

SUPREME COURT OF QUEENSLAND

CITATION: *Company Solutions (Aust) Pty Limited v Keppel Cairncross Shipyard Limited (In Liquidation) & Others* [2004] QSC 379

PARTIES: **COMPANY SOLUTIONS (AUST) PTY LIMITED ACN 056 571 049**
(applicant)
v
RICHARD JOHN DENNIS and SCOTT ANGUS BLACKWOOD as liquidators of KEPPEL CAIRNCROSS SHIPYARD LIMITED (IN LIQUIDATION) ACN 059 830 287
(first respondents)
&
CGU INSURANCE LIMITED
(second respondent)

FILE NO/S: S3580 of 2002

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court

DELIVERED ON: 29 October 2004

DELIVERED AT: Brisbane

HEARING DATE: 8 June 2004

JUDGE: Douglas J

ORDER: **THAT RICHARD JOHN DENNIS AND SCOTT ANGUS BLACKWOOD AS LIQUIDATORS OF KEPPEL CAIRNCROSS SHIPYARD LIMITED (IN LIQUIDATION) ACN 059 830 287 DELIVER TO THE APPLICANT A COPY OF THE CGU PUBLIC LIABILITY INSURANCE CONTRACT BETWEEN CGU INSURANCE LIMITED AND KEPPEL CAIRNCROSS SHIPYARD LIMITED.**

CATCHWORDS: PROCEDURE - SUPREME COURT PROCEDURE - QUEENSLAND - PRACTICE UNDER RULES OF COURT - Other matters before trial - Disclosure of documents - Documents beyond those directly relevant to issues – Disclosure of insurance policy in aid of application for leave to proceed – Disclosure of insurance policy to allow party to consider whether it should continue with litigation – Disclosure in special circumstances and where the interests of justice require it – *Uniform Civil Procedure Rules* 1999 (Qld), r 223

Uniform Civil Procedure Rules 1999 rr. 211, 223

Glaister v Banwell Pty Ltd [2003] WASC 101, considered
Re Gordon Grant & Grant Pty Ltd (1982) 1 ACLC 196,
 considered

Lampson (Australia) Pty Ltd v Ahden Engineering (Aust) Pty Ltd
 [1999] 2 Qd R 252, followed

*Mercantile Mutual Custodians Pty Ltd v Village/Nine Network
 Restaurants & Bars Pty Ltd* [2001] 1 Qd R 276, 283, applied

- COUNSEL: M T O’Sullivan for the applicant Company Solutions (Aust) Pty
 Ltd
 J W Lee for the applicant Danny Pavlic
 No appearance for the first respondents
 C A Wilkins for the second respondent
- SOLICITORS: O’Mara’s Lawyers for the applicant Company Solutions (Aust)
 Pty Ltd
 Keith Scott & Associates for the applicant Danny Pavlic
 No appearance for the first respondents
 Carter Newell for the second respondent

- [1] DOUGLAS J: Mr Pavlic was employed by Company Solutions (Aust) Pty Ltd (“Company Solutions”) on 13 May 1998 when he claims to have been injured in an accident. Company Solutions was a labour hire company which had provided his services to Keppel Cairncross Shipyard Limited (“Keppel Cairncross”). That company is now in liquidation. It had been insured with CGU Insurance Ltd (“CGU”) but CGU has denied indemnity in respect of this claim.
- [2] Company Solutions was sued by Mr Pavlic for damages arising out of the accident and, on 27 November 2001, it obtained leave to proceed with its claim against Keppel Cairncross for contribution or indemnity in respect of Mr Pavlic’s claim against it on the basis that his injuries were caused by Keppel Cairncross’s negligence or breach of statutory duties. Mr Pavlic has also brought an application for leave to proceed against Keppel Cairncross in liquidation. He had not originally joined it as a party to his action and is now out of time to do so in the normal course of events.
- [3] Company Solutions obtained its leave to proceed against Keppel Cairncross without having obtained disclosure of the insurance policy with CGU. Apparently there was then no issue as to whether the policy provided the necessary cover. It now wishes to obtain disclosure of that document in order to consider whether it is worth continuing with its third party proceedings. Had it made such an application before it obtained leave to proceed there seems little doubt that disclosure would have been ordered; see *Glaister v Banwell Pty Ltd* [2003] WASC 101 at [14]. There Master Sanderson adopted the reasoning of Master Lee QC in *Re Gordon Grant & Grant Pty Ltd* (1982) 1 ACLC 196, 199 where he had held that leave to proceed was more likely to be granted where there was an insurance company standing behind the company in liquidation to pay any judgment which the plaintiff might obtain against it.

- [4] Keppel Cairncross did not appear on the application. Nevertheless, it was submitted by CGU, which was given leave to intervene, that the issue of what cover was provided by the insurance policy was not relevant to the proceedings between Company Solutions and Keppel Cairncross. The evidence disclosed that Keppel Cairncross was in possession of a copy of the policy but CGU's submission was that it was not required to be disclosed pursuant to r. 211(1) because it was not directly relevant to the allegations in issue and, therefore, no order pursuant to r. 223 for delivery or production of the policy should be made. An order by the Court under r. 223 for disclosure of a document, in addition to the normal duty under the rules to make disclosure without an order, is available only when there are special circumstances and the interests of justice require it; see r. 223(4)(a).
- [5] In this case the situation is complicated by the parallel application by Mr Pavlic for leave to proceed against Keppel Cairncross. His counsel wished to delay pursuing that application until the determination of Company Solution's application for disclosure of the insurance policy. On the basis of the reasoning in *Glaister v Banwell Pty Ltd*, however, there is every reason why disclosure should be made to Mr Pavlic of the insurance policy as it is relevant to the issue whether he should obtain leave to proceed.
- [6] After oral submissions had been concluded, therefore, I invited the parties to provide written submissions whether, if the application by Company Solutions for production of the insurance contract failed, production should nevertheless be granted as ancillary to Mr Pavlic's application against Keppel Cairncross because that company was in possession of a copy of the insurance contract.
- [7] I then received further written submissions from the parties which included submissions on the merits as to whether Mr Pavlic's application for leave to proceed should be granted. I do not propose to deal with that issue at this stage. My only concern is whether the policy should be disclosed to Mr Pavlic in aid of his application for leave to proceed. The terms of the insurance policy will be relevant to that issue. I propose to order, therefore, that the policy be disclosed to Mr Pavlic by Keppel Cairncross.
- [8] In those circumstances it is also appropriate to order that the policy be disclosed to Company Solutions. The question of the cover provided by the insurance policy is not in issue on the pleadings between it and Keppel Cairncross but it is highly important to the practical issue whether that litigation should proceed. In *Lampson (Australia) Pty Ltd v Ahden Engineering (Aust) Pty Ltd* [1999] 2 Qd R 252, 256-257 Moynihan J said:

“The test of direct relevance introduced by O. 35 r. 4 replaces the previous rule which required discovery of indirectly relevant documents which ‘might lead to a train of inquiry’; this being the test stated in *Compagnie Financiere Et Commerciale du Pacifique v Peruvian Guano Co.* Under this discovery regime an affidavit of discovery was conclusive unless the existence of other discoverable documents could be established or it could be demonstrated that documents had been excluded under a misconception, *Mulley v Manifold*. In this context O. 35 r. 14(4)(a) gives power in the circumstances there specified to order the disclosure of documents

beyond those directly relevant to the issues in the cause or in the circumstances contemplated by subr(4).” (My emphasis.)

- [9] Coincidentally that case also dealt with an application for disclosure of an insurance policy to assist one insurer to engage in a mediation knowing whether or not it could look to co-insurers for contribution. The situation here is that neither Company Solutions nor Mr Pavlic now know whether it is worth pursuing Keppel Cairncross further. It may be true that they can prosecute their claims to finality and then discover whether any judgment against Keppel Cairncross is valuable. It was also submitted that they could fund the liquidators to test whether the policy covered the company’s liability. Neither solution is commercially realistic where the parties do not know whether it is worth pursuing a claim based on the policy.
- [10] That seems to me to create special circumstances where the interests of justice require such an order and where the overriding philosophy of the rules suggests that the order would facilitate the just and expeditious resolution of the real issues in the proceedings at a minimum of expense; see r. 5. As Pincus JA said in *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd* [2001] 1 Qd R 276, 283 at [10]:
- “The former inflexible approach to applications for further discovery ... is no longer necessarily appropriate, under the current disclosure system, and because of the notions expressed in r. 5 of the *Uniform Civil Procedure Rules*. If it appeared, for example, that an order for further disclosure would be likely to ‘facilitate the just and expeditious resolution of the real issues’, that would enable and perhaps require the making of such an order.”
- [11] Where, as here, the form of the policy is relevant to the application pursued by Mr Pavlic, is of great practical relevance to Company Solutions for the further conduct of its role in the litigation, there is no doubt that the insurance policy exists and is in the possession of Keppel Cairncross, it seems to me that there are special circumstances and the interests of justice require the disclosure of the document.
- [12] Accordingly I propose to order in each application that Richard John Dennis and Scott Angus Blackwood as liquidators of Keppel Cairncross Shipyard Limited (in liquidation) ACN 059 830 287 deliver to the applicant a copy of the CGU public liability insurance contract between CGU Insurance Limited and Keppel Cairncross Shipyard Limited.
- [13] I shall hear the parties as to costs.