SUPREME COURT OF QUEENSLAND

CITATION:	*Byrne v People Resourcing (Qld) Pty Ltd & Ors* [2014] QSC 039
PARTIES:	**NICHOLAS GORDON BYRNE** (plaintiff) **v** **PEOPLE RESOURCING (QLD) PTY LTD** **(ABN 78 131 732 888)** (first defendant) and **THIESS JOHN HOLLAND** **(ABN 17 438 477 568)** (second defendant) **THIESS JOHN HOLLAND** **(ABN 17 438 477 568)** **(plaintiff by counterclaim)** **v** **PEOPLE RESOURCING (QLD) PTY LTD** **(ABN 78 131 732 888)** (first defendant by counterclaim) and **WORKCOVER QUEENSLAND** (second defendant by counterclaim) and **NICHOLAS GORDON BYRNE** (third defendant by counterclaim)
FILE NO:	7001 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	13 March 2014
DELIVERED AT:	Brisbane
HEARING DATE:	11 March 2014
JUDGE:	Applegarth J
ORDER:	**Application dismissed**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – OTHER MATTERS - order sought for separate and prior trial of issues about indemnity between defendants and scope of

indemnity of compulsory insurer - where defendants contesting liability in a personal injury claim – where defendants have not accepted liability for the claim – whether a separate trial should be ordered to resolve hypothetical questions that may arise between the defendants if liability is established against both defendants

Uniform Civil Procedure Rules 1999 (Qld), 171

Advance Traders Pty Ltd v McNabb Constructions [2011] QSC 212, cited
Bass v Perpetual Trustee Co Ltd (1999) 198 CLR 334; [1999] HCA 9, cited
BOQ Ltd v Chartis Australia Insurance Ltd [2012] QSC 319, cited
King's College v Allianz Insurance [2004] 1 Qd R 394; [2003] QSC 353, cited
Jacobson v Ross [1995] 1 VR 337; [1995] VicRp 24, cited
Perre v Apand (1999) 198 CLR 180' [1999] HCA 36, cited
QBE Insurance (Aust) Ltd v Tropical Reef Shipyard Pty Ltd [2009] FCAFC 161, cited
Re Multiplex Constructions Pty Ltd [1999] 1 Qd R 287, cited
Reading Australia Pty Ltd v Australian Mutual Provident Society (1999) 217 ALR 495; [1999] FCA 718, cited

COUNSEL: D J Murphy for the plaintiff, third defendant by counter-claim
R M Treston QC with G. O'Driscoll for the first defendant, first defendant by counter-claim
R Douglas QC with D.J. Schneidewin for the second defendant, plaintiff by counter-claim
W Sofronoff QC-SG with K Holyoak for the second defendant by counter-claim.

SOLICITORS: Sciaccas Lawyers for the plaintiff, third defendant by counter-claim
MacDonnells Lawyers for the first defendant, first defendant by counter-claim
Barry Nilsson for the second defendant, plaintiff by counterclaim
Kaden Borris for the second defendant by counter-claim.

[1] On 11 March 2014 I heard an application by the plaintiff by counterclaim for an order that certain questions be determined separately before trial, or, in the alternative, that certain paragraphs of the second defendant by counterclaim's amended answer be struck out pursuant to the *Uniform Civil Procedure Rules* 1999, r 171. During the course of the hearing I indicated that I was not prepared to make either order, and indicated in general terms my reasons for that view. Some of the parties did not require me to give reasons for that decision. However, it is appropriate that I do so.

[2] The five questions about which the applicant ("TJH") seeks separate determination relate to issues that will arise between the defendants to a personal injury action and the second defendant by counterclaim (WorkCover) in the event that each of the first defendant (PRQ) and TJH is adjudicated liable to pay damages to the plaintiff (Mr Byrne).

[3] The principles that govern the circumstances in which an order will be made for the separate trial of preliminary issues have been discussed in a number of recent authorities. The decision of Branson J in *Reading Australia Pty Ltd v Australian Mutual Provident Society*[1] has been influential. Judges of this Court have applied that decision[2]. Decisions affirm the utility of such orders in appropriate cases[3]. Sometimes such an order is appropriate to avoid the necessity for a lengthy trial or at least to reduce a trial's length. However, care must be taken in making such an order because it sometimes happens that separate trials of different issues may turn out to be productive of delay, additional expense, appeals and uncertainty[4].

[4] TJH cited in support of its application *Jacobson v Ross*[5]. The reference in that case to a preliminary trial where relevant facts "are merely to be taken as assumed for the purposes of the determination of the preliminary question" must be treated with some reserve, since the decision pre-dates the decision of the High Court in *Bass v Perpetual Trustee Co Ltd*[6]. In applying *Bass*, Branson J observed in *Reading*[7] that the judicial determination of a preliminary question must involve "a conclusive or final decision based on concrete and established or agreed facts for the purpose of quelling a controversy between the parties". With some qualifications, which are not presently relevant, a court will not answer hypothetical questions.

[5] These principles, derived from *Bass*, were discussed by Holmes J (as her Honour then was) in *King's College v Allianz Insurance*[8], and more recently by Jackson J in *BOQ Ltd v Chartis Australia Insurance Ltd*[9]. I respectfully adopt their Honours' analysis. A declaration or other order which is "not based on facts, found or agreed, will be purely hypothetical and at best ... do no more than declare that the law dictates a particular result when certain facts in the material pleadings are established"[10]. If the assumed facts are in dispute, then the answers may be of no use at all to the parties.[11] It may be no part of judicial power to effect a determination of rights by applying the law to facts which are neither agreed nor determined by reference to the evidence in the case.[12] It has been said that "judicial decisions based on assumed facts are suitable only for questions of law and then only if the facts as pleaded exhaust the universe of relevant factual material".[13]

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1 (1999) 217 ALR 495; [1999] FCA 718.
2 For example in *Advance Traders Pty Ltd v McNabb Constructions* [2011] QSC 212.
3 *Re Multiplex Constructions Pty Ltd* [1999] 1 Qd R 287 at 288.
4 *Perre v Apand* (1999) 198 CLR 180 at 332 [436]; [1999] HCA 36 at [436].
5 [1995] 1 VR 337 at 340-342.
6 (1999) 198 CLR 334; [1999] HCA 9.
7 (Supra) at [8].
8 [2004] 1 Qd R 394 at 398-401; [2003] QSC 353 at [15] – [25].
9 [2012] QSC 319 at [31] – [40].
10 *Bass* at 357 [49].
11 Ibid.
12 *Bass* at 359 [56].
13 *QBE Insurance (Aust) Ltd v Tropical Reef Shipyard Pty Ltd* [2009] FCAFC 161 at [27].

[6] Ultimately, the appropriateness of determining questions at a preliminary trial depends upon the facts that are agreed or determined at it, whether the question depends upon an assumption about the happening of a future event, whether answering what may be described as hypothetical questions has utility and where the interests of justice lie.

[7] Before turning to the facts which are agreed, and identifying the hypothetical nature of the five questions which are posed for preliminary determination, it is appropriate to observe that, historically, and for good reason, there has been a marked reluctance to determine questions of indemnity in advance of the liability of a party claiming indemnity from an insurer against that liability. *King's College* and *BOQ Ltd* are illustrative of that reluctance.

[8] TJH accepted that the questions about which it sought a preliminary trial were hypothetical. The issue for my consideration is whether it is appropriate in the circumstances to order a preliminary determination of such hypothetical questions.

Background facts

[9] Mr Byrne was injured in a work accident on the Airport Link Project on 21 January 2010. He claims damages for personal injury and loss in respect of that accident against PRQ (a labour hire company which contracted to provide his services) and TJH (which was the project contractor and host employer of Mr Byrne under the labour hire contract).

[10] Both PRQ and TJH deny liability.

[11] WorkCover is the workers' compensation insurer of PRQ, such compulsory insurance existing pursuant to the *Workers Compensation and Rehabilitation Act* 2003 (Qld).

[12] The labour hire contract between PRQ and TJH contained contractual indemnities in favour of TJH and warranties by PRQ in respect of the quality of staff supplied and the provision of certain forms of insurance. TJH seeks to rely upon a contractual indemnity which pre-dates the injury and another contractual indemnity which is said to have retrospective effect.

[13] Issues have been raised in the proceeding by counterclaim about the indemnity afforded by WorkCover to PRQ under the 2003 Act in the event that, at trial, common law liability is adjudicated in favour of Mr Byrne against each of PRQ and TJH. Those issues which are the subject of the five questions quoted below apparently have been a significant reason as to why the proceedings have not been resolved.

[14] The stance taken by WorkCover about the extent of its obligation to indemnify the employer against, and to pay the plaintiff, the damages adjudicated against the employer have implications in other cases, including cases involving other plaintiffs employed by PRQ who were injured on the same project. I was told that similar issues arise in other litigation, and that the early resolution of the issues about which TJH seeks a preliminary determination would facilitate the settlement of these proceedings and others. However, it is apparent that a determination of those issues at a preliminary trial would not be the end of the matter, due to the commercial implications of the decision.

[15] TJH frankly acknowledged in its submissions that, irrespective of any decision on the separate questions in the Trial Division, the matter will go on appeal. WorkCover did not indicate that it was inevitable that it would appeal if the preliminary determination went against it. However, such an appeal, with its resultant delay, seems highly probable, irrespective of how the questions are answered.

The issues and the time required to try them

[16] Senior Counsel for WorkCover identified the following substantial issues to be tried in the proceedings:

1. Whether either PRQ or TJH or both of them or none of them are liable to Mr Byrne ("liability");

2. The quantum of Mr Byrne's claim ("quantum");

3. Apportionment between the two defendants in the event that each is adjudicated liable to pay the damages which are assessed ("apportionment");

4. Questions of indemnity between PRQ and TJH, including:

   (a) whether, on their true construction, neither of the indemnities is engaged;

   (b) if one or other of them is engaged, the scope of the indemnity.

5. The extent to which the statutory policy of insurance will respond to all of PRQ's liability to Mr Byrne if PRQ is found liable to any degree, or whether it only responds to that proportion of PRQ's liability that is apportioned.

There are other issues concerning alleged breach of contract by PQR, but these identify the substantial issues in the proceedings.

[17] I inquired of the parties how long it would take to try each issue in the event:

(a) the order for separate determination sought by TJH was not made; and

(b) an order was made for the separate determination of the first three issues, leaving issues between defendants of contractual indemnity and issues concerning the scope of indemnity provided by WorkCover to be determined later, as between the defendants and WorkCover.

[18] In an affidavit sworn on 21 January 2014 the experienced litigation solicitor representing TJH thought that the trial of all issues would take between seven and ten days. It is unlikely that a trial of such length could be easily set down for hearing this year. A trial of that duration might only be set down for trial in 2015.

[19] Views differed as to the duration of a trial on the first issue or the trial of issues of liability, quantum and apportionment. A realistic estimate was two to three days, but some counsel thought that a trial of those issues may take four days. I previewed at the hearing that I intended to make a direction for the parties to

prepare a trial plan which would enable a better estimate of whether a separate trial of liability, quantum and apportionment would take two, three or four days. If those issues were separately tried, then remaining issues of indemnity and the fifth issue would remain to be tried.

[20] The fifth issue is said by TJH to involve a point of law. That may be so, but it is a point of law which comes with its complexity, as is apparent from the submissions filed to date, the legislation and the volume of case law that will require consideration. Given the issue's complexity and its general importance one would expect a judge trying the fifth issue to reserve judgment for some time. The determination of issues of contractual indemnity may also require consideration of substantial legal argument. Some evidence would be required to be called about the circumstances under which the indemnities were entered into. However, that evidence may not be substantial. In any event, I estimate that the trial of issues 4 and 5 will occupy some days.

The questions posed for separate determination

[21] Neither the original application nor the amended application defined the questions to be separately determined save for saying that they were the questions raised by paragraphs 33 and 34 of the counterclaim and in response paragraphs 36 to 39 of the amended answer of the second defendant by counterclaim. Three questions and a further potential question were formulated in TJH's submissions in reply dated 20 February 2014. Upon the hearing of the application the following five questions were posed:

1. In the event of each of the first defendant and second defendant being adjudicated liable to pay damages to the plaintiff, is the second defendant by counterclaim, as insurer pursuant to the *Workers' Compensation & Rehabilitation Act* 2003, obliged to indemnify the first defendant as to, and pay the plaintiff:

   (a) the full measure of damages adjudicated against the first defendant; or

   (b) only the measure of such damages which is (or but for any pre-injury contractual indemnity given by the first defendant to the second defendant would be) apportioned to the first defendant pursuant to s 6(c) of the *Law Reform Act* 1955?

2. If "yes" to Question 1(a), in the further event that the second defendant enjoys, and judgment by cross-claim is entered upon, an indemnity against the first defendant in respect of any damages payable by the second defendant to the plaintiff, pursuant to a pre-injury contract entered into between them, which indemnity excludes s 6(c) contribution, does the answer to Question 1 remain "yes"?

3. If "yes" to Question 2, in the further event that the second defendant pays the judgment sum adjudicated against it in favour of the plaintiff, in whole or in part, and executes the same against the first defendant upon the cross-claim adjudicated in its favour, is the second defendant by counterclaim obliged to indemnify the first defendant in respect of such executed sum, limited to

paying no more than the full measure of damages adjudicated against the first defendant in favour of the plaintiff?

4. If "yes" to Question 1(a), in the event that the second defendant enjoys, and judgment by cross-claim is entered upon, a right of action for damages for breach of contract against the first defendant for the full measure of any damages payable by the second defendant against the plaintiff, does the answer to Question 1(a) remain "yes"?

5. If "yes" to Question 4, in the further event that the second defendant pays the judgment sum adjudicated against it in favour of the plaintiff, in whole or in part, and executes the same against the first defendant upon the cross-claim adjudicated in its favour, is the second defendant by counterclaim obliged to indemnify the first defendant in respect of such executed sum, limited to paying no more than the full measure of damages adjudicated against the first defendant in favour of the plaintiff?

The hypothetical nature of the questions

[22] As can be seen from the form of each question, they are hypothetical questions. Question 1 is premised upon each of PRQ and TJH being adjudicated liable to pay damages. This is in circumstances in which neither defendant accepts that it is liable to pay damages and where only Mr Byrne contends that both will be adjudicated liable to pay damages. The liability of PRQ and the liability of TJH to pay damages to Mr Byrne is a contested issue in the proceedings. It is not in the nature of a simple contingency. The liability of both defendants is not a concrete and established fact. It is not an agreed fact.

[23] If, as the defendants would have it, neither of them is liable to pay damages to Mr Byrne, then the separate determination of Question 1 would not be of great utility. Its separate determination may facilitate the resolution of the proceedings, assuming all other issues of liability, quantum, apportionment, contractual indemnity and breach of contract could be resolved. However, the resolution of Question 1 following almost inevitable appeals would delay the trial of Mr Byrne's claim for damages and have no bearing upon the outcome of the trial of that claim if, at trial, neither defendant is found liable to pay damages or only one defendant is found liable to pay damages.

[24] The other questions introduce additional contingencies. I will not delay to identify them. They are apparent from the form of the questions which pose the question as to whether the answer to Question 1 would remain "Yes" in certain events. They include, for example, success on a cross-claim for an indemnity against PRQ.

[25] None of the parties which sought the separate determination of these questions thought, on reflection, that there was any particular utility in having a separate determination of only Question 1.

[26] Even if I had been persuaded that the questions were appropriate ones for a separate, preliminary trial, notwithstanding their hypothetical nature, then the risk exists that an appeal court would take a contrary view and, in conformity with the High Court's decision in *Bass* and other authorities, conclude that the questions should not have been made the subject of a separate determination. Even if that was not the

case, then resolution of almost inevitable appeals would mean that the trial of Mr Byrne's proceeding against the defendants would be delayed by a least a few years whilst appeals and applications for special leave to appeal to the High Court were pursued.

[27] Mr Byrne was originally prepared to agree to a question similar to Question 1 being the subject of early separate determination in the hope that it would resolve his claim without the necessity for a trial. But it became apparent during the hearing of the application that the issues which TJH and WorkCover sought to be determined would not be as simple as first seemed. Mr Byrne's counsel always made his support for the separate determination on a qualified basis, noting that a factor which militated against making an order for what was then thought to be one issue between TJH and the defendants by counterclaim being heard separately was a possible appeal. Mr Byrne's submissions of 20 February 2014 noted that an appeal in respect of that determination would significantly erode the costs and time saving benefits referred to in the affidavit material. Mr Byrne's position at the end of the hearing was that the separate determination originally proposed no longer appeared to be "the shortest way home", but now it appeared that the determination of the questions would take some days and there would be inevitable appeals.

Determination of the applications

[28] The five questions for determination are hypothetical. The later questions involve contingencies upon contingencies, for example, they involve the contingency that each defendant is adjudicated liable to pay damages to Mr Byrne and that TJH obtains a judgment upon an indemnity. In some respects, the questions are in the reverse order to the issues identified by senior counsel for WorkCover. The defendants and WorkCover seek the early determination of at least Question 1. The best way for that to be achieved is for the hypothetical or contingent nature of the question to be removed. Unless and until Mr Byrne obtains a judgment for damages against each of PRQ and TJH, the question will remain a hypothetical one.

[29] I decline to exercise my discretion to order a preliminary trial of that first hypothetical question and the other four hypothetical questions.

[30] I dismiss paragraph 1 of the amended application.

[31] The alternative application for certain parts of WorkCover's pleading to be struck out pursuant to r 171 was extremely ambitious in circumstances in which senior counsel for TJH could not say that WorkCover's legal arguments were unarguable. The power to strike out a pleading on the ground that it discloses no reasonable basis of defence or has a tendency to prejudice or delay the fair trial of the proceeding because it is without merit is to be exercised with great caution. Although WorkCover's arguments may be weak for the reasons which TJH outlines, they cannot be described as unarguable. I decline to exercise my discretion to strike out the relevant parts of WorkCover's pleading.

The further conduct of the proceedings

[32] After I indicated my provisional views about TJH's applications, the issue arose at the hearing as to whether all issues should be tried at the one trial, which in some estimates may last as long as seven to ten days, in which event the trial would not be able to be set down for some substantial time, or whether the appropriate course was

to have a separate trial of what I have earlier described as liability, quantum and apportionment (and such other limited issues which could conveniently be tried at the same time and which might assist in the determination of issues between defendants and WorkCover).

[33] The early resolution of personal injury claims is important. An individual in Mr Byrne's position should have his claim for liability against his former employer and the host employer who organised the contract works determined without delay. Delay exacerbates the distress and uncertainty faced by workers and others who suffer personal injuries. The resolution of their claims, one way or the other, helps them get on with their lives. If possible, Mr Byrne should be spared the trouble and expense of being involved in the litigation of issues in which he has no direct interest. If he succeeds against either or both of the defendants then he should be able to recover the damages that are awarded to him, leaving the defendants and WorkCover to fight between themselves over issues that may be important to them, but which are not important to Mr Byrne.

[34] Through no particular fault of his own Mr Byrne has been caught up in proceedings by counter-claim instituted by TJH. Those issues include the five questions which I have listed above. Those questions are made contingent on Mr Byrne obtaining judgment against PRQ and TJH. If he fails against both defendants then the questions are academic. If he succeeds against only one of them, they are also academic. It is only if he succeeds against both that they become relevant. I am not persuaded that it is in the interests of justice for Mr Byrne and his legal representatives to be involved in a trial of such contingent questions. Instead, the interests of justice are served by the early trial of his claim against both defendants. If he succeeds then he will have the benefit of a judgment. In the event that he obtains a judgment against both defendants, then the five questions (or differently formulated questions) and the factual issues between the defendants and WorkCover about the nature and extent of the indemnities granted by PRQ to TJH can be litigated.

[35] Where most parties contend that neither PRQ nor TJH will be found liable to Mr Byrne, I do not consider it is in the interests of justice to have a trial of all issues which may last seven to ten days, including questions which are hypothetical. The interests of justice are best served by at least the question of whether both PRQ and TJH are liable to Mr Byrne being determined without unnecessary delay and expense.

[36] I will consider orders that the parties have formulated for a separate determination of the liability of the first defendant and the liability of the second defendant to Mr Byrne, the quantum of his claim and apportionment between defendants in respect of any damages so assessed to be the subject of a separate trial.

[37] As indicated, I intend to dismiss TJH's application for an order pursuant to r 483 and its alternative application for an order pursuant to r 171.

[38] The fact that I will make directions for the trial of Mr Byrne's claim does not mean that it necessarily should be tried. If the parties, properly advised, have formed an assessment about his prospects of succeeding against each defendant, the quantum of his damages and appropriate apportionment of liability (leaving aside questions of indemnity) then it should be possible for an agreed resolution of those issues to

be reached. If that resolution results in each defendant being held liable to pay damages to Mr Byrne then the contingent nature of Question 1 will be removed. TJH and WorkCover will be one step closer to having a question which is important to them resolved without the delay associated with waiting for Mr Byrne's case to be tried. So I encourage the parties to at least resolve Mr Byrne's claim without the necessity for a trial.