

SUPREME COURT OF QUEENSLAND

CITATION: *State of Queensland v Seltsam Pty Limited* [2019] QCA 248

PARTIES: **STATE OF QUEENSLAND**
(applicant)
v
SELTSAM PTY LIMITED
ACN 000 003 734
(first respondent)
WORKCOVER QUEENSLAND
(second respondent/not a party to the application)

FILE NO/S: Appeal No 13249 of 2018
DC No 4406 of 2017

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil)

ORIGINATING COURT: District Court at Brisbane – Unreported, 2 November 2018 (Koppenol DCJ)

DELIVERED ON: 12 November 2019

DELIVERED AT: Brisbane

HEARING DATE: 22 July 2019

JUDGES: Fraser and Morrison and McMurdo JJA

ORDERS: **1. Grant leave to appeal.**
2. Allow the appeal.
3. Set aside the orders made in the District Court on 2 November 2018 and in lieu thereof give judgment for the applicant against the first respondent in the Third Party proceedings pursuant to rule 293 of the *Uniform Civil Procedure Rules 1999* (Qld).
4. Order the first respondent to pay the applicant’s costs of and incidental to the amended application filed in the District Court on 31 October 2018 and the Third Party proceedings.
5. Order the first respondent to pay the appellant’s costs of and incidental to the application for leave to appeal and the appeal.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – INJUSTICE – GENERALLY – where the applicant, through WorkCover, accepted a claim for compensation and paid statutory compensation under the *Workers’ Compensation and*

Rehabilitation Act 2003 (Qld) to a worker who had developed mesothelioma in the course of his employment with the applicant – where WorkCover brought proceedings under s 207B of the *Workers' Compensation and Rehabilitation Act 2003 (Qld)* against the first respondent, a supplier of asbestos, to recover the compensation paid out to the worker – where the first respondent sought to join the applicant as a third party, claiming equitable contribution against it – where the applicant applied to the District Court for summary judgment on the ground there was no cause of action against it – where the application in the first instance was dismissed – where the applicant seeks leave to appeal the orders made in the District Court – where the applicant submits that the proposed appeal involves the question of whether a claim for equitable contribution can be maintained by the first respondent against the applicant for any liability which the first respondent may have to WorkCover pursuant to s 207B(7) of the *Workers' Compensation and Rehabilitation Act 2003 (Qld)* – where it is contended that the learned primary court judge erred in failing to give judgment to the applicant against the first respondent – whether the primary court judge erred in the dismissal of the application in the first instance – whether there has been a substantial injustice

Workers' Compensation and Rehabilitation Act 2003 (Qld),
s 207B

COUNSEL: G W Diehm QC, with K F Holyoak, for the applicant
R Douglas QC for the first respondent

SOLICITORS: Crown Law for the applicant
Edmondson Legal Pty Ltd for the first respondent

- [1] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the orders proposed by his Honour.
- [2] **MORRISON JA:** From 1947 Mr Stillaway worked for three employers beginning with employment by the State of Queensland, which operated the Queensland Housing Commission. Many years later he claimed to have been exposed to asbestos dust and to have developed mesothelioma. He claimed compensation from the second respondent in the proceedings, WorkCover Queensland. WorkCover accepted the claim and paid statutory compensation under the *Workers' Compensation and Rehabilitation Act 2003 (Qld)*.¹
- [3] WorkCover then brought proceedings under s 207B of the *WCRA*, against Seltsam Pty Ltd, a supplier of the asbestos. Those proceedings are to recover the compensation paid out. Seltsam then sought to join the State of Queensland as a third party, claiming equitable contribution against it.

¹ In these reasons I will refer to the Act as *WCRA*.

- [4] The State applied to the District Court for summary judgment on the ground there was no cause of action against it. That application was dismissed. The State now seeks leave to appeal under s 118(3) of the *District Court of Queensland Act 1967* (Qld).
- [5] At the heart of the application to this Court is the question: can a claim for equitable contribution be maintained by Seltsam against the State of Queensland for any liability which Seltsam may have to WorkCover pursuant to s 207B(7) of the *WCRA*.²

The statutory provision

- [6] The provisions of 207B of the *WCRA*, and in particular s 207B(7) as it was at the relevant time, are central to the claim for equitable contribution. They relevantly provide:

“207B Insurer’s charge on damages for compensation paid

- (1) This section applies to
 - (a) an injury sustained by a worker in circumstances creating –
 - (i) an entitlement to compensation; and
 - (ii) a legal liability in the worker’s employer, or other person, to pay damages for the injury, independently of this Act; and
 - (b) damages that an employer is not indemnified against under this Act.
- (2) An amount paid as compensation to a person for an injury, to which there is an entitlement to payment of damages at a time or for a period before the person becomes entitled to payment of damages by an employer or another person, is a first charge on any amount of damages recovered by the person to the extent of the amount paid as compensation to the person.
- ...
- (7) If a person who has received compensation has not recovered, or taken proceedings to recover, damages for the injury from another person, other than the worker’s employer –
 - (a) the insurer is entitled to be indemnified for the amount of the compensation by the other person to the extent of that person’s liability for the damages, so far as the amount of damages payable for the injury by that person extends; and
 - (b) to that end, the insurer is subrogated to the rights of the person for the injury.

² All references to s 207B of the *WCRA* are to that section at the time of the compensation payout in 2012 unless otherwise stated.

- (8) Payment made as indemnity under subsection (7), to the extent of the payment, satisfies the person’s liability on a judgment for damages for the injury.”

[7] Section 207B(7) is applicable here as the worker (Mr Stillaway) received compensation but did not take proceedings to recover damages from “another person, other than the worker’s employer”.

The pleaded claims

[8] The claim brought by WorkCover seeks \$387,446 “pursuant to [WorkCover’s] statutory entitlement to indemnity under section 207B(8)³ of the *Workers’ Compensation and Rehabilitation Act* 2003 (Qld) in respect of compensation paid by [WorkCover] to [Mr Stillaway] for personal injuries caused by the negligence of [Seltsam]”.⁴

[9] The statement of claim pleads that Mr Stillaway developed mesothelioma as a consequence of inhaling asbestos, and that asbestos came from products manufactured and supplied by Seltsam.⁵ The statement of claim goes on to plead that Seltsam owed Mr Stillaway a duty of care and it negligently injured Mr Stillaway. The negligence includes failing to adequately warn of the dangers of asbestos, failing to remove the asbestos, and failing to take reasonable precautions to prevent inhalation.⁶ It goes on to plead that Mr Stillaway made an application for compensation, which was accepted and compensation was paid.⁷ It also pleaded that Mr Stillaway had not taken proceedings against Seltsam in order to recover damages in respect of his injury.⁸

[10] On that basis WorkCover claimed \$387,446 (the amount of compensation paid out) pursuant to s 207B(a) of the *WCRA*.

[11] When the State of Queensland was joined contribution was initially claimed under s 6C of the *Law Reform Act* 1995. That claim was then amended and, in the form in which it stood when the matter was heard by the learned primary judge, contribution was claimed “to the extent of fifty percent or such lesser sum as may be found by the Court to be just and equitable, in respect of any sum which [WorkCover] may recover against [Seltsam] ... having regard to the responsibility of [the State of Queensland] for such sum on the ground that the negligence of the Queensland Housing Commission caused or contributed to the damage ...”.⁹

[12] The third party pleading recites the proceedings between WorkCover and Seltsam and then pleads:¹⁰

“In [the] event that Seltsam is liable to WorkCover, Seltsam claims contribution from the State of Queensland in respect of such sum which WorkCover may recover against the Seltsam, together with costs and interest, on account of the matters pleaded below.”

³ Referring to the current version s 207B(8) of the *WCRA*, which was formerly s 207B(7).

⁴ Appeal Book (AB) 25.

⁵ Statement of Claim, paras 1-9, AB 27-28.

⁶ Statement of claim paras 10-11.

⁷ Statement of Claim paras 14-15.

⁸ Statement of Claim, para 12.

⁹ AB 54.

¹⁰ Paragraph 8, AB 57.

- [13] The “matters pleaded below” include paragraphs 9A and 10 of the third party pleading which contend:
- (a) The Queensland Housing Commission owed Mr Stillaway a non-delegable duty of care to take reasonable care to avoid exposing him to unnecessary risk of injury;
 - (b) Mr Stillaway’s injury was caused or contributed to by a breach of the Queensland Housing Commission’s duty, which is then specified to include 13 grounds of breaches such as failure to warn, failure to adequately research, failure to provide protective equipment and failure to remove the asbestos.
- [14] Paragraphs 11 and 11A then plead the basis upon which Seltsam contends that the State of Queensland is liable to contribute to any judgment against Seltsam in favour of WorkCover:¹¹

“11 In the premises pleaded above, QHC, or in turn the State of Queensland, would, if sued by the Worker, have been liable as a tortfeasor in respect of any damage suffered by the Worker.

11A. Any moneys payable by Seltsam to WorkCover upon the claim would constitute a benefit to the State of Queensland in respect of which, in equity, there was relief of a common burden as between Seltsam and the State of Queensland, on account of them being jointly and severally liable in respect of the damages to which the Worker was otherwise entitled.”

- [15] The State of Queensland’s defence pleads that Workcover’s claim against Seltsam is a statutory cause of action pursuant to s 207B(7) of the *WCRA*, not a claim for damages, the cause of action independent of that of Mr Stillaway and a cause of action in which Seltsam’s liability is only an ingredient of the statutory right of indemnity.¹² It goes on to plead that the alleged liability of the State of Queensland to Mr Stillaway in respect of damages to Mr Stillaway “is not a coordinate liability or a coordinate liability of the same nature and the same extent to require equity’s intervention for equitable contribution as a matter of law”.¹³ The defence then gave a particularised denial of paragraph 11A of the third party statement of claim.

Accepted principles of law

- [16] Seltsam rightly accepted that the following principles reflect the established law in respect of the nature of the right given to WorkCover under s 207B of the *WCRA*:
- (a) the policy of a provision such as s 207B is to ensure that “an employer who paid statutory compensation to an injured employee or, in the case of his death, to his dependants, where the injury or death, though occurring in the course of employment, was caused by the wrongful act or omission of another person, was to be entitled to be indemnified against the payment of that compensation by that other person”;¹⁴

¹¹ AB 59. In this part of the pleading QHC means the Queensland Housing Commission, and “worker” means Mr Stillaway.

¹² Para 7 AB 69.

¹³ Para 8, AB 70.

¹⁴ *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321 at 326; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 207 CLR 520, 527, [2001] HCA 53 [13].

- (b) the claim to enforce the entitlement to indemnity is not a claim in tort, rather it is a cause of action created by statute for indemnity against the person liable to pay damages to another;¹⁵
- (c) the liability of such a s 207B defendant is a “notional liability at common law ... for pecuniary and non-pecuniary loss ... having regard to limitations on the liability of the wrongdoer *to the person* who has received compensation”;¹⁶
- (d) the entitlement under s 207B(7) of the *WCRA* is not a claim for damages, but a cause of action created by statute for indemnity against a person liable to pay damages to another; the wrongdoer’s liability is an ingredient of the statutory right;¹⁷
- (e) the statutory right of indemnity conferred by s 207B(7) upon the insurer who has paid the compensation (WorkCover) is not to be equated with the cause of action which the worker would have had against the wrongdoer; s 207B(7) creates a cause of action separate to that vested in the worker;¹⁸
- (f) this is so, notwithstanding the fact that it is an ingredient of the statutory right that the person from whom the indemnity is sought was liable to pay damages to the worker;¹⁹ the action is merely brought to recover the statutory indemnity, and although proof of neglect or default in the s 207B action is necessary in order to claim the indemnity, the action is not brought in respect of that neglect or default;²⁰
- (g) the right to indemnity is not based upon the default of the person alleged to be liable;²¹ “he derives his right to make a claim against the defendants, not because of their act or a default, but because the Act ... has imposed a liability upon them to indemnify him if he has had to pay compensation to his injured workman by reason of that neglect or default ...”;²²
- (h) a claim under s 207B(7) is not one for, or including, damages in respect of personal injury;²³
- (i) the relevant time of the assessment of the wrongdoer’s liability, as an ingredient of the statutory right, is the time of the occurrence of the compensable injury, but the statutory right “does not require the continuance of persistence of the liability”;²⁴
- (j) section 207B(7)(a) is an “acknowledgment of the independence of the cause of action vested in the insurer by that provision from that of the person to whom the insurer has paid compensation, in this case the worker. It is the

¹⁵ *Victorian WorkCover Authority v Esso Australia Ltd* at [14], referring to *Tuckwood v Rotherham Corporation* [1921] 1 KB 526 at 540.

¹⁶ *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420; [2010] HCA 34 at [26].

¹⁷ *Amaca* at [53].

¹⁸ *Amaca* at [14], [19] and [53]; *WorkCover Queensland v Seltsam Pty Ltd* (2001) 53 NSWLR 518.

¹⁹ *Victorian WorkCover Authority v Esso Australia Ltd* at [14].

²⁰ *Victorian WorkCover Authority v Esso Australia Ltd* at [14], referring to *Tuckwood v Mayor of Rotherham* at 540.

²¹ *Ex parte Workers’ Compensation Board of Queensland* [1983] 1 Qd R 450 at 458.

²² *Ex parte Workers’ Compensation Board of Queensland*, adopting *Tuckwood v Mayor of Rotherham*, per Atkin LJ at 538, 540.

²³ *Ex parte Workers’ Compensation Board of Queensland* at 459.

²⁴ *Tickle Industries Pty Ltd v Hann* at 333.

independence of this cause of action from that of the worker that ... allowed the insurer to pursue an indemnity following the death of the worker. It is also why a right of indemnity exists even when the cause of action of the worker is time-barred under the relevant statute of limitations”;²⁵ and

- (k) the cause of action under s 207B(7) does not accrue until the payment of compensation is made, but then accrues on each occasion that a payment of compensation is made.²⁶

[17] WorkCover’s claim against Seltsam under s 207B(7) is not tortious in character, nor is it a claim for damages or a subrogation claim.²⁷ It is not a claim derivative of any claim of the worker.²⁸ Rather, as was submitted by the State,²⁹ a claim under s 207B(7) is a *sui generis* cause of action for a statutory indemnity, inhering in WorkCover and to be pursued in its name, in which the common law liability of the person to the worker is a statutory element, but it is not in respect of the acts or omissions in that liability.

Discussion

[18] The principles applicable to equitable contribution are set out in *HIH Claims Support Limited v Insurance Australia Limited*:³⁰

- (a) persons who are under coordinate liabilities to make good the one loss must share the burden pro rata;³¹
- (b) equitable contribution may exist when the obligors are severally bound by different instruments in respect of the same liability;³²
- (c) it is possible to have a common obligation where the obligation of each of two obligors has a different source such as statute and contract, provided the obligations can be characterised as of the same nature and to the same extent;³³
- (d) equitable contribution does not apply between a liability which is primary, such as a liability in tort, delict or contract, and a liability which is generally secondary, such as the liability of an indemnity insurer to an injured party;³⁴
- (e) contribution is a two-way exercise; there is no contribution from one without contribution from the other;³⁵
- (f) the equity to seek contribution arises because the exercise of the rights of the obligee or creditor ought not to disadvantage some of those bearing a common burden; an equity does not arise merely because all of the obligors derive a benefit from a payment by one or more of them; the preferred expression is the wider term coordinate liabilities; an equity is not enlivened

²⁵ *WorkCover Queensland v Amaca Pty Ltd* at [19].

²⁶ *Ex parte Workers’ Compensation Board of Queensland* [1983] 1 Qd R 450, at 460.

²⁷ *Amaca* at [15]-[19].

²⁸ *Ex parte Workers’ Compensation Board of Queensland* at 458-459.

²⁹ Appellant’s outline, paragraph 12.

³⁰ (2011) 244 CLR 72 at [36]-[47].

³¹ *HIH* at [36].

³² *HIH* at [37].

³³ *HIH* at [39].

³⁴ *HIH* at [40].

³⁵ *HIH* at [41].

merely because the claimant's payment operates to the financial benefit or relief of the other party; without a common legal burden or coordinate liability, no equity of contribution arises;³⁶ and

- (g) the proposition that equity looks to substance rather than form cannot be invoked to depart from or modify the requirement that equity only intervenes if there is coordinate liability in respect of the one loss.³⁷
- [19] In my view, there are a number of reasons why Seltsam's claim to equitable contribution cannot succeed.
- [20] First, WorkCover pursues a statutory right of action against Seltsam to recover compensation payments made to a worker. WorkCover cannot bring that claim against the State of Queensland because the statutory right is limited to recovery from wrongdoers other than the employer.
- [21] Senior Counsel for Seltsam accepted that the State could not be made liable for the same character of payment, i.e. the claim to recover the compensation.³⁸ The contention was, however, that one needed to go a further step and recognize that the only basis upon which WorkCover enjoys that right of action was because the worker made a claim for statutory compensation instead of taking some other course, such as suing the wrongdoer. The State, it was said, was liable to the worker for damages at common law, for negligence. Unless Seltsam could claim equitable contribution from the State one wrongdoer would be entirely burdened with the liability for damages.
- [22] The foundation of the claim was expressed during oral argument in these terms:³⁹
- “The contribution sought in equity would be founded on the fact that ... Seltsam, having been found liable because ... it was a wrongdoer in respect of Mr Stillaway, it is entitled to ... prove that the State was also liable to Mr Stillaway ... for common law damages also”
- [23] However, that confuses and conflates a claim for damages at common law and the statutory claim available to WorkCover under s 207B. Seltsam's liability to WorkCover is derived solely from the statutory right to recover the compensation paid out. It is not a claim for damages, much less a claim based in tort. WorkCover's claim is to recover the compensation paid, whereas the State's liability (if any) would be for common law damages.
- [24] That the extent of recovery by WorkCover under its s 207B(7) claim might be adjusted under s 207B(7)(a) by reference to what the common law damages might be, does not alter the fundamental fact that WorkCover's claim is one to which the State (as employer) could never have been made liable.
- [25] Secondly, the pleaded basis for the contribution is that both the State and Seltsam are liable to the **worker**, not WorkCover: paragraphs 11 and 11A of the Third Party Statement of Claim, see paragraph [14] above.⁴⁰ Of course that had to be so, as

³⁶ *HHH* at [42]-[46].

³⁷ *HHH* at [47].

³⁸ First respondent's outline paragraph 20, appeal transcript T1-4 line 40.

³⁹ Transcript 1-8 lines 33-39.

⁴⁰ AB 59.

Seltsam accepted that the State could not be made liable for the s 207B(7) claim. But that serves to emphasize that there is no coordinate liability, and no common burden.

- [26] Thirdly, the lack of mutuality is demonstrated by the fact any payment of damages by the State would not discharge the obligation under s 207B(7), which is a claim that cannot be brought against the employer. In *Burke v LFOT Pty Ltd*⁴¹ McHugh J referred to the nature of the common obligation necessary to found equitable contribution, noting that it must be such that discharge by one party “constitutes a benefit to the other or others which, in fairness, the law cannot countenance them keeping”. McHugh J went on:⁴²

“... An order of contribution prevents the injustice that would otherwise flow to the plaintiff by the defendant being enriched at the plaintiffs expense in circumstances where they have a common obligation **to meet the liability which the plaintiff [for contribution] has met** or will have to meet.”

- [27] Here the discharge by Seltsam does not benefit the State, which could never be made liable for the s 207B(7) claim.
- [28] Fourthly, the result of Seltsam’s contention would be to compel a result contrary to that for which the statute provides. Section 207B(7) of the WCRA provides an avenue of recovery against persons who are **not** the employer. In other words, the charge given to WorkCover does not apply to the employer who is indemnified under the WCRA. As was said in *Tickle Industries Pty Ltd v Hann*,⁴³ and restated in *WorkCover (Qld) v Amaca Pty Ltd*:⁴⁴

“[A]n employer, or insurer, as the case may be, who paid compensation for a worker (or his or her dependants) for injury (or death) caused by the wrongful act or omission of another was entitled to be indemnified against the payment of that compensation **by that wrongdoer**.”

- [29] Here the insurer cannot sue the State for indemnity in respect of the compensation it paid yet the claim for equitable contribution made here by Seltsam would achieve that result. It is a result for which the statute does not provide. Where that is so there is authority that the remedy of equitable contribution will be denied.⁴⁵
- [30] For these reasons the third party claim against the State of Queensland for equitable contribution should have been dismissed.
- [31] I would propose the following orders:
1. Grant leave to appeal.
 2. Allow the appeal.

⁴¹ (2002) 209 CLR 282 at [41].

⁴² *Burke v LFOT Pty Ltd* at [38], emphasis added; adopted in *Lavin v Toppi* (2015) 254 CLR 459, at [41].

⁴³ (1974) 130 CLR 321 at 326-327.

⁴⁴ *Amaca* at [27]; emphasis added.

⁴⁵ *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at [66], [93].

3. Set aside the orders made in the District Court on 2 November 2018 and in lieu thereof give judgment for the applicant against the first respondent in the Third Party proceedings pursuant to rule 293 of the *Uniform Civil Procedure Rules* 1999 (Qld).
4. Order the first respondent to pay the applicant's costs of and incidental to the amended application filed in the District Court on 31 October 2018 and the Third Party proceedings.
5. Order the first respondent to pay the appellant's costs of and incidental to the application for leave to appeal and the appeal.

[32] **McMURDO JA:** I agree with Morrison JA.