SUPREME COURT OF QUEENSLAND

CITATION:	*Suncorp Metway Ins Ltd v Clonmel P/L & Ors* [2000] QSC 135
PARTIES:	**SUNCORP METWAY INSURANCE LIMITED (ACN 075 695 966)** (Applicant) **v** **CLONMEL PTY LTD TRADING AS REMO CONCRETE CONSTRUCTIONS (ACN 010 071 388)** (First Respondent) **UPPER PALM INVESTMENTS PTY LTD (ACN 003 260 820)** (Second Respondent) **CENTRAL QUEENSLAND BUILDING PTY LTD (ACN 010 306 984)** (Third Respondent)
FILE NO:	2877 of 2000
DIVISION:	Trial
DELIVERED ON:	12 May 2000
DELIVERED AT:	Brisbane
HEARING DATE:	4 May 2000
JUDGE:	Muir J
ORDER	**1. That leave to deliver the Third Party Notice be refused** **2. That the Third Party Notice be struck out** **3. That the Respondents pay two-thirds of the applicant's costs of and incidental to the application, to be assessed.**
CATCHWORDS:	PRACTICE – APPLICATION TO STRIKE OUT THIRD PARTY NOTICE – application pursuant to r 171(1) UCPR, or alternatively, r 293, or on court's inherent jurisdiction – non-compliance with r 194 UCPR. CORPORATIONS LAW – LIQUIDATION – corporation de-registered – effect on office and powers of directors – effect on contract with insurer pursuant to s 601AG *Corporations Law* – whether insurer given "all information and assistance" as required under policy – whether liability to respondents was in existence at the time of de-registration. *Lord Corporation Pty Ltd v Green* (1991) 22 NSWLR 532 *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1954-1955) 92 CLR 200, contrasted *Littlewood v George Wimpey & Co Ltd & British Overseas*

Airways Corporation [1953] 2 QB 501, contrasted

Uniform Civil Procedure Rules, r 171, r 293, r 194
Corporations Law, s 594, S 601AG, s 471A, s 499(4) s 495(2)
Law Reform Act 1955 (Qld), s 6(c)

COUNSEL: R G Bain QC for the applicant
R G McDougall for the respondents

SOLICITORS: McCullough Robertson Lawyers for the applicant
Quinlan Miller & Treston solicitors for the respondent

Introductory

[1] The applicant Suncorp Metway Insurance Ltd seeks orders that the Third Party Notice directed to it by the respondents in the action and filed on 17 December 1999 be struck out. The application is brought pursuant to r 171(1) of the *Uniform Civil Procedure Rules,* alternatively pursuant to r 293 of the Rules and, in the further alternative, in reliance on the Court's inherent jurisdiction.

[2] The plaintiff in the action was injured on a construction site in April 1989. The third defendant, Clonmel Pty Ltd, was the plaintiff's employer and a subcontractor to the fifth defendant, the builder. The fourth defendant was the owner and developer of the site. The second defendant Scotpark Pty Ltd (in liquidation) was the hirer out of rigging and a rigging contractor to the fifth defendant. The plaintiff was injured when a kibble filled with concrete, being manoeuvred with a crane provided by Scotpark and operated by its driver, fell and struck him.

[3] The action was commenced on 9 April 1992. The respondents claimed contribution against Scotpark on 11 April 1996.

[4] Scotpark claimed on its policy of insurance with Suncorp. Suncorp, on 29 October 1996, wrote to the liquidator of Scotpark stating that it was prepared to extend indemnity to Scotpark and to assume the conduct of the defence on its behalf. Subject to the terms and conditions of the policy. The letter expressly drew the liquidator's attention to –

> "… condition 2(d) of the policy, which provides that it shall have full discretion in the conduct of any proceedings in connection with any claim and that 'the Insured shall give all information and assistance as SUNCORP may require in the prosecution, defence or settlement of any claims'."

[5] The letter discloses that the liquidator had provided some 20 boxes of documents in connection with the action to Suncorp's solicitors who had, after inspection, returned them with the exception of some folders required in connection with the action.

[6] In a letter dated 6 October 1999 to the former liquidator of Scotpark, the solicitors for Suncorp notified that Suncorp declined indemnity to Scotpark in respect of the claim. Like notification was given to the Australian Securities and Investment Commission by a letter of the same date. Scotpark had been deregistered on 24 June

1997 pursuant to s 574 of the *Corporations Law*. On 29 October 1999 Suncorp's solicitors withdrew as solicitors on the record for Scotpark.

[7] On 9 November 1999 it was ordered that the third, fourth and fifth defendants be given leave to bring an application for leave to issue a Third Party Notice within 21 days of 9 November. No such application for leave was made. Instead, the legal representatives of the plaintiff and the respondent agreed between themselves to extend the time within which a Third Party Notice could be delivered. The notice was delivered to the applicant on 11 December 1999. It was then thought by the respondents that the notice was issued in compliance with r 194 of the Rules. Mr McDougall, who appeared for the respondents, conceded that the there was no compliance with r 194. That concession is clearly correct. Rule 194(b)(ii) refers to an agreement by a plaintiff to an extension of time for the filing of a defence by a defendant. There was no such extension of time granted by the plaintiff.

[8] In the Third Party Notice the respondents seek a declaration that the applicant is obliged to pay to the respondents the amount that would have been payable to Scotpark under the policy but for its de-registration on 24 June 1997 by virtue of a statutory obligation to contribute pursuant to s 6(c) of the *Law Reform Act 1995* (Qld).

[9] Reliance is placed by the respondents on s 601AG of the *Corporations Law* which relevantly provides –

> "601AG Claims against Insurers of Deregistered Company
> A person may recover from the insurer of a company that is deregistered an amount that was payable to the company under the insurance contract if:
> (a) the company had a liability to the person; and
> (b) the insurance contract covered that liability immediately before deregistration."

[10] The respondents, consequent upon the concession to which I have referred, made application for leave to deliver the Third Party Notice, or alternatively, for irregularities relating to it to be waived. The application was opposed by the applicant on grounds that –

(a) any leave would be futile as, indemnity having been declined, Scotpark could have no valid claim on Suncorp under the policy;

(b) even if the contention in (a) did not succeed, s 601AG had no application as Scotpark had no liability to any of the respondents existing "immediately before deregistration" and/or which was "covered" under the policy "immediately before deregistration".

Did Scotpark cease to be covered by the policy?

[11] The policy provides that "the due observance and fulfilment by the insured of the terms, conditions … (of the policy) … shall be conditions precedent to any liability of Suncorp to make any payment under (the) policy". Condition 2(d) provides –

> "SUNCORP shall have full discretion in the conduct of any proceedings in connection with any claim and the insured shall give

all information and assistance as SUNCORP may require in the prosecution defence or settlement of any claim."

[12] It will be noted that the obligation is couched in terms of giving the information and assistance **required** by Suncorp. The material initially filed in support of the applicant's claim consisted of –

(a) Copies of correspondence between the applicant (or its solicitors) and the liquidator of Scotpark, correspondence between the applicant (or its solicitors) and the former liquidator of Scotpark and copies of correspondence between the solicitors for the applicant and former directors of Scotpark;

(b) Evidence as to what the solicitors for the applicant had advised the applicant as to lack of "cooperation" on the part of former directors of Scotpark;

(c) Expressions of opinion by the applicants' solicitors that failure on the part of the former directors of Scotpark to assist the applicant amounted to an insuperable prejudice to the applicant in and about defending the claims against Scotpark.

[13] Very little of the above material goes to the critical issue for present purposes, namely whether Scotpark has given "all information and assistance" required by Suncorp in the defence of the respondents' claims.

[14] There is evidence that the applicant, through its loss adjustors, made a number of unfruitful attempts in 1997 to obtain relevant information and assistance from two of Scotpark's directors. However any request or "requirement" by the applicant directed only to directors of Scotpark and not complied with cannot, of itself, give rise to a breach of condition 2(d) of the policy. The provision imposes an obligation on Scotpark to meet requirements imposed on it by the applicant. It does not concern the applicant's dealings with third parties. It is plain that, upon making of a winding-up order, the general powers of directors of a company come to an end: see e.g. Ford, *Principles of Corporation Law*, 6th ed (1992) para 2207 at 826. McPherson, *The Law of Company Liquidation*, 3rd ed (1987) at 172; and *Lord Corporation Pty Ltd v Green* (1991) 22 NSWLR 532 at 541-3, and *Corporations Law* ss 471A, 495(2) (Members' voluntary winding up) and 499(4) (Creditors' voluntary winding up).

[15] Section 471A now makes it plain that a director is not removed from office by the event of winding up. However, after directors' powers in relation to the affairs of a company have ceased, a request for information or a requirement directed to such directors is not a request to or requirement of the company itself. The fact that the directors may have some continuing obligations to the company based on their pre winding-up role and powers does not alter or qualify the view just expressed.

[16] The only relevant request before me was one by the solicitors for the applicant to "The liquidator Scotpark Pty Ltd (in liquidation) care of Worrell Whitehill & Co" dated 13 October 1997. The letter was responded to by Mr Worrell in a letter of 21 October 1997 in which he pointed out that he had resigned as liquidator "some time ago". In any event, the letter of 13 October could not be a request to or requirement of Scotpark as, by the date of the letter, Scotpark had been deregistered. In a letter of 22 September 1999 to one of the former directors of the applicant, the solicitors

for the applicant complained of a director's failure to provide information and assistance on request, and of attempts to contact another director of the applicant which had not met with success. It is alleged that the failure of the director to "cooperate with its adjustors and provide them with the required information constitutes a breach of condition 2(d) of the policy".

[17] For the reasons advanced above, that conclusion is erroneous. On the material before me, no breach of condition 2(d) has been established.

Application of s 601AG of the *Corporations Law*

[18] Paragraph (a) of s 601AG is couched in the past tense.

[19] Paragraph (b) is also worded in the past tense. It plainly refers to insurance cover which existed "immediately before deregistration". It seems reasonable to construe para (a) as referring also to the same time. The liability referred to in para (a) is in respect of "an amount that was payable to the company under the insurance contract".

[20] In this case Scotpark had no liability to the respondents immediately before de-registration. Their claim was one for contribution under s 6 of the *Law Reform Act*. Under that section –

> "Any tortfeasor liable in respect of that damage [damage suffered by any person as a result of a tort] may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage …".

[21] Any liability of Scotpark to the respondents arising under the *Law Reform Act* had not come into existence at the time of its deregistration: cf *Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1954-1955) 92 CLR 200 at 211 and *Littlewood v George Wimpey & Co Ltd & British Overseas Airways Corporation* [1953] 2 QB 501 at 519.

[22] For the above reasons, the respondents cannot succeed in obtaining the relief claimed in the proposed Third Party Notice, at least in the way the action is presently constituted. I thus refuse leave to deliver the Third Party Notice and order that it be struck out.

[23] I order that the respondents pay two-thirds of the applicants' costs of and incidental to the application, to be assessed. This apportionment is meant to make due allowance for the applicant's fruitless argument based on withdrawal of cover under the policy.