notice under s 16(1) of *PIPA*.
- [27] As the decision in *Pukeroa* also illustrates, the power to add a defendant under r 69 cannot be relied on to dispense with compliance by the plaintiff with the pre-court procedures under *PIPA* in respect of the proposed additional defendant. The remedial purpose of r 69 does not displace the mandatory requirements imposed by *PIPA* in respect of a claim by a plaintiff that is regulated by *PIPA*.

### **Outcome of this application**

- [28] The plaintiff's application filed on 29 March 2010 was limited to seeking the joinder of the third party as the second defendant to this proceeding pursuant to r 69 of the *UCPR*. It is not necessary to consider the plaintiff's argument based on *Interline*, because of the non-compliance with *PIPA*. The application cannot succeed on the basis on which it was argued. Theoretically compliance by the plaintiff with *PIPA* in respect of its claim against the third party may be possible, if the plaintiff can obtain leave under s 59(2)(b) of *PIPA* to start the proceeding

against the third defendant after the end of the limitation period within a period allowed by the court. If such leave were obtained, it may permit the joinder of the third party to this proceeding, although the proceeding against the third party would be stayed under s 59(3) of *PIPA* until the plaintiff complied with the pre-court procedures.

- [29] No doubt because the plaintiff did not apply for the requisite order under s 59(2)(b) of *PIPA* in the application, no submissions were addressed by the parties as to whether there is, in fact, power in the circumstances of this case for an order to be made under s 59(2)(b) of *PIPA* to facilitate the joinder of the third party as a defendant in this proceeding and, if so, whether the power should be exercised in the plaintiff's favour.
- [30] As this possible avenue of compliance with *PIPA* has not been explored, I will adjourn the application filed on 29 March 2010 to a date to be fixed. This will enable the plaintiff to decide whether it does wish to amend its application and seek an order under s 59(2)(b) of *PIPA* and, if so, allow all parties to consider what additional material should be placed before the court in relation to such an application.