

# SUPREME COURT OF QUEENSLAND

CITATION: *Ritchie v Biniris (Aust) Pty Ltd & Ors* [2004] QSC 254

PARTIES: **ALAN GEORGE RITCHIE**  
(Plaintiff)  
v  
**BINIRIS (AUST) TY LTD (ACN 071 134 686)**  
(First Defendant)  
**CONSOLIDATED MEAT GROUP PTY LIMITED**  
**(ACN 065 093 709)**  
(Second Defendant)  
**GIBSON CHEMICALS PTY LTD (ACN 004 162 832)**  
(Third Defendant)

FILE NO/S: 136 of 2000

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court, Cairns

DELIVERED ON: 12 August 2004

DELIVERED AT: Cairns

HEARING DATE: 3 August 2004

JUDGE: Jones J

ORDER: **1. Application for summary judgment is dismissed.**  
**2. Application for separate hearing of an issue between the third and first defendant is dismissed.**  
**3. The first defendant supply further and better particulars of its amended defence to the third party Statement of Claim within 28 days from the date hereof.**  
**4. Costs reserved.**

CATCHWORDS: PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – SUMMARY JUDGMENT – summary judgment pursuant to r 292 and s 293 *Uniform Civil Procedure Rules*

PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – Summary determination of issues – application for order to be indemnified to be determined separately

PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – PLEADINGS – PARTICULARS -

Where application seeks to strike out

PROCEDURE – QUEENSLAND – PRACTICE UNDER  
RULES OF COURT – PLEADINGS – PARTICULARS -  
Application for further and better particulars

*Gray v Morris* (2004) QCA 5

*Queensland Coal Pty Ltd v Arco Resources Ltd* (unreported  
QSC 7486/97)

*Reading Australian Pty Ltd v Australian Mutual Provident  
Society* (199) FCA 718

*Re Multiplex Constructions Pty Ltd* (1999) 1 QdR 287

*Uniform Civil Procedure Rules 1999*

*WorkCover Act 1996*

COUNSEL: Mr E P Williams (solicitor) for the plaintiff  
Mr M Glen for the first defendant/respondent  
Ms C A Rolls (solicitor) for the second defendant  
Mr G D O’Sullivan for the third defendant/Applicant

SOLICITORS: Paul Williams as town agent for K M Splatt & Associates for  
the plaintiff  
MacDonnells for the first defendant/respondent  
Gadens Lawyers for the second defendant  
Phillips Fox for the third defendant

- [1] The third defendant, Gibson Chemicals Pty Ltd (“Gibson”), in third party proceedings against the first defendant, Biniris (Aust) Pty Ltd (“Biniris”) claims an entitlement to be indemnified for damages that may be awarded against it in respect of a claim for damages by plaintiff, and additionally for claims made against it by the second defendant, Consolidated Meat Group Pty Ltd (“CMG”) to be indemnified in respect of the plaintiff’s claim against CMG.
- [2] By this application Gibson seeks summary judgment against Biniris, or in the alternative, a separate prior determination of its right to be indemnified. The application also seeks a striking out of part of the Biniris defence to the third party Statement of Claim and in the alternative, an order for Further and Better Particulars.

### **Background facts**

- [3] CMG is the owner/operator of a meat works situated at Innisfail in the State of Queensland. CMG contracted with Gibson to provide cleaning services at the meat

works (the agreement is referred to as the Hygiene Systems Agreement). Gibson subcontracted part of its obligations to Biniris. The division of responsibilities is set out in writing in a document attached to the Further and Better Particulars.<sup>1</sup>

- [4] The division of responsibility includes the obligation for Biniris to provide the necessary labour to carry out the cleaning operations. The plaintiff was employed by Biniris as a cleaner. He was injured in the course of his employment on 1 July 1998 when his left hand was caught in a motorised roller and he suffered a de-gloving injury. He now claims damages for personal injury.

### **The plaintiff's claims**

- [5] By his Further Supplementary Amended Statement of Claim (the Statement of Claim), the plaintiff alleges against each defendant various breaches of duty. Against Biniris, it is the breach of its duty as an employer both at common law and pursuant to statute. Against CMG he alleges a breach of its duty to provide, inter alia, safe premises, safe working conditions, proper training and supervision and safe equipment compliant with legislation. Against Gibson, the plaintiff alleges that it failed to carry out a hazard assessment so as to ensure that hazards were identified, risks assessed and control measures implemented and reviewed, and that it failed to carry out any risk assessment of the cleaning operations.

### **Claims between the defendants**

- [6] There are separate proceedings between CMG and Gibson wherein CMG claims an entitlement to be indemnified by Gibson in the event CMG is found to be liable to the plaintiff. The basis of that entitlement is the written terms of the contract between them wherein –

“3. The contractor (Gibson) undertakes to have in place a public risk insurance policy indemnifying the client (CMG) while the contractor's employees are on the client's premises.

4. The contractor undertakes to maintain a current Work Cover policy with respect to the contractor's employees at all times the work is carried out for the client on the client's premises.”<sup>2</sup>

- [7] The proceedings now under consideration are brought by Gibson against Biniris claiming entitlement to be indemnified by Biniris in the event Gibson is found to be liable to the plaintiff or to CMG. The basis of that entitlement is the written terms of various contractual documents. Firstly, the following terms appear in Biniris' letter of 20 October 1997 which records an agreement acknowledged by the representatives of each company.<sup>3</sup>

“1. Fundamentally, from our discussions, Biniris agrees to the (attached) list of responsibilities in regard to operational aspects of the venture.

...

12. Biniris (Aust) Pty Ltd will provide all insurances and respective indemnities including WorkCover in respect to the contracted

<sup>1</sup> Filed 23 September 2003

<sup>2</sup> See second defendant's Further Amended Statement of Claim against the third defendant.

<sup>3</sup> Further and Better Particulars of Third defendants State of Claim para 3(a)

services labour on a site by site basis i.e. staff who are paid by Biniris (Aust) Pty Ltd in completing the services i.e.

- (i) Public Liability Insurance to the value of \$20 million.
- (ii) WorkCover Liability – unlimited.”

[8] The attached list of responsibilities referred to in ‘1.’ above initially included a provision for Gibson to provide;

“(5) Training HACCP & Hygiene Programs, Chemical usage, safety & handling.

In a “revised” list this was deleted but the date for revision is not stated or known.

[9] On 4 November 1997 there was a further letter to Gibson in support of a quotation (No.2832) and pricing schedule which makes reference to WorkCover and Public Liability Insurances in the following terms:-

- Workers’ Compensation and Public Liability insurances as specified in the heads of agreement submitted to you on 20 October 1997.”<sup>4</sup>

[10] A further document entitled **General Conditions of Contract** which identifies Biniris as the contractor contains the following clauses:-

“3. The Contractor undertakes to have in place a Public Risk Insurance Policy indemnifying the client whilst the contractor’s employees are on the client’s premises. Such policy will be to the value of \$20 million.

4. The Contractor undertakes to maintain a current WorkCover Policy with respect to the Contractor’s employees at all times the work is carried out for the client on the client’s premises.”<sup>5</sup>

[11] The quotation 2832 was formally accepted by a document dated 21 November 1997 under covering letter dated 20 November 1997.

[12] Biniris did in fact arrange WorkCover Cover and took out a policy of Public Risk Insurance with Royal and Sun Alliance Insurance Australia Limited.

[13] Gibson now argues that the proper construction of the terms set out in the letter 20 October 1997 (para 7 hereof) results in Gibson being entitled to a complete indemnity from Biniris in respect of liability Gibson may have, *howsoever arising*, in respect to the first defendant’s employees.<sup>6</sup> It argues that the words “all insurances” are of the wide import; that they intend to cover claims by staff of Biniris against Gibson as well as claims against CMG which Gibson might have to indemnify. On the basis that the proper construction of the contractual documents provides a blanket indemnity, Gibson argues it is entitled to summary judgment pursuant to r 292 of the *Uniform Civil Procedure Rules* (“UCPR”).

[14] It is obvious that in determining the proper construction of these terms regard must be had to the expression in all related documents. It is a matter of contention whether the reference to the two specific insurance policies in clause 12 (i) and (ii)

<sup>4</sup> Ibid para 3(b)

<sup>5</sup> Ibid at para 3(b)

<sup>6</sup> See para 3(b) in reply to first defendant’s Defence

are words that limit the scope of the words “all insurances in respect of indemnities”. As well, the reference to those two specific policies echoes the obligations imposed on Gibson under the terms of its contract with CMG. Discerning what was the intention of the parties may well result in the inquiry going beyond the terms of the 20 October letter.

- [15] The principles upon which summary judgment might be entered are identified in *Gray v Morris*<sup>7</sup> particularly in the judgment of McMurdo J who said:-  
 “With respect to those who may have expressed a different view, it seems to me that rules 292 and 293 should be applied by reference to their clear and unambiguous language, without a need for any paraphrase or comparison with a previous rule. But in the application of the plain words of rules 292 and 293, and in particular the consideration of whether there is a need for a trial, a court must keep in mind why the interests of justice usually require the issues to be investigated at a trial. In my view it surely remains the case, as Mason, Murphy, Wilson, Deane and Dawson JJ said in *Famcourt* at 99, that “the power to order summary or final judgment is one that should be exercised with great care and should never be exercised unless it is clear there is no real question to be tried.” That remains a forceful and authoritative guidance and is in no way intention with the application of these rules according to their own terms.”
- [16] As a result of this, it cannot be said that Biniris’ opposition to the construction contended by Gibson is so without merit that it has no real prospect of defending Gibson’s claim. In my view the application for summary judgment must be dismissed.
- [17] The alternative submission that there should be a prior determination of the issue between Gibson and Biniris is put forward on the basis that if Gibson’s submission is successful it would simplify the proceedings and reduce the duration of the trial. Mr O’Sullivan of Counsel for Gibson argued that the construction of the written terms of the contract raised a discrete issue which would be unaffected by evidence otherwise called in respect of other issues.
- [18] The Amended Defence to the Third Party Statement of Claim (the Defence) filed by Biniris raises issues of the scope of the insurance required by the terms of the agreement. Biniris pleaded (in para 3(b) ) that the contractual obligation to take out a Public Liability Insurance Policy was for a policy on “usual commercial terms i.e. in respect of legal liability to third parties for damages arising out of acts undertaken by Biniris employees.” These terms at one level gives rise to a question of whether “usual commercial terms” is something to be implied in the contract, and whether there is such a concept as usual commercial terms. At another level there is a consideration of whether the commerciality of the terms of the contract could be used as an aide to construction. At yet a further level there may be a question whether the indemnities offered by different parties down the contractual chain were intended to cover the same risk. This latter point arises through the similarity of terms of a document “General Conditions of Contract” at the two relevant levels.

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<sup>7</sup> (2004) QCA 5 at para [46]

- [19] The effect of a preliminary determination, even if Gibson was successful, would not necessarily result in its departure from the proceedings. Gibson is still subject of claims made by the plaintiff and a claim made by the second defendant so the presence of Gibson at trial would still be necessary. What might change of course is the shifting of risk from one insurer to another. Biniris argues that any such possible consequence should be determined on a contemporaneous consideration of all indemnities. The issue of what the contracting parties intended by their words might well depend upon this.
- [20] The considerations which attend the ordering of a preliminary hearing were discussed by Bramson J in *Reading Australia Pty Ltd v Australian Mutual Provident Society*<sup>8</sup>. In the course of setting out a comprehensive (though not exhaustive) list of considerations her Honour identified factors which support the making of any order and those which tell against doing so<sup>9</sup>. Included amongst these is a contribution to the saving of time and costs by narrowing the issues. This was a consideration in *Re Multiplex Constructions Pty Ltd*<sup>10</sup> and *Queensland Coal Pty Ltd v Arco Resources Ltd*<sup>11</sup>. Also included is the consideration that attempted early resolution may cause significant contested issues both at the preliminary hearing and again at the trial.
- [21] I am not convinced that a preliminary hearing would necessarily resolve the question of which insurer is found to provide indemnity. There would be considerable duplication of costs in the event the preliminary hearing did not produce the result for which Gibson contends whereas the determination of the issue will significant add to the duration of the trial. Accordingly, I am not, in the exercise of my discretion pursuant to r 483 of *UCPR* persuaded to order a separate determination of this issue.

### **Particulars**

- [22] The third item of relief sought in the application is the striking out of certain paragraphs of the subject Defence and the associated particulars. Broadly speaking, these paragraphs relate to the claim by Biniris that contractual terms ought to be construed having regard to the Biniris' "usual practice" or to the "usual commercial practice" in respect of such insurances.
- [23] As to the Biniris practice, that is objected to on the basis that it is not contended that such practice was known to, or accepted by Gibson. As to the usual commercial practice, objection is taken that the basis for the implication of such a concept has not been made out. Prima facie there is merit in these submissions. However, a complication has arisen which precludes my disposing of the application. Mr Glen of counsel who appeared on the application on behalf of Biniris did so on the instruction of WorkCover. His client's obligation to indemnify Biniris relates simply to the statutory policy under the *WorkCover Act 1996*. WorkCover has no obligation to indemnify under the broader claims made by the third defendant. Consequently Biniris (or its general insurer) ought to have the opportunity to consider its position with respect to these broader issues.

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<sup>8</sup> (1999) FCA 718.

<sup>9</sup> Ibid at para [8]

<sup>10</sup> (1999) 1 QdR 287

<sup>11</sup> (unreported QSC 7486/97)

- [24] In earlier correspondence, the present legal representatives of Biniris indicated that the subject Defence was to be reviewed. In the light of arguments which have been raised by the third defendant such a review should have regard to the issues now raised. In an effort to avoid the costs of the parties making a further application – particularly where costs so far expended and this claim are quite disproportionate to the likely quantum of the claim – I will accede to the suggestion made by Mr Glen of counsel that an order be made for the provision of particulars but allowing extended time for compliance. I assume that by ordering further particulars within the next 28 days there will be sufficient time for Biniris to consider its position, take independent legal advice and to effect any changes to the subject Defence as may be advised.

### **Orders**

- [25] I make the following orders:-
1. Application for summary judgment is dismissed.
  2. Application for separate hearing of an issue between the third and first defendant is dismissed.
  3. The first defendant supply further and better particulars of its amended defence to the third party Statement of Claim within 28 days from the date hereof.
  4. Costs reserved.