SUPREME COURT OF QUEENSLAND

CITATION:	*Advance Traders Pty Ltd v McNab Constructions Pty Ltd* & *anor* [2011] QSC 212
PARTIES:	**ADVANCE TRADERS PTY LTD** **ACN 009 672 002** (Plaintiff) v **McNAB CONSTRUCTIONS PTY LTD** **ACN 073 311 681** (First Defendant) and **McNAB CONSTRUCTIONS AUSTRALIA PTY LTD** **ACN 102 840 906** (Second Defendant)
FILE NO/S:	BS 9687 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2011
JUDGE:	Boddice J
ORDER:	**The application is dismissed**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – OTHER MATTERS – Where the defendants apply for an order pursuant to r 483 Uniform Civil Procedure Rules 1999 (Qld) for the separate determination of questions in the proceeding – Where the defendants submit that the separate

determination of those questions will result in savings of time and cost – Whether it is just and convenient for the order to be made

Queensland Building Services Authority Act 1991 (Qld)

Uniform Civil Procedure Rules 1999 (Qld)

Body Corporate for Sun City Resort CTS 24674 v Sunland Constructions Pty Ltd [2010] QSC 463

Arnold v Attorney-General (Vic) (unreported, Fed C of A, Sundberg J, Nos VG629–37 of 1995, 8 September 1995, BC9502745)

Evans Deakin Industries Ltd v Commonwealth [1983] 1 Qd R 40

Heery v Criminal Justice Commission [2001] 2 Qd R 610

Lee v Arisaig Pty Ltd & Ors [2005] QSC 265

McNab Constructions Pty Ltd v Queensland Building Services Authority [2010] QCA 380

Puerto Galera Pty Ltd v J M Kelly (Project Builders) Pty Ltd [2008] QSC 356

Pico Holdings Inc v Wave Vistas Pty Ltd [2003] QCA 204

Reading Australia Pty Ltd v Australian Mutual Provident Society (1999) 217 ALR 495

Re Multiplex Constructions Pty Ltd [1999] 1 Qd R 287

Sherlex Pty Ltd v Thornton & Ors [2003] QCA 461

State of Queensland v Dale and Meyers Operations Pty Ltd [2010] QSC 361

Watpac Civil Infrastructure Pty Ltd (formerly JMS Civil & Mining (Aust) Pty Ltd) v Komatsu Pty Ltd [2009] QSC 281

COUNSEL: Doyle SC with Trim, M for the plaintiff/respondent

Fraser QC with Codd, B for the first and second defendants/applicants

SOLICITORS: McInnes Wilson for the plaintiff/respondent

Lenz Moreton for the first and second defendants/applicants

[1] By application filed 31 May 2011 the first and second defendants ("the defendants") make application for an order pursuant to r 483 of the *Uniform Civil Procedure Rules* 1999 ("UCPR") for the separate determination of the following questions in the proceeding:

(a) whether the contract entered into on 22 December 2004 was made between the plaintiff, as principal, and the second defendant, as construction manager;

(b) whether the services agreed to be provided by the construction manager under the contract were "building work" within the meaning of that term as used in s 42 of the *Queensland Building Services Authority Act* 1991 ("QBSA Act");

(c) whether any contractor's licence of an appropriate class for the services existed under the QBSA Act:

(i) at the time when the services were provided, and

(ii) at least six months prior to the provision of the services.

[2] The defendants submit each of those questions is properly to be the subject of a separate determination as they are discrete issues and although their determination will not dispose of the litigation completely, their separate determination may result in significant savings of time and cost in relation to the dispute the subject of the proceeding, and assist in its ultimate compromise.

[3] The plaintiff opposes the separate determination of any of those questions. It submits there is no truly separate question to be determined, that the questions are not "ripe for determination"; that a separate determination of those questions is not likely to save any meaningful time or expense; that the questions may instead lead to a significant increase in time and expense, and that the separate determination of those questions would unnecessarily fracture and delay the proceeding.

The proceeding

[4] The plaintiff was the developer of an apartment complex built in the redevelopment of a wool store at Teneriffe. As part of that redevelopment, a written contract for construction management services ("the contract") was entered into on 22 December 2004. The contract was executed by the plaintiff and the second defendant. The first defendant's name appeared in the heading of that contract.

[5] The plaintiff seeks a declaration that the contract entered into between the plaintiff and the second defendant was in truth a contract between the plaintiff and the first defendant. It seeks a repayment of over $10 million from the defendants on the basis that the first defendant did not have a building licence and was thereby precluded from receiving monetary consideration pursuant to s 42 of the QBSA Act. It also seeks repayment of moneys paid to the second defendant pursuant to void adjudications. In the alternative, the plaintiff pleads that if the contract was between the plaintiff and the second defendant, the second defendant has been overpaid its contractual entitlements by over $6 million.

[6] The pleadings are voluminous. They have been amended over the course of the proceeding, which was commenced in 2009. Relevantly, for the purposes of the present application, the plaintiff alleges:

(a) the first defendant was the contracting party;

(b) the first defendant, as the contracting party, was required to hold a licence pursuant to the QBSA Act;

(c) the first defendant did not hold a licence pursuant to the QBSA Act at the relevant time;

(d) accordingly, the only entitlement of the first or second defendant to receive money from the plaintiff arose under s 42(4) of the QBSA Act.

[7] The defendants allege that:

(a) the second defendant was the contracting party;

(b) the services provided by the construction manager under the contract was not "building work" within the meaning of s 42 of the QBSA Act at the relevant time;

(c) there was no licence of an appropriate class for the provision of services under the contract by the construction manager at the relevant time;

(d) by reason of (c), s 42 does not apply to the activities of the construction manager under the contract.

[8] The defendants estimate a hearing of the preliminary issues would take three to four days. The plaintiff estimates a hearing of the preliminary issues would take five to six weeks.

Rule 483

[9] Relevantly, r 483 of the UCPR provides:

> "The Court may make an order for the decision by the court of a question separately from another question, whether before, at, or after the trial or continuation of the trial of the proceeding."

[10] The rule is intended to provide for the determination of an issue or issues the resolution of which is likely to lead to substantial savings and expense.[1] Whether an order is made is subject to the exercise of the discretion of the Court.[2] In exercising that discretion, a relevant consideration is whether it would be convenient to determine first the issues raised, and, in particular, whether the successful determination of the separate issues would:

(a) relieve the parties and the Court of the need to otherwise consider a significant volume of documents;

(b) avoid the need for the Court at trial to consider expert evidence,

(c) avoid, or at the very least reduce, the necessity for a lengthy trial.[3]

[11] In *Reading Australia Pty Ltd v Australian Mutual Provident Society & anor*,[4] Branson J said, in respect of a provision in the *Federal Court Rules*, which is materially in identical terms to r 483:

> "(a) …
>
> (b) a question can be the subject of an order for a separate decision under 0 29 r 2 even though a decision on such a question will not determine any of the parties' rights (*Landsal Pty Ltd (in liq) v REI Building Society* at FCR 425; ALR 647);
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> (c) however, the judicial determination of a question under 0 29 r 2 must involve a conclusive or final decision based on

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1 *Evans Deakin Industries Ltd v Commonwealth* [1983] 1 Qd R 40 at 45-46.
2 *Body Corporate for Sun City Resort CTS v Sunland Constructions Pty Ltd* [2010] QSC 463 at [19].
3 *State of Queensland v Dale and Meyers Operations Pty Ltd* [2010] QSC 361 at [19], [20].
4 (1999) 217 ALR 495 at [8].

concrete and established or agreed facts for the purpose of quelling a controversy between the parties (*Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; 161 ALR 399; [1999] HCA 9 at [45]);

(d) where the preliminary question is one of mixed fact and law, it is necessary that the question can be precisely formulated and that aft of the facts that are on any fairly arguable view relevant to the determination of the question are ascertainable either as facts assumed to be correct for the purposes of the preliminary determination, or as agreed facts or as facts to be judicially determined (*Jacobson v Ross* [1995] 1 VR 337 at 341, referring to *Nissan v Attorney-General* [1970] AC 179 at 242-3; [1969] 1 All ER 629 at 663-4 per Lord Pearson; *Bass v Perpetual Trustee* at [53]);

(e) care must be taken in utilising the procedure provided for in 0 29 r 1 to avoid the determination of issues not 'ripe' for separate and preliminary determination. An issue may not be 'ripe' for separate and preliminary determination in this sense where it is simply one of two or more alternative ways in which an applicant frames its case and determination of the issue would leave significant other issues unresolved (*CBS Productions Pty Ltd v O'Neill* (1985) 1 NSWLR 601 per Kirby P at 606);

(f) factors which tend to support the making of an order under 0 29 r 2 include that the separate determination of the question may:

  (i) contribute to the saving of time and cost by substantially narrowing the issues for trial, or even lead to disposal of the action; or

  (ii) contribute to the settlement of the litigation (*CBS Productions Pty Ltd v O'Neill* per Kirby P at 607);

(g) factors which tell against the making of an order under 0 29 r 2 include that the separate determination of the question may:

  (i) give rise to significant contested factual issues both at the time of the hearing of the preliminary question and at the time of trial (*GMB Research & Development Pty Ltd v Commonwealth* [1997] FCA 934);

  (ii) result in significant overlap between the evidence adduced on the hearing of the separate question and at trial – possibly involving the calling of the same witnesses at both stages of the hearing of the proceeding: (*GMB Research & Development Pry Ltd v The Commonwealth*; *Arnold v Attorney-General (Vic)* (unreported, Fed C of A, Sundberg J, Nos VG629-37 of 1995, 8 September 1995,

BC9502745). This factor will be of particular significance if the Court may be required to form a view as to the credibility of witnesses who may give evidence at both stages of the hearing of the proceeding; or

(iii) prolong rather than shorten the litigation (*GMB Research & Development Pty Ltd v Commonwealth*)."

These factors have been identified as being relevant in considering the operation of r 483.[5] Ultimately, the issue for the Court, in determining whether to exercise the discretion and make an order for separate determination, is whether it is "just and convenient" for the order to be made.[6]

The application

First question

[12] There is no doubt that a material fact in issue is the identity of the party contracting as construction manager. The plaintiff contends that whilst the contract was executed by a director of the second defendant, the first defendant was specifically named in the contract and the second defendant executed the contract as agent for the first defendant. The defendants contend the second defendant made the offer to contract and was intended by the parties to be the contracting party.

[13] The defendants submit that the prior determination of this question is "ripe for determination". Further, it is a discrete issue and its determination will impact on the issues to be determined in respect of s 42 of the QBSA Act. The plaintiff submits that the question of who was the contracting party is not "ripe for determination". It will require a substantial hearing itself as it requires a determination of the objective intention of the parties in all the circumstances.[7] Its early resolution will not resolve the proceedings, or save any meaningful time or cost. Instead, it may lead to an increase in time and costs.

[14] In support of the contention that the issue of the correct identity of the contracting party cannot be resolved by a confined body of evidence, the plaintiff asserts that the defendants' own pleading demonstrates that resolution of the issue will require consideration of the extrinsic events pleaded by the defendants, including oral and written communications, an alleged previous history of dealings, and events after the contract was signed. It will also require a consideration of numerous discussions pleaded by the plaintiff by way of reply, and consideration of documentation.

[15] Whilst courts are now more liberal in their consideration of whether to order the separate determination of preliminary questions,[8] caution must be exercised before making such an order having regard to the risk of being too readily tempted by the

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5 *Body Corporate for Sun City Resort CTS v Sunland Constructions Pty Ltd* [2010] QSC 463 per Applegarth J at [19].

6 *Arnold v Attorney-General (Vic)* (unreported, Fed C of A, Sundberg J, Nos VG629-37 of 1995, 8 September 1995, BC9502745), followed in *Reading Australia Pty Ltd v Australian Mutual Provident Society* (supra) at [9].

7 *Pico Holdings Inc v Wave Vistas Pty Ltd* [2003] QCA 204 at [3]-[6], [44], [51] and [63].

8 See *Re Multiplex Constructions Pty Ltd* [1999] 1 Qd R 287; *Heery v Criminal Justice Commission* [2001] 2 Qd R 610.

promise of a saving of time and costs whereas the outcome results in time wasting and an increase in costs whilst also fragmenting and delaying the outcome.[9]

[16] Having considered the competing claims, and the detailed pleadings in respect of this issue, I am not satisfied this question is an appropriate question for a separate determination prior to the hearing of the proceeding. The question is a central issue, and the subject of extensive pleading. Its resolution will require consideration of voluminous evidence and documentation. Its determination is likely to take much more than three to four days. It will involve extensive preparation. Its determination will not obviate the need for an extensive trial in any event.

[17] I decline, in the exercise of my discretion, to order that the first question be determined separately.

Second and third questions

[18] The defendants submit the second and third questions involve matters of construction in respect of a legislative provision which has itself been the subject of consideration by this Court.[10] Further, their determination as separate questions will result in a considerable saving of time and money in respect of the determination of the remaining issues in dispute in the proceeding.

[19] In support of that contention, the defendants submit that depending on the outcome of those separate determinations, the defendants will not be obliged to lead evidence to prove an entitlement under s 42(4) of the QBSA Act to retain any of the monies paid by the plaintiff. This will result in a substantial reduction in the length of the trial and the number of expert witnesses required to be called at any trial. It will also reduce the number of expert witnesses required to provide reports.

[20] The defendants further submit that the determination of those questions will impact on which party has the burden of proving an entitlement to amounts in dispute, and that the determination of who has the burden of proof will significantly assist in the preparation of the evidence for the proceeding itself, and perhaps, in its resolution without a trial.

[21] The plaintiffs submit that a preliminary determination of the second and third questions would not resolve the proceedings, would likely require a duplication of evidence, and will necessitate an assessment of the credibility of witnesses on more than one occasion. It would also not save any meaningful time or expense.

[22] In support of this contention, the plaintiff submits that the question of whether the "services" were "building work" within the meaning of the legislation, cannot be resolved merely by a consideration of the contract itself. Its determination must be considered in context, and by having regard to the services set out in part B of the contract. The plaintiff submits a consideration of part B indicates that the words contained therein are ambiguous and will require the Court to consider evidence of the surrounding circumstances in order to construe the words in part B. This will result in a substantial hearing, and the likely duplication of evidence at a later hearing with the potential for inconsistent findings as to credit as well as a

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9 *Sherlex Pty Ltd v Thornton* [2003] QCA 461 at [16]-[20]; *Lee v Arisaig Pty Ltd & Ors* [2005] QSC 265 at [12], [21]-[22]; *Watpac Civil Infrastructure Pty Ltd v Komatsu Pty Ltd* [2009] QSC 281 at [4]-[8].

10 See *Puerto Galera Pty Ltd v J M Kelly (Project Builders) Pty Ltd* [2008] QSC 356. See also *McNab Constructions Pty Ltd v Queensland Building Services Authority* [2010] QCA 380.

lengthening of the trial process. The plaintiff submits that the construction of an ambiguous, or potentially ambiguous, contract is not appropriate for determination as a preliminary issue in the absence of evidence as to surrounding circumstances.[11]

[23] Further, the plaintiff submits that even if the second and third questions were ordered to be determined separately, and prior to the trial itself, their determination would not resolve the central issue in the proceedings. The separate questions are directed to whether the services the first defendant agreed to perform pursuant to the contract required a licence, and whether there was a licence for those services that were agreed. This would not resolve the question of who actually performed the work of the construction manager, whether the work actually performed by the construction manager required a licence, and whether there was an available licence for the work actually performed. The defendants do not merely dispute that the work required under the contract was building work within the legislative provision. They also dispute that the first defendant performed either building work or the services required under the contract[12] and separately plead the second defendant performed various kinds of work described as "trade works"[13] and procured various items for use by the plaintiff or trade contractors. The defendants plead that these kinds of work were outside the scope of services under the contract or were, in the alternative, a variation to it. Evidence will be required to identify the trade works and items procured by the defendants.

[24] Whilst there is merit in the defendants' submission that a separate determination of the second and third questions could be useful in resolving which party has the onus of proof, I am not satisfied that a separate determination of those questions would result in any significant saving of time or expense in respect of the ultimate hearing of the proceeding. The defendants contend that the second and third questions could be determined in one day. Having regard to the pleaded issues, this is likely to be an under estimate. In any event, it is apparent from a consideration of the issues that even if that be so, there would remain substantial issues for determination. Accordingly, a separate determination of these questions will not obviate the need for a lengthy trial. It also will not save any significant time or expense. Indeed, there is a significant risk that the determination of the summary issue would be delayed by an appeal from the determination of this issue.

[25] I decline, in the exercise of my discretion, to order that the second and third questions be determined separately.

Orders

[26] The application is dismissed. I shall hear the parties as to costs.

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11 *Sherlex Pty Ltd v Thornton & Ors* [2003] QCA 461 at [16]-[20].

12 See para 22, sub (a) of the defence.

13 See para 16A of the defence.