IN THE SUPREME COURT OF QUEENSLAND Writ No. 1058 of 1990

Brisbane

Before the Hon. Mr Justice Mackenzie

[re: Bambora P/L v Sun Alliance Aust Ltd]

BETWEEN:

BAMBORA PTY LTD (IN LIQUIDATION) Plaintiff

AND:

SUN ALLIANCE AUSTRALIA LIMITED Defendant

JUDGMENT - MACKENZIE J.

Judgment delivered 3 June 1999

CATCHWORDS:

PRACTICE AND PROCEDURE - Statement of Claim - whether amendment could be made pursuant to O 32 - whether proposed amendment raised a separate cause of action.

Supreme Court Rules O 32 rr 1, 2, 5

Gould v Skinner (1983) 1 Qd.R 377

Wilkinson v Rockdril Contractors Pty Ltd (1997) 1 Qd.R 560

Pianta v BHP Australia Coal Limited (1996) 1 Qd.R 65

Counsel: Mr R Lilley for the plaintiff
Mr J.S. Douglas QC for the defendant
Solicitors: Deacons Graham & James for the plaintiff
Quinlan Miller & Treston for the defendant
Hearing date: 26 May 1999

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1 This is an application to amend a statement of claim in an action which has been on foot since 1990. The underlying facts are the following. On 16 October 1989 fire damage was caused to a night-club in Rockhampton in suspicious circumstances. On 31 October 1989 the plaintiff made a claim under an insurance policy with the respondent in respect of the fire.

2 Then on 10 November 1989 a further incident involving an incendiary device occurred at the night-club causing further damage. On 17 November 1989 the applicant made a claim in respect of that explosion. When about nine months had passed without the claims being paid the writ was issued. The endorsement of the writ seeks damages for breach of contract of indemnity entered into between the plaintiff and the defendant on 11 July 1989. When the statement of claim was delivered on 26 July 1990, the pleading referred only to the incident on 10 November 1989 describing it as an incident where the premises were fire bombed and severely damaged by fire.

3 The pleadings thereafter referred only to the incident of 10 November 1989 and no explanation has been proffered for the omission to include the incident of 16 October 1989 in them. On one occasion a version of the

defence referred to the incident of 16 October 1989 inadvertently and an amendment substituting 10 November 1989 for it was delivered shortly afterwards. Even that did not result in any attempt to include the incident of 16 October 1989 in the pleadings. The amendment which is controversial seeks to include a paragraph alleging that on 16 October 1989 the premises were damaged by fire. There is an uncontroversial amendment sought claiming interest pursuant to the *Insurance Contracts Act*. That is equally applicable to either incident and was not objected to.

4 The matter has been listed for trial and the amendment is opposed on the ground that the respondent/defendant has prepared for trial on the basis that only the incident of 10 November 1989 is in issue.

5 It is true that in correspondence the two incidents were habitually discussed in the one letter. However, the headings refer to the incidents by separate claim numbers. The applicant submits that the proposed amendment represents no change to the plaintiff's cause of action but a change in the particulars of the claim. The cause of action, it is submitted, was always a claim for damages for breach of a policy indemnity.

6 The respondent/defendant submits that while the endorsement of the writ was framed in that way, the statement of claim which limited the claim to the incident on 10 November 1989 superseded the broader claim on the writ (*Gould v Skinner* (1983) 1 Qd.R 377 at 379 - 380; *Wilkinson v Rockdril Contractors Pty Ltd* (1997) 1 Qd.R 560, 565 - 6).

7 It was submitted that notwithstanding the apparent breadth of the general endorsement on the writ of summons the endorsement was superseded by the claim which pleaded expressly loss and damage suffered as a consequence of the fire bombing and fire which occurred on 10 November 1989. It was submitted that the defendant had conducted the action on that basis and that the proposed amendment raised a new cause of action, a claim for indemnity for loss and

damage suffered as a consequence of the fire on 16 October 1989. The limitation period for bringing that action had expired. It was submitted that leave under O 32 was required. It was submitted that while sub-rules 2 and 5 of O 32 r 1 permitted an amendment to be made to add a new cause of action out of time, it could only be done if the new cause of action arose out of the same facts or substantially the same facts as the original cause of action. It was submitted that the two incidents were separate and distinct and therefore the conditions prescribed in O 32 had not been complied with.

8 While conceding that the nature of the cause of action now sought to be added was also a claim for indemnity under a policy of insurance it was submitted that the cause of action arose out of completely different facts, an incident alleged to have occurred on 16 October 1989. It was submitted that the claim sought to be introduced by the amendment was a completely separate and independent claim from that previously pleaded.

9 Reliance was placed on *Pianta v BHP Australia Coal Limited* (1996) 1 Qd.R 65, 68 where an analysis of the circumstances arising in that case led to refusal of an appeal against the primary judge's refusal to allow an amendment. By analogy, the submission was that in the present case, while the two causes of action arose from alleged breaches of the same contract of indemnity, the lawfulness of the failure to pay the claims depended on analysis of two separate and distinct incidents. (This is in my view an inescapable conclusion, since the outcome in respect of each incident may differ according to the evidence in respect of the respective cases.)

10 On behalf of the applicant/plaintiff it was submitted that the claim arose out of the substantially the same facts because the parties were the same, the property insured was the same, the policy was the same, the refusal to pay under the contract was the same and that the damage alleged was the same. The last-mentioned fact relies on an

analysis of the value of damage alleged to have been incurred in the two incidents. It was submitted that the defendant had treated the matter as one claim, that the defendant's attitude to payment was dependant to the same police investigations and that the defendant's loss adjuster assessed the loss from both claims as if there was only one claim.

11 In my view the proper analysis of the situation leads to the conclusion that the causes of action do not arise out of the same facts or substantially the same facts. Order 32 r 1 cannot then be invoked to allow amendment out of time. I am also satisfied that, for reasons which are not explained, the plaintiff has until now conducted the action on the basis that the incident in respect of which it was seeking to enforce the insurance contract was that constituted by an explosion and fire on 10 November 1989, and there are unambiguous indications in the pleadings that the defendant did not understand the action to be concerned with the earlier incident. The statement of claim has consistently restricted the ambit of the more general claim endorsed on the writ and has superseded that claim. Accordingly the summons is dismissed with costs to be taxed.