SUPREME COURT OF QUEENSLAND

CITATION:	*Bridgeport Pty Ltd v Yelyruss Pty Ltd (in liq) and Anor* [2011] QSC 237
PARTIES:	**BRIDGEPORT PTY LTD ACN 076 392 900** (applicant) v **YELYRUSS PTY LTD ACN 101 056 946** (first respondent) **BRANKO MICO** (second respondent)
FILE NO:	BS 6571 of 2011
DIVISION:	Trial
PROCEEDING:	Applications
DELIVERED ON:	2 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2011
JUDGE:	Fryberg J
ORDERS:	Application is dismissed with costs.
CATCHWORDS:	Procedure – Supreme Court procedure – Queensland – Procedure under *Uniform Civil Procedure Rules* and predecessors – Other matters – application for leave to add contributor to notice of claim – factors considered – significant delay – prejudice – contribution would not be significant – leave not granted *Personal Injuries Proceedings Act 2002* *Brisbane Southeast Regional Health Authority v Taylor* [1996] HCA 25; (1996) 186 CLR 541 *Interpacific Resorts (Australia) Pty Ltd v Austar Entertainment Pty Ltd and Ors* [2004] QSC 427; [2005] 2 Qd R 23, applied
COUNSEL:	A Harding for the applicant R M Treston for the first respondent M J Lazinski (solicitor) for the second respondent
SOLICITORS:	Moray & Agnew Lawyers for the applicant MinterEllison for the first respondent QLD Law Group for the second respondent

HIS HONOUR: The substantive application before me is for leave to add a company as a contributor for the purposes of Part 1 of the *Personal Injuries Proceedings Act 2002* in respect of a claim made by the second respondent to this present application, Mr Miosch, against the applicant, Bridgeport Constructions.

Because the proposed first respondent, Yelyruss Pty Ltd, is in liquidation, the application requires leave to commence and proceed. Of course, the filing of the affidavit without having first got leave is a technical breach of the Act, but nobody has taken that point and I assume that leave can be given nunc pro tunc.

One of the major considerations in the grant of leave to commence the proceedings would be whether there is sufficient prospect of the substantive proceeding that is to be commenced, that is the application under paragraph 1, succeeding. Bridgeport and Yelyruss are both insured and the litigation is being conducted by their insurers.

By way of background, Mr Miosch was a plasterer. He was injured on the 19th of October 2005 when working as an independent contractor on a building site of a new house being built by Bridgeport. He cut his leg on a piece of glass which was protruding from a wall where it had been left leaning. The glass was apparently intended for windows in the house. There was no warning of the presence of the glass and no signs or protective devices to ensure the safety of the people working on the site. At the relevant time, the site was in the possession of Bridgeport.

Mr Miosch was not badly injured. He sustained a serious

cut to his leg and has apparently lost some two to four per cent of the function of the leg, but he is still able to be employed. It sounds at this preliminary stage as though his claim may well be able to be litigated in the Magistrates Court, if not then in the District Court.

Bridgeport as the occupier was, of course, the obvious person against whom to make the claim. Mr Miosch was not exactly prompt in making his claim, but he did so within time and that claim was served on Bridgeport in August 2007, a little over two months after Mr Miosch consulted solicitors. Delivery of that Notice of Claim under the *Personal Injuries Proceedings Act* triggered the running of time for the delivery of any Notice of Contribution by Bridgeport. It seems that Bridgeport either did not report the matter immediately to its insurer or, more likely, did so and its insurer, Allianz, failed to deliver the Notice of Contribution.

Evidence on behalf of Bridgeport is fairly quiet as to when Allianz first received notification of the matter. On the other hand, Bridgeport certainly knew of the injury at an early stage. There is in evidence a letter to Bridgeport from Yelyruss dated the 25th of October 2005 which refers to the injury and to the circumstances of the delivery of the glass. It alleges Yelyruss did not leave the glass in an unsafe position. The letter tends to suggest that the glass was, in fact, not fitted to the window for which it was intended because it was the wrong shape. That is to some extent confirmed by the hearsay evidence of Mr Byrnes that he has spoken to an administrative officer of Bridgeport and been told certain information, including that the reason why Yelyruss left the sheet of glass at the site was that it

had been made in the wrong shape. That rather opaque statement suggests that at an early stage Bridgeport was aware that the glass had not been placed in the window. It is, however, a little difficult to identify whether that occurred before or after the injury.

The time limit for delivering the Notice of Contribution expired in November 2007. In April 2009 Allianz, which was conducting the matter on behalf of Bridgeport, decided to give a Notice of Contribution to Yelyruss. However, it attempted to do so by serving the notice on the person who was at that time carrying on business under the business name previously owned by Yelyruss; that is, Suncoast Windows. Unsurprisingly, the new proprietor of that business name rebuffed the service but did so promptly, and Allianz became aware that no effective service of the Notice of Contribution had been achieved.

That happened, then, in April 2009 at which time Mr Miosch, having been asked for his consent to the late joinder of Yelyruss, gave such consent. Allianz was dilatory then in proceeding. Eventually it worked out who was the proprietor of the business name and managed to effect service of a Notice of Contribution on Yelyruss in November 2010. That was about the time or perhaps shortly before the time that Yelyruss went into liquidation. That fact did not percolate through to the solicitors for Bridgeport until April this year.

The evidence shows that toward the end of 2010 the solicitors for Yelyruss refused their consent to the late service of the Notice of Contribution, but that it took from then until the present application was filed in June

this year for Bridgeport to attempt the other option then open to it, that is, to get leave from the Court.

The application for leave is opposed by Yelyruss or more accurately by its insurer on just about every ground available. Yelyruss submits that there is a poor rendition of a prima facie case against it, that there has been delay in seeking to serve the Notice of Contribution which is not adequately explained, and that it will suffer prejudice.

It is, it seems, accepted on all hands that a dictum in *Inter Pacific Resorts Australia Pty Ltd v. Austar Entertainment Pty Ltd* [2004] QSC 427; [2005] 2 Qd R 23 at 25 sets out the appropriate test. That dictum focuses attention on prejudice, explanation for delay, the merits of the case at a reasonably superficial level, and finally the utility of the course proposed.

The application is, notwithstanding his earlier consent, now opposed by Mr Miosch primarily on the ground of the additional delay which would result if the application were granted.

I accept the submission on behalf of Yelyruss that there has been a failure to provide an adequate explanation for the delay. It can be inferred from what has been put forward in Mr Byrnes' affidavit that there has been incompetence in the Allianz office. However, the incompetence is said to be by inference on the part of somebody who is no longer there employed and there is a discomforting lack of detail about how it came about. None of the Allianz file is exhibited or very little of it. No explanation from the employee who has left the

company is forthcoming, and generally speaking one is simply left with the feeling that even after events happened which ought to have triggered attention, no attention was given to the matter. As Ms Treston on behalf of Yelyruss submitted, that is not in accordance with the purposes of the *Personal Injuries Proceeding Act* as enunciated in that Act.

As to prejudice, Mr Harding on behalf of Bridgeport submitted that there is no case of prejudice that can be made out by Yelyruss because it is no worse off being joined in these proceedings than it would be if it were not joined. That is because a person seeking contribution is not bound to bring the proposed contributor into the proceedings at the stage of the PIPA jumps and hoops. There is no prohibition on a defendant bringing a third party into proceedings after a completed PIPA proceeding and, therefore, it is submitted, it will be open to Bridgeport to proceed against Yelyruss in any event. Therefore, it is submitted Yelyruss has suffered no prejudice.

Ms Treston submitted that on the contrary, joinder would cause prejudice of a more intangible sort, such as the pressure to contribute in mediations under the process of the PIPA, and also the loss of the chance that Allianz would not think it worthwhile to bring contribution proceedings because the claim is so small. That might or might not be a sound submission.

The fact that the proceedings can still be brought against Yelyruss cuts two ways. While that argument can be used to demonstrate the absence of the prejudice to Yelyruss, it also means that if the present application

is refused there is no prejudice to Bridgeport. It can still bring contribution proceedings in the appropriate Court. Those proceedings could be brought whether or not the matter between Mr Miosch and Bridgeport proceeds to trial or whether it is settled, or, for that matter, discontinued. Consequently that point, it seems to me, really does not take the matter all that far.

Ms Treston submits that Yelyruss has suffered prejudice in other ways. She points to the failure so far to locate a relevant witness, a Mr Jones, and potential difficulty in finding him. The delay, it is submitted, puts Yelyruss in a similar position to that of the defendant in *Brisbane Southeast Regional Health Authority v Taylor* [1996] HCA 25; (1996) 186 CLR 541 where the well-known passage in the judgment of Justice McHugh sets out the nature of delay and the inevitability of some prejudice. That perhaps is to some extent less real than apparent. Two other witnesses were disclosed in the Notice of Claim which Yelyruss's solicitors had from November 2010 and there seems to have been no attempt to contact them.

Finally, there is the submission on behalf of Yelyruss that the case against it is a weak case. I think that is correct. The glass was delivered on site, on the evidence now before me, at a time when no other person or certainly no safety officer was present. The continuity of what happened thereafter is based upon some hearsay upon hearsay in the affidavit of Mr Taylor. Mr Taylor deposed that Ms Smart, the administrative officer, had told him that the glass was not handled by anyone on behalf of the applicant prior to the incident. I give virtually no weight to that evidence. It is unclear

where it comes from. Ms Smart may be assumed not to have had personal knowledge of it and if there are statements by witnesses to that effect, they have not been put into evidence.

It seems quite possible that the glass was tried in the window and found to be deficient in size before the accident happened, although, of course, that could have happened afterwards. In any event, that link, which is an important one, is one which would have been within the specific knowledge of Bridgeport and I am not prepared to make a finding on the basis of paragraph 8.9 of the affidavit. It is simply not sufficient when better evidence could have been procured.

So much for the submissions of Yelyruss. As to the issue of delay raised on behalf of Mr Miosch, the matter has progressed under the *PIPA* to the point where a compulsory conference, virtually the last step in the proceeding, could be held within a week or two without the presence of Yelyruss. However, if Yelyruss be added, it has two months to file or deliver a response to the claim against it, but I would not be prepared to assume that it would be willing to go to a compulsory conference in that time. Its insurer would doubtless want to have the documents examined by its lawyers and possibly to have counsel's advice given. I would expect that a delay of up to six months would afflict the plaintiff if the present application were granted.

In the end, the decision under the application is one which requires a balancing of the various considerations. The claim is not a large one. The pickle that Bridgeport is in is entirely due to the default of its insurer which

will wear any financial consequences if the application is not granted. The amount of contribution will not be large. Having regard to the nature of the injury, the cost of the reinvestigation on behalf of Yelyruss's insurer would be significant. The delay to the plaintiff is a significant factor against the grant of the application. The issue of prejudice is fairly neutral, although there is perhaps some slight evidence of prejudice to Yelyruss, and the failure to give an explanation that is adequate is again a matter that was entirely within the control of Bridgeport.

Bridgeport accepted responsibility for the delay, but that really does not advance its case. It seems to me that in exercising the discretion under the Act and applying the test referred to in the case cited Bridgeport has not demonstrated enough to warrant the grant of leave. I do not see why there should be a delay inflicted upon Mr Miosch because the insurance company was dilatory and I do not see that any great injustice will be inflicted on the insurance company Allianz if the leave is not granted.

For those reasons, the application is dismissed with costs.