

SUPREME COURT OF QUEENSLAND

CITATION: *Kestrel Coal P/L v Longwall Roof Supports Ltd & Ors* [2003] QSC 187

PARTIES: **KESTREL COAL PTY LTD**
(plaintiff)
v
LONGWALL ROOF SUPPORTS LTD (CN 027 0018 7898) a company incorporated in England and having its principal office in Wigan, Lancashire, England
(first defendant)
JOY MANUFACTURING COMPANY PTY LIMITED
(ACN 000 049 392)
(second defendant)
JOY GLOBAL INCORPORATED, a company incorporate in the United States of America
(third defendant)
GULLICK AUSTRALIA PTY LTD (ACN 001 671 790)
(fourth defendant)

FILE NO: 1249 of 2003

DIVISION: Trial Division

PROCEEDING: Application for joinder

DELIVERED ON: Friday, 20 June 2003

DELIVERED AT: Brisbane

HEARING DATE: 11 June 2003

JUDGE: Muir J

ORDER: **APPLICATION FOR JOINDER GRANTED ON TERMS MENTIONED**

CATCHWORDS: PROCEDURE – PRACTICE UNDER RULES OF COURT – PARTIES – OTHER MATTERS - where the applicant / plaintiff sought to join a party as the fifth defendant as that party was alleged to be the assignee of the interests in a contract between the plaintiff and the first defendant– whether in the circumstances the party should be joined as the fifth defendant

PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – THE APPLICATION AND THE ORDER – where the applicant / plaintiff sought orders concerning the preservation and disclosure of documents by a party if it was joined as the fifth defendant to these proceedings – whether such orders should be made

Limitation of Actions Act 1974
Property Law Act 1974, s 55
Uniform Civil Procedure Rules, r 69

Brisbane South Regional Health Authority v Taylor (1996)
 186 CLR 541
Tito v Waddell (No 2) [1977] 1 Ch 107
Tolhurst Associated Portland Cement Manufactures (1900) Ltd [1902] 2 KB 660
Williamson v Ah On (1926) 39 CLR 95

COUNSEL: Mr S Doyle SC, with him Mr R Traves, for the applicant/plaintiff
 Mr H Fraser QC, with him Mr D Williams for the 1st, 2nd, 4th & 5th respondents/defendants

SOLICITORS: Allens Arthur Robinson for the applicant/plaintiff
 McCullough Robertson as town agents for Acuity Legal for the 1st, 2nd, 4th & 5th respondents/defendants

- [1] **MUIR J:** This application by the plaintiff is for joinder of Joy Mining Machinery Ltd, an English company, as fifth defendant in the action and for other relief which is later identified. The application is opposed by the first, second and fourth defendants and by the proposed fifth defendant, which for convenience, will be referred to simply as the “fifth defendant”. The third defendant, a corporation resident in the United States was not served and did not appear on the application.
- [2] Before addressing the arguments advanced on behalf of the parties it is desirable that I provide a brief statement of material facts. On 3 May 1991 Gordonstone Coal Management Pty Ltd, the owner of the Gordonstone coal mine near Emerald, entered into an agreement with an English company, Gullick Dobson Ltd, (now called Longwall Roof Supports Ltd) for the manufacture and supply of roof supports for two long wall mining areas within the former company’s mine.
- [3] It is alleged that the roof supports manufactured and supplied pursuant to the contract were defective and that, in consequence, Gordonstone suffered loss and damage. The plaintiff Kestrel Coal Pty Ltd is the assignee from Gordonstone of rights of action in respect of the contract.
- [4] In the action the plaintiff claims against the first defendant for breach of contract and negligence in respect of the manufacture of the supports and in the making of alleged representations.
- [5] The second defendant, Joy Manufacturing Company Pty Ltd, is a company related to the other defendants and to the proposed fifth defendant. The ultimate holding company within the group is alleged to be the third defendant, a corporation incorporated and resident in the United States. It is alleged that the second defendant, in 1995, purchased the business of the first defendant and assumed its liabilities, including those owed to the predecessor of the plaintiff.

For present purposes it is unnecessary to discuss the basis on which claims are made against the fourth defendant.

- [6] The joinder of the fifth defendant is sought on the basis of an alleged assignment to it by the first defendant of the latter's interests in the contract on terms that the assignee assume the liabilities of the assignor. In this regard it is alleged that the assignee's promise to indemnify the promisor was for the benefit of the plaintiff (presumably as assignee of the rights of Gordonstone). A further argument is that the contract assigned is one in which the burdens cannot be separated from the benefits.¹ Also relied on to support the allegation that the fifth defendant "is involved as the successor of the first defendant" are various reports and communications which show the referral of matters the subject of the dispute to the fifth defendant and generally its involvement in the dispute.
- [7] The joinder is sought to be effected in reliance on *UCPR 69(1)(b)(ii)* which relevantly provides –
- “(i) The court may at any stage of a proceeding order that –
- ...
- (b) Any of the following persons be included as a party –
- ...
- (ii) A person whose presence before the court would be desirable, just and convenient to enable the court to adjudicate effectually and competently on all matters in dispute connected with the proceedings.”
- [8] Although it is obvious that if the claim against the fifth defendant is to go forward it would be sensible and convenient for the fifth defendant to be a defendant and for the allegations against it to be incorporated in the statement of claim in respect of the other defendants, it is submitted on behalf of the defendants that the requirements of the rules are not satisfied. The primary argument is that the evidence fails to establish an arguable case. In that regard, it is submitted that the evidence fails to establish an assignment of interests in the contract from the first defendant to the fifth defendant let alone an assignment of a kind which would give the plaintiff a cause of action against the fifth defendant namely, a novation or an assignment containing a promise for the benefit of the plaintiff within the scope of s 55 of the *Property Law Act*.
- [9] It is pointed out on behalf of the defendants that –
- (a) The fifth defendant was not a party to the contract;
- (b) The plaintiff's own evidence is to the effect that the second defendant at some stage "assumed the contractual responsibilities of the first defendant";
- (c) There is evidence to the effect that the entity responsible for installing the subject materials and for subsequent work in relation thereto was the first defendant's "Australian company".
- [10] In *Tito v Waddel*, Megarry V.C. discusses, in a general way, circumstances in which the benefit under certain types of contract is not able to be assigned independently

¹ See *Tito v Waddel* (No 2) [1977] 1 Ch 107 at 290.

of “annexed” liabilities or obligations. That discussion was relied on to circumvent the principle that a party’s contractual obligations are incapable of assignment except by novation.² I do not, with respect, doubt the accuracy of Megarry V.C.’s pronouncements but I was not directed to anything which suggested that they might have relevance to the contract or to any assignment in respect of it. There is the additional difficulty that no evidence pointed to the assignment of any contractual benefits to which obligations or liabilities might attach.

[11] The plaintiff relies heavily on a letter from the fifth defendant to the plaintiff dated 24 January 2000. It was written in response to a claim under the contract made by the plaintiff and forwarded to “Joy Mining Machinery” at a Rockhampton address under cover of a letter dated 31 December 1999.

[12] The 24 January letter acknowledged receipt of the claim by the second defendant and noted –

“This document has been forwarded on 10 January 2000 to Gullick Dobson’s registered office in the United Kingdom for the appropriate response.”

[13] In its letter of 24 January 2000 to the plaintiff the defendant wrote –

“We are in receipt of your claim for repair costs with regard to equipment supplied under the contract dated 3rd May 1991 between Gordonstone Coal Management Pty Ltd and Gullick Dobson Ltd.

Joy Mining Machinery Ltd in the UK is, in this context, essentially the successor company to Gullick Dobson Ltd.

We reject your claim as being beyond the time specified for the warranty period for the items in question. Schedule 7 of Annexure 2 states that the Guaranteed Service for Hydraulics is 2 years.”

[14] The letter concluded with a request that the plaintiff withdraw its claim.

[15] It was argued on behalf of the defendants that the letter did not establish that the fifth defendant was the assignee of rights and obligations under the contract let alone a “promisor” for the purposes of s 55 of the *Property Law Act*. I have much sympathy with that argument but no evidence as to the true factual position was adduced on behalf of the defendants and it is possible to draw inferences from the letter which support the plaintiff’s contentions. The contractual relationship between the first and fifth defendants is a matter which, as between them and the plaintiff, is peculiarly within the knowledge of the defendants. In those circumstances it is appropriate that the plaintiff have the benefit of any inference favourable to it which, reasonably, may be able to be drawn from the letter.³

[16] As the joinder application requires the exercise of a discretion, the merits of the case proposed to be advanced after joinder is a relevant consideration, at least where there are significant doubts concerning its prospects of success. Here I am satisfied that the case against the fifth defendant is not so deficient that the plaintiff should not be permitted to advance it. Subject to my later observations, if when pleaded it

² See eg *Tolhurst Associated Portland Cement Manufactures (1900) Ltd* [1902] 2 KB 660 at 668.

³ Cf *Williamson v Ah On* (1926) 39 CLR 95 at 113-115.

discloses no cause of action or there is no evidence to support it, application can be brought for its summary dismissal.

- [17] Joinder was resisted also on grounds that –
- (a) the plaintiff had delayed commencing proceedings since knowing the case it proposed to mount as early as 24 January 2000. The delay was both considerable and unexplained;
 - (b) the material disclosed that some, if not a substantial part, of the plaintiff's claims were statute barred; and
 - (c) the plaintiff's case, despite its delay in commencing proceedings, had not been formulated against the fifth defendant in a draft statement of claim.
- [18] The plaintiff explained the delay by reference to the existence of a significant trading relationship between the group of companies of which the plaintiff was a member and the defendant group of companies, continuing negotiations between the parties, the desire of the plaintiff to effect a commercial resolution of the dispute and the late obtaining of some relevant correspondence.
- [19] The defendants do not point to any prejudice flowing from delay other than the type of prejudice identified by McHugh J in *Brisbane South Regional Health Authority v Taylor*.⁴ Such prejudice, of course, as His Honour points out, can be both real and substantial. I do not consider however that it should prove fatal to the application. As the plaintiff's counsel points out the plaintiff could, if the application were to be rejected, commence separate proceedings and seek to have them heard with the existing proceedings. Moreover, the defendants are all members of the same group of companies with, it would seem, a common interest in the outcome of the proceeding. There is also substance in the point that the fifth defendant has known of and had an involvement in matters subject of the proceedings for a considerable length of time.
- [20] It is likely that the joinder is sought to be made out of an abundance of caution. Some rational reasons for the delay have been advanced. The failure to produce a draft statement of claim is not a matter of great concern. The existing pleading spells out the detail of the claim and the nature of the amendments which will need to be made to it to accommodate the claims against the fifth defendant are generally apparent from the material filed and arguments advanced in support of the application.
- [21] I accept that relevant to my determination is whether the joinder may defeat the fifth defendant's rights under the *Limitation of Actions Act*. UCPR 69(2) prohibits the joinder of a party "after the end of the limitation period" unless one of the requirements of that sub-rule is met. Sub-rule (2)(g) permits such joinder if "for another reason the court considers it just to include or substitute the party after the end of the limitation period". In this case the material suggests that the *Limitation of Actions Act* is unlikely to be a complete defence to all of the claims. In those circumstances it would not seem just to deprive the plaintiff the benefit of the joinder if the fifth defendant is not prohibited from advancing any limitation defences which existed at the date of filing of the application. As the plaintiff was

⁴ (1996) 186 CLR 541.

aware or ought reasonably to have been aware of the claim it is now seeking to advance when the proceedings were commenced against the other defendants, it does not seem to me to be just to, in effect, relieve the plaintiff from the obvious consequences of the course of action determined by it. The order I propose to make is that the joinder take effect from the date of the application.

Preservation of documents

- [22] The plaintiff seeks an order for the preservation of documents and supports it by the submission that –
- (a) There is no good reason not to make the order;
 - (b) There is some risk of their being “culled in the ordinary course of document management” having regard to their age;
- [23] I decline to make any such order. No request concerning preservation was made of the defendants prior to the making of this application. The defendants are now on notice concerning the plaintiff’s concerns and there is no reason to suppose that they might neglect their lawful obligations.

Disclosure of documents

- [24] The application seeks disclosure of “documents which record the assumption of the liabilities of the first defendant by the second or fifth defendants (directly or indirectly); and any insurance policy taken out under the agreement and any claim under it”. In relation to the latter category of documents, a clause of the contract required the first defendant to effect insurance for the benefit of Gordonstone in certain relevant respects. The plaintiff proposes to amend the statement of claim to allege that, in breach of contract, no such insurance was effected. It contends that such breach may be inferred from no mention having been made of any policy of insurance in relevant dealings between the parties.
- [25] It was conceded in argument that the plaintiff had not gone to the trouble of enquiring of the first defendant as to whether such insurance had been effected. In those circumstances, any order for early disclosure is inappropriate. The machinery of litigation is not intended to be a substitute for the observance of appropriate patterns of commercial conduct.
- [26] I do not accept the defendants’ contention that the application for early disclosure of the first mentioned class of documents is a “mere fishing expedition” aimed at attempting to discover a cause of action. Nevertheless I do not propose to grant the application. The subject documents are not necessary to enable a case to be pleaded. A statement of claim has already been filed and served. If the defendants’ conduct becomes oppressive in a material way or if it appears that the lack of disclosure will prejudice the plaintiff’s prospects of a fair trial, the question of early disclosure can be reconsidered. I have in mind matters such as an oppressive request for particulars or an attempt to strike out the statement of claim for want of relevant particulars.

Conclusion

- [27] The application for joinder will be granted on the terms I have mentioned. None of the other relief sought will be given. I will hear submissions as to the form of order and costs.