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Case Alert

Shaping the future of insurance law

Insurance position helps halt PIPA claim

***Palace v RCR O'Donnell Griffin Pty Ltd (in liq)* [2020] QSC 354**

21 JANUARY 2021

AT A GLANCE

- In a recent application heard before the Supreme Court of Queensland, a personal injuries claimant failed in his attempt to join a respondent to his PIPA pre-court claim outside of the legislative timeframe.
- On a separate basis, the claimant was also refused leave to proceed against the prospective respondent because it was in liquidation.
- The prospective respondent's insurance position was highly relevant to the court's dismissal of the application.
- This decision is a positive one for the insurance sector, as it confirms that the court will consider whether an insurance policy is a viable reason for a claim to proceed and upholds time limitations on claims.

Background

In this case, the application concerned a claim for damages for personal injuries sustained by Mr John Palace (claimant). The claimant alleged he sustained injuries while working as an electrician on a solar farm located near Townsville on 13 February 2018 (the incident).

The claimant alleged that he suffered heatstroke and, subsequently, sustained lower limb orthopaedic injuries that were caused by his co-workers when they were treating and transporting him to receive medical attention.

At the time of the incident, the claimant was an employee of a labour hire firm. He had been deployed to work under the instruction of RCR O'Donnell Griffin Pty Ltd (RCR).

The claimant did not identify RCR as his host employer until late 2019–early 2020, due to a mistaken belief that another entity was his host employer. An attempt was made to serve RCR with a PIPA notice of claim once it was identified.

The claimant acknowledged he had not served the notice of claim on RCR within nine months of the incident as required by section 9 of PIPA. As RCR did not agree to being added to the claim as a respondent, the claimant was required to obtain the court's leave to add RCR as a respondent (under section 14(2) of PIPA).

The claimant filed an application with the Supreme Court of Queensland to obtain the required leave. The application was heard by His Honour Justice Martin.

Relevant factors

Martin J found that the factors relevant to the grant of leave sought were identified in two earlier Supreme Court cases that concerned applications to join contributors to claims under section 16(2) of PIPA.[1] He found that section 14(2) and section 16(2) of PIPA were "relevantly indistinguishable".

The relevant factors are:

- Prejudice (to the party proposed to be joined)
- explanation for the delay
- the merits of the case (assessed superficially), and
- the utility of joining the party.

Prejudice

RCR submitted that it would be prejudiced by its late addition because it had no record of the incident and the claimant had failed to identify the co-workers allegedly involved in causing the claimant's orthopaedic injuries.

Delay

The notice of claim was made 15 months after the end of the legislative timeframe and Martin J found that the delay was not adequately explained by the claimant's solicitor. RCR submitted that the court should assess the delay through the prism of the purpose for statutory limitation periods, as espoused by the High Court in *Brisbane South Regional Health Authority v Taylor*,[2], which included:

- the risk of evidence being lost
- the oppression caused to a defendant in defending matters that occurred long ago
- the right of a defendant to arrange their affairs and resources on the basis that claims can no longer be made, and
- the right of insurers, often involved in such claims, to know the end point of potential liabilities they may have had interest in.

Martin J found that these matters were relevant in considering the delay in the context of section 14(2). He was most concerned by the fact that, in his view, the delay arose from the claimant (through his solicitors) failing to make "fundamental enquiries" going to the identity of the claimant's correct host employer. That failure indicated a lack of conscientious effort to comply with PIPA and tended against granting leave to add RCR.

Merits

Martin J found that the claimant had failed to demonstrate "even at a reasonably superficial level that the [orthopaedic] injuries can be sheeted home to [RCR]." In his view, the evidence in support of the claimant's alleged orthopaedic injuries was "very vague".

He accepted the heatstroke was likely caused by RCR's breach of duty, however noted that any heatstroke-related injuries were fleeting.

He also indicated that the claimant would have been better placed had he served a draft statement of claim clearly identifying the basis on which he alleged RCR was liable for his injuries. The view – expressed by the claimant's solicitor – that the claimant had "reasonable prospects of success" was insufficient to establish the superficial merits of his claim.

Utility of adding RCR

Martin J observed that RCR's public liability insurance policy would only respond to the claimant's proposed claim once the policy deductible of $100,000 had been exhausted. He referred back to his view that the claimant might only be able to establish liability for the alleged transitory heatstroke, which was a claim that had no prospect of exceeding the deductible.

Given the likely quantum of the heatstroke claim, the policy deductible and the fact RCR was in liquidation (and presumably therefore could not meet the policy

[1] *Interpacific Resorts (Australia) Pty Ltd v Austar Entertainment Pty Ltd* [2005] 2 Qd R 23; *Bridgeport Pty Ltd v Yelyruss Pty Ltd (in liq)* [2011] QSC 237

[2] (1996) 186 CLR 541

deductible), Martin J held there was "no point in granting leave" under section 14(2) of PIPA.

Leave under the Corporations Act

Section 500(2) of the *Corporations Act 2001* (Cth) provides that civil proceedings against a company in liquidation cannot be commenced except with the court's leave.

Accordingly, Martin J also addressed whether the claimant ought to be granted leave to proceed against RCR (by way of a PIPA pre-court claim) under section 500(2) of the Corporations Act. In doing so, he set out the commonly accepted factors a court must consider in granting leave to proceed under section 500(2), including:

- the merits of the case for which leave is being sought
- why the usual process of lodging a proof of debt ought to be circumvented, and
- other factors identified in earlier cases, such as whether granted leave will prejudice the creditors, the amount of seriousness of the claim, the extent to which already commenced proceedings have advanced, and the complexity of the legal questions involved.

Martin J also highlighted the importance of the respondent's insurance position. He reiterated the commonly accepted position that a strong presumption exists for a grant of leave to be made when a company in liquidation is insured against the relevant liability for damages and the costs of defending the proceedings. However, in this case, Martin J held that leave should not be granted under section 500(2), in line with his reasoning on the earlier question, as:

- the claimant's proposed claim did not display any serious question to be tried because of the causation deficiencies between any breach of duty by RCR and the claimant's alleged orthopaedic injuries
- the legal and factual issues were not complex enough to warrant leave being granted, and
- the damages that the claimant might recover regarding the heatstroke injuries would be far less than the deductible under RCR's insurance policy.

A positive result for insurers

Had this claimant been granted leave under section 14 of PIPA or under section 500(2) of the Corporations Act), the insurer would have been forced to defend the claims. To recover the defence costs falling within the deductible, the insurer would have had to lodge a proof of debt with the liquidator – an action destined to fail.

This decision is a positive sign for potential future respondent insureds and insurers, particularly in a market currently characterised by an uptick in liquidations of small-to-medium enterprises and a tightening around public liability risks. It confirms that the court will conduct a forensic and practical analysis about whether an insurance policy is a viable reason for a claim to proceed.

The decision also re-affirms that, in appropriate cases, the courts will apply the time limitations imposed by the pre-court personal injury legislative regimes with a reasonable degree of rigidity. That approach puts potential claimants and their representatives on notice that claims need to be properly investigated from the outset and the correct parties identified on a timely basis.

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Need to know more?

For more information please contact us.

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