# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Lee v Arisaig Pty Ltd & Ors* [2005] QSC 265 |
| PARTIES: | **JAMES MICHAEL LEE**<br>**(plaintiff)**<br>**v**<br>**ARISAIG PTY LTD (ACN 010 234 009)**<br>**(first defendant)**<br>**WOODLANDS ENTERPRISES PTY LTD**<br>**(ACN 009 759 746)**<br>**(second defendant)**<br>**LUMLEY GENERAL INSURANCE LIMITED**<br>**(ACN 009 759 746)**<br>**(third party)** |
| FILE NO: | 11029 of 2001 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court |
| DELIVERED ON: | 23 September 2005 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 9 September 2005 |
| JUDGE: | Mackenzie J |
| ORDER: | **1. Application dismissed with costs to be assessed** |
| CATCHWORDS: | INSURANCE – POLICIES OF INSURANCE – CONSTRUCTION – where first defendant is electrical contractor engaged by second defendant – where plaintiff had accident whilst carrying out electrical work on second defendant's premises – where plaintiff sued first defendant and second defendant for personal injuries sustained as result of accident – where third party proceedings commenced against first defendant's insurance provider – where application made by third party pursuant to r483 UCPR for preliminary and summary determination of question arising from third party proceedings – where question to be determined related to whether second defendant entitled to indemnity as "principal" under policy between first defendant and third party – whether question can be appropriately heard before trial and summarily |

*Uniform Civil Procedure Rules* 1999 (Qld) r 483

*Australian Paper Plantations Pty Ltd v J & EM Venturoni* [2000] VSCA 71
*Burch v Shire of Yarra Ranges* (2004) 42 MVR 1
*Kavanagh v The Commonwealth* (1960) 103 CLR 547
*QBE Insurance (Aust)) Pty Ltd v SLE Worldwide Australia Pty Ltd* [2005] NSWSC 776
*Roads and Traffic Authority (NSW) v Palmer* (2003) 38 MVR 82
*Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* (2000) 23 WAR 291

COUNSEL: K Holyoak for the applicant
G W Diehm for the second defendant

SOLICITORS: Barry & Nilsson for the applicant
McInnes Wilson for the first defendant
Butler McDermott & Egan for the second defendant

[1] **MACKENZIE J:** This is an application by the third party, an insurer, pursuant to rule 483 UCPR for preliminary and summary determination of a question whether on the facts alleged against the third party, the second defendant is entitled to indemnity as "principal" under a policy between the first defendant and the third party. The particular focus is on the following provisions of the policy:

**The agreement**

> "After You have paid the premium We will indemnify You against claims for Compensation in respect of Injury or Damage happening during the Period of Insurance and caused by an Occurrence in connection with Your Business".

**Definitions**

> "You" .. means
> (a) The insured stated in the Schedule …
> (d) any principal in respect of the liability of such principal arising out of the performance by You of any contract or agreement (subject to the limitations elsewhere expressed in the Policy)".

[2] There are two proceedings, 11029/2001 which in its present form has as its parties the plaintiff, the two defendants and the third party and BS1069 of 2005, the parties to which are the plaintiff and the first defendant.

[3] The factual context of 11029/2001 is that the plaintiff was the employee of the first defendant which conducted an electrical contracting business. The second defendant conducted a poultry breeding business. On 8 December 1998 the plaintiff was using an extension ladder to perform electrical work at the premises of the

second defendant when the ladder, which had its feet on a concrete floor with sawdust and woodchip on it, and its top against a steel beam, gave way causing the plaintiff to fall 3 metres to the ground.

[4] The claim against the first defendant rests on allegations of negligence, breach of duty and breach of contract of various kinds by it as the plaintiff's employer. The claim against the second defendant rests on allegations that it was negligent and in breach of statutory duty by failing, broadly, to ensure that it was safe for the plaintiff to use the ladder at the place and in the manner in which it was used.

[5] The proceedings BS1069 of 2005 allege against the sole defendant, who is the first defendant in the earlier proceedings, that liability arises from negligence, breach of statutory duty and breach of contract particulars of which are expressed slightly differently from those in 11029 of 2001. These proceedings were not commenced until 10 February 2005.

[6] By order of Phillipides J on 6 June 2005 in 11029/2001, BS1069 of 2005 was consolidated with that action and an order giving leave to serve third party proceedings was made for the first time. A series of directions prescribing a tight timetable was made resulting in a trial date of 26 October 2005 being allocated.

[7] The application before me was filed on 1 August 2005 and adjourned on 11 August 2005 to 9 September 2005 when it was heard by me. There is no unreasonable delay by the third party in bringing the present application in the circumstances. The respondent opposes the application on two grounds. The first is that the application is premature because the issues raised by the third party can only be resolved in the context of facts as determined by the trial judge. The second is that the construction contended for by the third party is wrong.

[8] There is a complaint that the separate question that is to be determined is not properly set out as required by rule 486 which states that a separate question or questions must:

(a) Set out the question or questions to be decided; and
(b) Be divided into paragraphs numbered consecutively.

[9] The application is that, pursuant to Part 5 of Chapter 13 of the *Uniform Civil Procedure Rules* 1999:

(a) The question raised by the third party proceedings ("the question") be decided separately before the trial of the proceedings between the plaintiff and the second defendant.

[10] On its face, the application is not in compliance with *UCPR* 483 since it does not set out a question to be decided. However, as conducted, the argument focused on the question in the third party's written submissions as follows:

> "In the facts alleged in the Amended Statement of Claim of the Second Defendant against the Third Party, is the Second Defendant entitled to indemnity as a 'principal' under the policy number

> 5L1449556 between the First Defendant and the Third Party within the meaning of sub-paragraph (d) of the definition of 'You' therein?."

[11] It is plain from the second defendant's outline of argument that there was no misapprehension as to this. The third party's argument proceeds on a concession, for the purposes of the application only, that there is no disputed fact and that any factual matter which the second defendant may wish to establish against the third party, within the parameters of its pleading and particulars may, for the purposes of the argument, be accepted as true. In particular, for the purposes of the application the argument should proceed on the footing that the second defendant is a "principal" for the purposes of sub-paragraph (d) of the definition of "you" and that the third party will establish the factual matters particularised in its proposed amended statement of claim (filed by leave before me) and previously supplied further and better particulars.

[12] Another assumption made by the third party is that any factual matters which might be proved at trial will be confined to those matters in the pleadings. There is a divergence of sorts with regard to this, since the second defendant contends that it is open to a trial judge to make a determination of liability that does not necessarily comply with the pleaded particulars of negligence, provided that the matter is fully litigated and no other evidence on the issue could have been led. It is submitted that it is inappropriate to determine the question in a vacuum without the benefit of findings of fact in the principal action between the plaintiff and the defendants. It is also submitted that the second defendant neither knows the evidence that may be led by the plaintiff or the first defendant which could influence the outcome and which could cause an adjustment of the second defendant's case, nor precisely how it is that the insurer proposes to argue its case that it is not a "principal" or that the injury does not "arise out of" the performance of the contract.

[13] Returning to the detail of the pleadings, it seems to be common ground that the ladder, and perhaps other equipment, was provided by the second defendant to enable the first defendant to do the work contracted for. In 11029/2001 the particulars relied on against the first defendant are common to each of the heads of claim, breach of contact, breach of statutory duty and negligence. They are, in precis:

(1) Failing to provide equipment that was safe;
(2) Permitting the plaintiff to use equipment, particularly the ladder, that was inadequate or not inspected by the first defendant before use;
(3) Failure to inspect the floor surface and/or the ladder to establish that they were in a safe condition;
(4) Failing to ensure defects in the floor surface were rendered safe;
(5) Failing to maintain repair or replace the surface to ensure it was safe;
(6) Failing to warn the plaintiff of the nature of the work he was to perform and safety measures to undertake it;
(7) Failing to warn the plaintiff about the condition of the ladder or the floor so he was aware of potential hazards when ascending the ladder;
(8) Failing to advise the second defendant of the need to so warn the plaintiff.

[14] In BS1069 of 2005, in precis, the particulars common to the claims of breach of contract, negligence and breach of statutory duty against the only defendant (the first defendant in the other action) are:

(a) Failing to train and instruct or supervise the plaintiff particularly in relation to securing the ladder against slipping;
(b) Failing to take care to see that the plaintiff, as an unsupervised apprentice electrician, would be safe;
(c) Exposing the plaintiff to risk of falling from the ladder;
(d) Failing to ensure the ladder was not a danger;
(e) Causing or permitting the ladder to be used in a way which presented a danger;
(f) Failing to warn the plaintiff as to the condition of or danger presented by the ladder;
(g) Failing to ensure there was an adequate or safe system of work;
(h) Failing to erect a system of fall protection;
(i) Failing to undertake the proper risk assessment.

[15] The particulars of negligence and breach of statutory duty in 11029/2001 against the second defendant are the following, in precis:

(i) Failing to provide a safe floor surface;
(ii) Failing to inspect the floor surface to ensure it was safe;
(iii) Failing to ensure that defects in the premises or the ladder were remedied to render them safe;
(iv) Failing to maintain repair or replace the floor surface to ensure it was safe;
(v) Failing to warn of the state and condition of the premises by verbal or written communication, signage or roping off or instructions;
(vi) Failing to instruct the plaintiff in the correct use of the ladder.

[16] The further and better particulars, in so far as they relate to the characterisation of the second defendant as principal of the first defendant, recite the nature of the agreement, which was partly written and partly oral. It is said that the liability of the second defendant arises out of the performance by the first defendant of the agreement in respect of which the second defendant was a principal in that:

(i) The agreement which involved moving power points required that the first defendant do work for the second defendant;
(ii) In the course of performing that work the first defendant was assigned a particular task for the plaintiff to perform; and
(iii) The alleged incident occurred when the plaintiff was completing the assigned task.

[17] The amended statement of claim, read by leave, by the second defendant against the third party recites an outline of the plaintiff's allegations against the respective parties and in particular that the accident was caused by the negligence or breach of statutory duty of the first defendant and the second defendant, as respectively particularised above.

[18] The essence of the third party's application is that, even assuming that all necessary findings of fact are made in favour of the plaintiff against the second defendant and all facts pleaded against the third party by the second defendant are true, there is no

basis, on a true construction of the insurance contract, upon which the third party is obliged to indemnify the second defendant. Reliance was placed by the third party on a number of propositions. Firstly, it was submitted that the allegations by the plaintiff against the second defendant arise independently of the performance of the contract between the first defendant and the second defendant; they relate principally to the safety of the premises and in particular the ladder.

[19] Secondly, where a person is a principal under the definition of "You" in the policy the critical elements are that it is the performance of the contract by the primary insured that is envisaged, and that liability of the principal can be characterised as "arising out of the performance" of the contract by the primary insured. Reliance was placed on *Australian Paper Plantations Pty Ltd v J & EM Venturoni* [2000] VSCA 71, *Roads and Traffic Authority (NSW) v Palmer* (2003) 38 MVR 82, and *Burch v Shire of Yarra Ranges* (2004) 42 MVR 1 in this regard. It was also submitted that the principle referred to in those cases applies to insurance contracts as well as contractual indemnity provisions (*QBE Insurance (Aust)) Pty Ltd v SLE Worldwide Australia Pty Ltd* [2005] NSWSC 776).

[20] Thirdly, it was submitted that those authorities also established that "arising from", while being words of wide scope, imply at least an indirect causal relationship, not merely a temporal one, between the performance of the contract and the relevant incident. Fourthly, *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* (2000) 23 WAR 291, if inconsistent with the previously mentioned line of authority, should not be followed. It was submitted that treating "arising out of" as equivalent to "in the course of" was contrary to authority including *Kavanaugh v The Commonwealth* (1960) 103 CLR 547. It was also submitted that *Speno* did not give sufficient regard to the requirement that liability of the principal arise out of the performance of the agreement or contract by the primary insured and that mere temporal connection was not sufficient.

[21] Accepting, for the purpose of dealing with the present application, the force of the third parties submissions, the critical issue as between it and the second defendant is likely to be whether the second defendant's liability arises from the performance of the contract by the first defendant. It is true that the pleading of particulars of negligence and breach of statutory duty against the first and second defendants respectively are referable to them severally. However, acceding to the third party's application in advance of evidence being led and findings of facts being made is problematical.

[22] Firstly, the pleadings suggest that at a factual level there may be the potential for overlap of activities as between the first and second defendants in regard to the matters pleaded. What the evidence will disclose as to this and the degree of any interaction or overlap between them in connection with the safety of the workplace is yet to be determined. Where some, at least, indirect causal connection between the performance of the contract by the first defendant and the liability of the second defendant is a critical issue, it cannot in my view be said with confidence that no such link will emerge from the evidence at trial. Further, while the pleadings are intended to govern the case, it is not uncommon for the evidence actually given to throw a different emphasis on the issues as the case progresses. The extent to which

the parties are confined to the pleadings in such a case or allowed to address the case as actually litigated is peculiarly a matter for the trial judge. The combination of these two factors in my view demonstrates why it is premature to accede to the third party's application.

[23] I refuse the application with costs to be assessed.