SUPREME COURT OF QUEENSLAND

CITATION:	*Chenoweth v ING Australia Limited* [2004] QSC 143
PARTIES:	**IAN LEWIS CHENOWETH** (applicant/plaintiff) v **ING AUSTRALIA LIMITED ACN 009 657 176** (defendant) **SWISS RE LIFE AND HEALTH AUSTALIA LTD ACN 000 218 306** (respondent)
FILE NO/S:	SC No 11527 of 2002
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	8 April 2004
JUDGE:	Mackenzie J
ORDER:	**1. The notice is set aside.** **2. The applicant pay the respondent's costs of and incidental to the application to be assessed.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PARTIES – THIRD PARTIES AND SIMILAR PROCEEDINGS – disclosure – where notice for non-party disclosure – whether sufficient particularity – whether documents directly relevant – whether notice should be set aside *Uniform Civil Procedure Rules*, rr 242, 247, 444, 445 *Labon v The Lake Placid Resort Pty Ltd* [1995] 1 Qd R 24, cited *Lin v Lin & Macquarie Bank* [2003] QSC 177, distinguished *Petoneport Pty Ltd v Barnes* [1999] 2 Qd R 267, cited *Uthmann v Ipswich City Council* [1998] 1 Qd R 435, cited *Waind v Hill* [1978] 1 NSWLR 372, cited

COUNSEL: JP Kimmins for the applicant
AW Duffy for the respondent

SOLICITORS: Maurice Blackburn Cashman for the applicant
Freehills for the respondent

[1] **MACKENZIE J:** This is an application by the plaintiff under *UCPR* 247 requiring a decision about objections to the production of documents in a notice of non-party disclosure. The notice required Swiss Re Life and Health Australia Limited to produce certain documents in an action concerning cessation of payments to the respondent plaintiff under a Group Salary Continuance Policy.

[2] The framework of the plaintiff's case in the action is that from December 1987 to September 1999 he was employed by a company that had a staff and executive superannuation fund which held a Group Salary Continuance Policy with the defendant entitling an employee to benefits if the member suffered from a total disability. On or about 27 January 1999 the plaintiff claimed on the policy on the basis of chronic fatigue syndrome. The claim was accepted and payments were made until about October 2001. Payments ceased because the defendant said it had formed the opinion that the plaintiff did not currently have a sickness. It was alleged that the defendant breached the policy in ceasing to pay the plaintiff the benefits and had breached the duties of good faith and fair dealing which it owed to the plaintiff.

[3] In its defence, the defendant admitted it owed the plaintiff a duty of good faith and fair dealing. It also admitted a duty to consider and determine whether it should form the opinion that the plaintiff was totally disabled as defined in the policy and to act reasonably in making its decision. However it asserted that it was under no obligation to pay benefits unless it received proof to its satisfaction of an event or condition establishing an entitlement to benefits and that it had considered the plaintiff's claim in good faith, and, acting reasonably, was not satisfied that the plaintiff was totally disabled within the meaning of the policy. The policy provided that the defendant was under no obligation to pay benefits unless it received proof to its satisfaction of any event or condition establishing the members' entitlement to benefits.

[4] The respondent to the present application provided reinsurance to the defendant in respect of the present policy. A limited number of file notes and other documents generated by the respondent were described in the plaintiff's list of documents. Copies of them are annexed to the affidavit of Mr Hodgson (Exhibits RLH3 to RLH8). There were other documents mentioning the respondent which were created by the defendant (Exhibits RLH9 to RLH12). A letter transmitted with the list of documents referred to the solicitors seeking instructions in relation to the requirement that communications between the defendant and the reinsurer be disclosed. Rule 444 and 445 letters were exchanged concerning the extent of the obligation to make further disclosure. A notice of non-party disclosure addressed to what appears to be an associated company of the respondent was sent. As well as clarifying the roles of those two companies, the respondent disputed whether the documents sought to be produced were relevant in determining whether the defendant may have breached the policy of insurance, may have concluded that the plaintiff no longer met the definition of disablement, or may have accepted the

plaintiff's claim. A further notice was later sent to the respondent. Objection was taken to production of the documents sought on the basis that:

(a) the notice did not describe the documents sought with sufficient particularity; and

(b) alternatively, the notice sought the production of documents that were not relevant to the matters in issue.

[5] The relevant part of the notice is as follows:

> "The allegations in the pleadings to which the documents are relevant are as follows:
>
> (a) subsequent to 27 January 1999 the Defendant accepted the Plaintiff's claim No. 3592 under the Group Salary Continuance Policy in respect of total disability due to chronic fatigue syndrome;
>
> (b) subsequent to 27 January 1999 the Defendant made payments under and in accordance with the Group Salary Protection Policy until about October 2001;
>
> (c) by letter dated 29 January 2001 the Defendant informed the Plaintiff that it considered the Plaintiff did not currently have a sickness and intended to cease payments which were being made pursuant to the Group Salary Protection Policy;
>
> (d) as at 29 October 2001:
>
> (i) the Plaintiff was suffering from chronic fatigue syndrome;
>
> (ii) chronic fatigue syndrome was a sickness within the meeting of the said policy;
>
> (iii) the Plaintiff had a total inability, solely by reason of such sickness, to engage in his trade, profession or occupation, ie: work in a managerial capacity in an insurance company and/or an insurance broking business;
>
> (iv) the plaintiff came within the definition of "total disability" in the schedule to Group Salary Continuation Policy 607692-1.
>
> (e) the defendant breached the said policy in ceasing to pay the Plaintiff the aforesaid benefits"

[6] The documents requested were as follows:

Date	*Description*
27/01/1999 – present	All documents which are in the possession of Swiss Re Life and Health Australia Limited which are directly relevant to the allegations in the pleadings which are set out herein;
27/01/1999 – present	Correspondence which has passed between Swiss Re Life and Health Australia Limited and the Defendant which are directly relevant to the

> allegations in the pleadings as set out herein.

[7] The applicant submitted that there was evidence in the documents disclosed by the defendant showing that the reinsurer had been intimately involved with the defendant in all aspects of the case and apparently had a financial interest in the decision made to cease payments to the plaintiff. It was submitted that the allegations set out in the notice of non-party disclosure were "directly relevant and were taken from the statement of claim". Therefore the assertion that the documents were not relevant could not be sustained. There seems to be an element of non sequitur in this argument. The question is not whether the allegations in the notice of non-party disclosure are directly relevant. It is whether the documents required to be produced are directly relevant to the allegations. It may also be noted that what is set out in the notice of non-party disclosure is a paraphrase or summary of some of the allegations.

[8] The thrust of the applicant's argument is that the documents obtained from the defendant on disclosure prove that the respondent has directly relevant documents which relate to:

(a) the plaintiff's duties at work and important information from his employer crucial to determining whether the plaintiff suffered total disability;
(b) medical evidence going to the existence of the plaintiff's condition and the level of any disability;
(c) general documents relating to the plaintiff's disability;
(d) its assessment of the plaintiff's claim and the decision to finalise the claim, which relates to whether the defendant acted in good faith and dealt fairly and acted reasonably in considering and determining whether or not the plaintiff was totally disabled.

[9] With respect to (d), the notice of non-party disclosure is not particularly informative as to the basis upon which it is alleged that the defendant had breached the policy. It will be difficult for a non-party receiving the notice to discern easily what would be directly relevant to that issue. As Exhibit RSW7 to the affidavit of Ms Warren alludes, paragraph 11 of the statement of claim sets out ways in which it is alleged that the defendant breached its duties. Most are reminiscent of grounds for an application for administrative law relief. None are particularised in a way that would suggest to a reader precisely what was the nature of default alleged. For example there is nothing that suggests that intrusion by the respondent into the decision making process or a corresponding improper abdication of the defendant's duty to make its own decision is an issue. A mere allegation of taking into account of irrelevant considerations is insufficient to do so.

[10] For that reason alone, the notion that the descriptions of documents required to be disclosed are sufficient to enable the respondent to determine what must be produced cannot be sustained. It is also symptomatic of a problem of a larger nature with the application. There is no allegation in the pleadings linking the alleged defaults on the part of the defendant with anything done by the respondent. In the absence of such a pleading direct relevance of interaction between them to matters in issue is difficult to see. The point made in the correspondence exhibited to Ms Warren's affidavit (Exhibits RSW5 and RSW7) about particularisation is a valid point in this context. The attitude maintained by the applicant was that the

statement of claim had not been further particularised and that the application and affidavit in support were sufficient for the respondent's solicitors to obtain instructions (Exhibit RSW6).

[11] The matters so far addressed form one aspect of the respondent's opposition to the application. There are other issues raised as well. They included a submission that *UCPR* 242 does not authorise general disclosure against a third party (*Labon v The Lake Placid Resort Pty Ltd* [1995] 1 Qd R 24), nor authorise a fishing expedition (*Uthmann v Ipswich City Council* [1998] 1 Qd R 435). As general prepositions, that is so. It was submitted that the inference was open that the notice was a fishing expedition in the absence of anything demonstrating what the plaintiff intended to prove by the documents referred to in the notice.

[12] Within the framework of the submissions, it was submitted that the notice was oppressive in that it did not specify individual documents or classes of documents; the only stated limit was direct relevance to allegations in the pleadings set out in the notice. In addition the notice did not limit itself to matters truly in issue since admissions in the defence made disclosure with respect to some of them wholly or partly unnecessary. Further, the period covered by the notice was about five years.

[13] Taken in conjunction with the lack of any clearly pleaded link between the respondent and the defendant and the assertion by the defendant that it had no other documents from the respondent except those already disclosed, and the lack of evidence of the existence of any others, the ambit of the notice was oppressive. It was submitted that there was no evidence that inadequacy of disclosure had been pursued with the defendant or that there was not another simple and expedient method of proving what was sought to be proved. For example, to the extent that there might be medical evidence bearing on the issue of illness, generally that might be recovered at the instigation of the plaintiff himself.

[14] The applicant submitted that the documents were described with clarity. They were documents which related directly to issues and correspondence that had passed between the respondent and the defendant and were directly relevant to the matters in issue described in the notices.

[15] The applicant relied on the proposition that the mere use of the words "relating to" was not fatal provided the subject matter was defined sufficiently (*Waind v Hill* [1978] 1 NSWLR 372 at 381 – 382; *Petoneport Pty Ltd v Barnes* [1999] 2 Qd R 267 at 274). It was submitted that the present case was one, as in *Lin v Lin & Macquarie Bank* [2003] QSC 177 where it was held that there was a substantial identity of interest between the family company to which the notice was directed to the plaintiffs and the first defendant, where a similar obligation of disclosure to that of a party was imposed upon the company with the identity of interest. The reasons for judgment suggest that there was expected to be no opposition by the first defendant to the plaintiffs' claim in the action. It was also a case where there was a good deal of particularisation of the connection between the company and the plaintiff's and first defendant, as well as a need to compare original documents of the company with copies obtained from other sources. The evidence in Lin provided a much stronger case for comprehensive non-party disclosure than the present.

[16] Notwithstanding the applicant plaintiff's arguments, I am persuaded that the case is one where the notice should be set aside. Despite the submission that there is sufficient definition of the documents which can be identified as directly relevant to issues, I do not accept that it is so. It may be that, subject to what has been said, a more precisely drawn notice might be upheld, but its present form is not adequate. The consequence is that the application should be dismissed. The essential submissions which succeeded were raised before the application was made. The applicant should therefore pay the respondent's costs.

Orders

1. The notice is set aside.
2. The applicant pay the respondent's costs of and incidental to the application to be assessed.