# DISTRICT COURT OF QUEENSLAND

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| CITATION: | *Australian Building Insurance Services Pty Ltd v CGU Insurance Limited* [2018] QDC 167 |
| PARTIES: | **Australian Building Insurance Services Pty Ltd** (plaintiff/ respondent)<br>**v**<br>**CGU Insurance Limited** (defendant/ applicant ) |
| FILE NO/S: | BD4368/17 |
| DIVISION: | Civil |
| PROCEEDING: | Application under r 380 *Uniform Civil Procedure Rules* |
| DELIVERED: | 8 August 2018, Ex tempore |
| HEARING DATE: | 08 August 2018 |
| DELIVERED AT: | Brisbane |
| JUDGE: | Horneman-Wren SC DCJ |
| ORDER: | **1. The application is dismissed.**<br>**2. The applicant is to pay the respondent's costs of and incidental to the application assessed on the indemnity basis.** |
| CATCHWORDS: | CIVIL PROCEDURE – PLEADINGS – APPLICATION TO AMEND DEFENCE AFTER REQUEST FOR TRIAL DATE – where application brought two days prior to trial – where applicant by seeking amendment posits a position inconsistent with that taken in related proceeding before the Supreme Court – where amendment would require considerable re-pleading – whether grounds for allowing the amendment are established.<br>CIVIL PROCEDURE – APPLICATION – COSTS – whether unsuccessful application ought to attract a costs order on the indemnity basis. |
| COUNSEL: | P Travis for the plaintiff/ respondent<br>A Harding for the defendant/ applicant |
| SOLICITORS: | Axia Litigation Lawyers for the plaintiff/ respondent<br>MCK Lawyers for the defendant/ applicant |

[1] This is an application made under rule 380 of the Uniform Civil Procedure Rules to amend a defence after a request for trial date has been signed. The trial of this matter is, in fact, listed to be heard on Friday, the 10th of August. That is in two

days' time. The defendant, in its application and in the submissions made in respect of it, contends that the amendments ought be allowed because, in some respects, they simply make explicit that which the defendant is already able to argue at the trial on the present state of the pleadings. Whether that is so is a matter for the trial Judge but insofar as the defendant seeks to make explicit certain matters with reference to rule 149(1)(c) of the Uniform Civil Procedure Rules, an amendment will not be necessary to the extent that it is otherwise presently able to argue those matters as it asserts.

[2] Central to the defendant's application is amending the defence in a way which would permit it to assert in the proceedings that the amounts claimed by the plaintiff, which I shall simply refer to as invoices, do not arise under the Preferred Supplier Agreement, which was assigned to the plaintiff by another entity; an assignment which was consented to by the defendant. Rather, the defendant seeks to assert that the liability under those invoices arises under Service Orders, themselves a separate contractual arrangement arising in respect of each request for service supply made under the Preferred Supplier Agreement. Those service orders are provided for in clause 6 of the Preferred Supplier Agreement.

[3] The procedure for the making of a Service Order under subclause 6.1 subparagraphs (a) and (b) seems to establish that the offer may be made by way of a request from CGU for the supply of services and that there will be a deemed acceptance of the offer upon which a binding Service Order will be formed by performance of services by the plaintiff as requested by CGU under the request for supply. That is, acceptance by performance. Clause 9 of the Preferred Supplier Agreement provides for fees and payment.

[4] It is conceded by CGU, in the submissions made in support of the application, that CGU consented to the assignment of the rights and obligations under the Preferred Supplier Agreement; but not any Service Orders. Without determining the matter, as it is not a matter for me, but it is relevant to the issue as to whether amendment ought be allowed, it would seem that the assignment of the rights and obligations under the Preferred Supplier Agreement would extend to the rights and obligations under any Service Orders made or entered into thereunder, because it is only through the Preferred Supplier Agreement that any right to enter into a Service Order arises, or any obligation to pay for services provided under such order is created. That is a matter which, in my view, weighs against the granting of the application.

[5] More significantly, however, is that in separate proceedings brought in the Supreme Court of Queensland as against a third party, which assigned its rights under the Preferred Supplier Agreement to the plaintiff in these proceedings, CGU was sought to be joined as a party. CGU resisted that application on the basis that it did not contest that a resolution of the issue as to the validity of the assignment of the Preferred Supplier Agreement would resolve the issue as to whether it was liable to pay the plaintiff in these proceedings, who was the first defendant in those proceedings, or the third party entity, who was the plaintiff in those proceedings.

[6] It had been raised by Mr Travis of counsel, who appeared for the first defendant in those proceedings, who is the plaintiff here, that CGU ought be joined because, otherwise, there would be a need for the validity of the assignment to be proven in two separate proceedings. That submission by Mr Travis was followed by

submissions made on that issue by both Ms Vass, who appeared for the plaintiff in those proceedings, and Ms Stoker, who appeared as counsel for CGU. Ms Vass had submitted to Peter Lyons J that there was no utility in joining CGU in those proceedings. Ms Vass submitted in respect of the issue of the need to prove separately against CGU the validity of the assignment of the Preferred Supplier Agreement that any issue concerning CGU would fall away after the resolution of the facts in dispute in the matter in the Supreme Court.

[7] Ms Vass was asked by his Honour whether her position was "that, essentially, you say that if the defendant succeeds on the assignment against you, CGU is unlikely to separately allege the assignment's ineffective?" Ms Vass answered in the affirmative. His Honour said "if the defendant fails on the assignment and it can't succeed, it's unlikely it'll succeed against CGU." Ms Vass again answered in the affirmative. At page 1-34 between lines 25 and 30 it is made clear that the assignment being discussed was the assignment of the Preferred Supplier Agreement.

Following those submissions having been made by Ms Vass, Ms Stoker for CGU, in resisting the application to join her client, stated the position of CGU to be a "practical one". Ms Stoker observed that if CGU continued in a way that was planned prior to the application for joinder, if the court were to find for the plaintiff on its argument in relation to the effect of the assignment or, as she put it, the lack of the effective assignment, it was CGU's view that if the court were to find for the plaintiff, then CGU would have done no wrong in the way that it had currently directed the payment. That is, that it would have correctly paid the correct party, being the plaintiff in those proceedings, not the plaintiff in these proceedings. As to the issue of satisfaction of the debt, if it were found to the contrary, that is that the payments ought to have been made to the plaintiff here rather than the plaintiff in the Supreme Court proceedings, Ms Stoker observed that payment by that plaintiff to Mr Travis's client would satisfy the debt.

[8] The residual issue, however, was whether or not CGU would remain liable in circumstances that the debt was unpaid and, therefore, unsatisfied. In respect of those matters Ms Stoker told the court CGU had always said that it wanted to abide by whatever the court ruled on the substantive issue between the parties. That substantive issue necessarily included the validity of the assignment of the Preferred Supplier Agreement to the plaintiff in this case, and whether the amounts payable under invoices were properly to be paid to Mr Travis's client. Ms Stoker told the court that if for some reason the plaintiff in those proceedings was unable to provide the funds to Mr Travis's client in accordance with the court order:

> *Then CGU would understand that it had to step in and pay that difference, but subject to its right to recover from the plaintiff.*

[9] His Honour then said:

> *Yes. Let's just put this really clearly if I can. The plaintiff – sorry – the first defendant says the right to payment for – let's call them invoices that haven't been paid prior to the settlement of the sale of the contract – the right to payment on those invoices went to the first defendant. It says it was assigned to the first defendant. It sues from – it sues the plaintiff in*

*part on the basis that moneys payable to the first defendant by CGU, in fact, went to the plaintiff.*

Ms Stoker:

*Yes.*

His Honour:

*It puts its claim in a couple of ways...and it also has a contractual basis. So supposing it succeeds on the validity of the assignment, meaning that the money that the plaintiff received should've been paid to it, the risk for CGU is if it accepts that outcome that the plaintiff might not have the funds to reimburse the defendant, and then what you're telling me – this is an important thing to say – nevertheless, CGU will accept this assignment was valid. It would then have to pay the first defendant and, as you say, you would have a right to recover from the – it would assert a right to recover from the plaintiff moneys already paid on the same invoices.*

Ms Stoker:

*I appreciate what your Honour summarises is something of considerable gravity and that those are my instructions is reflected in the correspondence.*

His Honour:

*That's all right. I don't – I just want to make sure we're absolutely clear.*

Just shortly after that exchange Ms Stoker submitted:

*With that in mind, I submit that there really is no role for CGU to play here and that were CGU required to participate in the whole of the trial, it would have very little to do in way of contribution of evidence in a way of participation.*

[10] In my view, considering those exchanges between counsel for all the parties and his Honour in that matter, and the resolution of that application by CGU not being joined in those proceedings, the position which CGU seeks to take by its amendment here is to eschew everything that was said in the submissions it advanced before his Honour to resist joinder in that case. Moreover, the position which it asserts now, in light of what was understood by its counsel in that matter to be the issues to be resolved before the Supreme Court, it would have needed to have asserted its desire to be a party to advance the very arguments which it knew the plaintiff was not going to assert concerning the proper source of the entitlement to payments being under the Services Orders, not the Preferred Supplier Agreement. In light of those matters and the proximity of the trial date and the fact that those matters would require considerable re-pleading as to the proper construction of the contracts, beyond that which Mr Harding asserts is available to the defendant already on the current state of the pleadings, in my view, grounds for allowing an amendment at this late stage have not been established, and the amendment application should be refused.

[11] Mr Travis on behalf of the successful respondent plaintiff seeks costs on an indemnity basis. In some fairly detailed submissions he has set out the basis for that. Much of the application was not resolved in the sense that Mr Harding made a very fair concession at the outset of the submissions he made on behalf of the applicant/ defendant that if he were to fail on the point that he has failed on, then that would dispose of the application. There is much merit in the submissions,

however, that Mr Travis makes in respect of other aspects of the application concerning deemed admissions and matters of that kind. Particularly, that his instructing solicitor drew to the attention, very fairly given that the defendant's solicitors are interstate, the pleading rules in this state under the Uniform Civil Procedure Rules in relation to what might have been deemed admissions, or which are asserted by the plaintiff as deemed admissions in the defence, which is ultimately a matter for the trial judge.

[12] That occurred very shortly after the filing of the defence and there were two pieces of correspondence, at least, and one phone call in respect of those matters. No amendment was sought until this application was brought in the shadow of the impending trial. Those are matters which themselves favour an award of indemnity costs.

[13] Moreover, however, is that this application having been filed, Mr Travis's instructing solicitors wrote to the solicitors for the applicant on the 31st of July 2018. That letter addressed all of the issues which were to be ventilated and were ventilated in the written submissions by the respondent, but particularly, insofar as the matter has been resolved on the limited basis that it has, upon the fair concession made by Mr Harding, the very matters upon which the matter has been resolved against the applicant, that is, the inconsistency with the position taken, or sought to be taken, in these proceedings as compared with that taken in the Supreme Court proceedings. In my view, it has been demonstrated this is an appropriate matter in which to award indemnity costs pursuant to rule 703 and apart from the usual rule in relation to costs.

[14] So the orders will be that the application is dismissed. The defendant is to pay the plaintiff's costs of and incidental to the application assessed on an indemnity basis.