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Date: 8 December, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

[2004] QSC 427

FRYBERG J

No BS9649 of 2004

INTERPACIFIC RESORTS (AUSTRALIA) PTY LTD TRADING AS COURAN COVE ISLAND RESORT (ACN 010 976 422)	Applicant
and	
AUSTAR ENTERTAINMENT PTY LTD (ACN 068 104 530)	First Respondent
and	
PAUL MASON	Second Respondent
and	
SALLY IRENE MASON	Third Respondent

BRISBANE

..DATE 01/12/2004

ORDER

HIS HONOUR: This is an application pursuant to section 16(2) of the Personal Injuries Proceedings Act 2002 for leave to add a person as a contributor to a notice of claim made under that Act by the second and third respondents against the applicant. The proposed contributor is the first respondent in these proceedings. For ease of reference, I shall refer to the applicant as Interpacific, the first respondent as Austar and the second and third respondents as the Masons.

On 13 August 2000, Mr Mason was injured while attending a conference at Couran Cove Resort, a facility owned and operated by Interpacific. In January 2001, Interpacific was notified of his claim for damages, based on allegations of negligence by that company. The assessors acting for the company responded in March of that year, advising that their inquiries had concluded. The Masons were, however, at that point not ready to begin proceedings. Mr Mason's injuries had not stabilised and their solicitors required the preparation of engineering reports to support the claim. Therefore, they did not immediately issue a claim against Interpacific.

In 2002, Parliament passed the Personal Injuries Proceedings Act. That imposed a requirement for certain statutory notices to be given. The Masons served those notices in December 2002 and I assume that the appropriate responses were received from Interpacific in due course. In February 2003, a letter from its solicitors confirmed that the Masons notices were compliant with the Act.

The solicitors for Interpacific requested that Mr Mason be medically examined and it appears that there was then considerable delay in achieving that. That delay is unexplained. Eventually arrangements were made in September 2004 for such an examination.

In the meantime, the solicitors for Interpacific were pursuing investigations about the circumstances and eventually they discovered from their client that Mr Mason had been at the resort for a conference organised by Austar, his employer. Further investigation brought to light part of an application for credit lodged and signed by Austar with Interpacific as part of the dealings between those two companies.

The precise nature of that document is, at this stage, somewhat uncertain. The evidence does not unequivocally disclose whether it is part of a longer contract entered into by Austar each time it wishes to hire the resort - and I should interpolate that it appears that Austar envisaged multiple hirings from some of the contractual documents - or whether it was a one off document signed as an application for credit only once.

I say that, notwithstanding the contents of a letter written by the solicitors for Interpacific which asserted that the two pages of the application for credit were part of a longer contract. That letter was seized upon by counsel for Austar for forensic advantage, but I am unpersuaded that it necessarily reflects the correct analysis of the position.

Even if there was more than one application for credit, it may be that the proper construction is that on each occasion there were two collateral contracts, an application for credit and a contract for the booking. It is not appropriate to try to resolve these issues on an application such as the present. T

The significance of the application for credit is that it contains a contractual indemnity. The terms of the indemnity are somewhat extravagant.

> "Subject to any legislation the contrary [sic] the effect of which cannot be excluded or restricted: (a) - (b) the applicant" - that is to say, Austar - "shall indemnify and keep indemnified the resort" - that is to say, I assume, Interpacific - "by any third party in respect of any such loss, damage, death or injury referred to in subparagraph (a)."

On the basis of that clause, Interpacific now claims that it is entitled to be fully indemnified by Austar in respect of the Masons' claims.

The delay in Mr Mason's medical examination has meant that the report of the doctor has only been provided relatively recently. Consequently, no compulsory conference has been held under the Act, although the Masons' solicitors first requested one in November 2003. It is understandable why that is so if there was no report of the medical examination. However, the Masons now say that they are anxious to proceed and that a conference should be convened as soon as possible. Interpacific wishes, however, to have Austar present at that conference on the basis that the prospects of achieving a settlement are enhanced if it is present and consequently if

there is another person who may contribute to any settlement. Leave of the Court as sought in the present application would not have been required but for the fact that Interpacific is out of time to give a notice making Austar a contributor under section 16(1).

Consequently, the issues which generally seem to bear upon the question of whether that leave should be given involve questions of prejudice to the respective parties, whether there is an adequate explanation for the delay, at a reasonably superficial level the merits of the claim against the proposed contributor, and finally the utility of the proposed course.

It seems to me that the question of delay is not one which is fatal in the present case. The leave that is sought is opposed by both the Masons - mainly on the ground that if it is given it will delay the proceedings - and by Austar, and in particular Austar asserts that Interpacific should have given its notice under section 16(1) and that the fault in relation to the failure to do so lies both with its solicitors and with the company itself.

It is submitted that the explanation for the delay which has been given - that is, that it took a long time to find the document, that the document as found is incomplete, and that the question of the existence of the indemnity was not something that had occurred to the solicitors - is inadequate. It is also submitted that the evidence discloses an inadequate

performance by Interpacific in providing its solicitors with documents.

I do not think that there has been any particular failure by the solicitors to do what reasonably could have been done by them. As far as the provision of documents by Interpacific to them is concerned, it seems to me that while there may be some criticism directed at Interpacific in this regard, given the peripheral nature of the documents in question - at least from the point of view of a layman - it is not a major factor.

At the heart of Austar's opposition to the leave being granted is the submission that the claim against it by Interpacific is on its face demonstrably weak. That submission is based on a number of contentious issues of fact as between those two parties. In particular, counsel for Austar referred to the difficulty which Interpacific will have in proving the terms of the contract and establishing the existence of the indemnity. It seems to me that while there may be some technical difficulties created by the rules of evidence in that regard, it is improbable that they will ultimately be of such seriousness as to significantly weaken any claim under the indemnity. That is not to say that the claim under the indemnity will necessarily succeed, but it does not seem to me that there is any great weight - at least at this level of consideration that I am giving to it - by reason of difficulties of proof of the contract.

I hope I do not do Mr Holyoak's careful submissions on this point a disservice if I refrain from embarking on an elaborate examination of the case law on this topic because it does seem to me to have in it something of a hypothetical flavour.

As far as the question of prejudice is concerned, counsel for Austar raises the possibility that a failure to give a notice might subsequently be held to preclude it from issuing third party proceedings in the event that Court action were continued to judgment against it by the Masons. I should interpolate here that the Masons did commence proceedings to prevent their becoming time-barred, but in accordance with the usual form of order those proceedings have been stayed. That suggestion was given short shrift by Mr Holyoak for Austar on the basis that his client would not contend to that effect. That might be sufficient to create an estoppel in that regard.

However, there is another aspect to this question of prejudice. For reasons which need not be elaborated, Mr Mason was entitled to receive and did receive Workers Compensation pursuant to a policy of Workers Compensation insurance issued to Austar by an insurance company, Royal and Sun Insurance. That is not the insurance company which carried the public risk liability for Austar. Using Austar's name, Royal and Sun Insurance has commenced proceedings in the Supreme Court of Tasmania to recover the Workers Compensation which it has paid to Mr Mason, those proceedings, of course, being by way of subrogation in the same of Austar. Those proceedings have been brought against Interpacific based on what is alleged to

be Interpacific's negligence in its operation of the resort. By way of defence, Interpacific has raised the indemnity.

The problem that arises is that the public liability insurer acting in the name of Austar for the purposes of today's proceedings is not at present in a position to state whether it accepts the proposition that Interpacific is liable to the Masons. Notwithstanding that that assertion has been made in the Tasmanian litigation, Austar in the Queensland claim leaves open the possibility of asserting that Interpacific cannot claim against it on the indemnity by reason of the fact that Interpacific has no liability to the Masons, it not having been negligent.

If that were to occur, the effect would be to place Interpacific in a situation where it was on the horns of a dilemma. Of course there may be ways of preventing Austar - that is to say the nominal Austar - from both approbating and reprobating, but the fact that this potential difficulty exists does seem to me to be an important consideration in deciding whether Austar ought to be part of the negotiations with the Masons.

It would be different if Austar were in a position to say, "We accept that Interpacific is liable to the Masons and we do not wish to become involved in any matter of dispute between Interpacific and the Masons in regard to quantum" but Austar is not in that position and may well wish to raise points

about the validity of the Masons' claims and the quantum of them.

Consequently, there is, it seems to me, both the possibility of prejudice to Interpacific if Austar does not become part of the claim procedures under the Act and also utility in effecting the joinder. The utility is not only to enable Austar through its public liability insurers to become fully apprised of the situation but also in enabling it to be present at the negotiations in the manner suggested by counsel for Interpacific.

Counsel for Austar suggested that its presence would only inhibit the negotiations particularly the compulsory conference which must be held under the Personal Injuries Proceedings Act. It was pointed out that the issues likely to arise between the two companies in relation to the existence and terms of the indemnity did not affect the Masons or were likely to elongate the conference, as it was put, and were likely to increase the cost of that.

In my view, having regard to the proportionality of the time which has already elapsed, such a delay would not be great and would not be unacceptable.

As regards costs, I find it difficult to identify what courses would be more costly than what other courses. No evidence has been put before me as to actual costs likely to be incurred and the whole issue is speculative since it depends upon the

attitudes taken by various parties, particularly Austar. I do not think I can comfortably make any finding as to what is the position regarding costs.

Mr Holyoak also submitted that Austar would suffer prejudice by reason of having to fight on two fronts. I do not think that is correct. If there are to be proceedings against Austar by way of third party notice in Queensland (assuming the Queensland action is to proceed) then the issue will arise whether Austar wishes to defend as between plaintiffs and Interpacific. If it does not it may well be that the proceedings could be remitted to the Supreme Court of Tasmania but if it does then the fighting on two fronts is unavoidable since the question of the plaintiffs' right of action against Interpacific and the quantum of their damages does not arise in the Tasmanian litigation.

In my view, any potential prejudice to Austar of this nature is likely to be able to be avoided by appropriate directions when some more detail as to its position is known.

Both Austar and the Masons submitted that another reason for refusing leave would be the delay which would occur in resolution of the Masons' claim. I have some sympathy for this approach but it is limited by the fact that there is no explanation for Mr Mason's delay in attending a medical examination and, more pertinently, the matter can be dealt with by making orders to ensure that the compulsory conference takes place at a relatively early date.

I see no reason why Interpacific should not, as the price of the leave which it seeks, have to dispense with the requirement for Austar to make disclosure of documents to it before the compulsory conference as required, it seems, by section 29 of the Act. That would mean that Austar would not be able to delay the happening of a conference by reason of this obligation. That is not to be taken, however, as in any way sanctioning a limitation of disclosure under the uniform civil procedure rules should Austar ultimately be joined as a party to the action.

I also see no reason why Interpacific should not be required to make disclosure to Austar pursuant to section 28 in a lesser time than is allowed by that section.

Some prejudice might arise to Austar by reason of its obligation to sign a certificate of readiness under section 37 of the Act when it has received notice only relatively recently. In these circumstances, I think the problem can be dealt with by my dispensing with the requirement for Austar to sign that certificate prior to the holding of the compulsory conference.

If those steps are taken, I see no reason why it could not be ordered that the compulsory conference which is already overdue be held in early February next year. Counsel for the Masons accepted that this was a time which would be satisfactory to his clients and, taking into account the Christmas break which must intervene, it seems to me that that

should allow sufficient time for the present parties to the conference to be ready and also for Austar to be substantially ready for the conference.

I therefore propose to grant the leave which is sought in the application and to make directions of the type which I have indicated. I would ask that counsel prepare a draft conformably with these reasons and bring that draft into my Chambers by 1 p.m. tomorrow.

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HIS HONOUR: The draft should also provide that the costs as between Interpacific and the Masons be costs in action number 6937 of 2003 and otherwise there should be no order as to costs.
