

SUPREME COURT OF QUEENSLAND

CITATION: *Watpac Civil Infrastructure P/L v Komatsu Australia P/L*
[2009] QSC 281

PARTIES: **WATPAC CIVIL INFRASTRUCTURE P/L (FORMERLY
JMS CIVIL & MINING (AUST) P/L) ACN 129 804 968**
(plaintiff)

v

KOMATSU AUSTRALIA P/L ACN 054 514 739
(defendant)

FILE NO/S: BS 1641 of 2009

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 9 September 2009

DELIVERED AT: Brisbane

HEARING DATE: 4 September 2009

JUDGE: McMurdo J

ORDER: **The application filed on 31 August 2009 is dismissed.**

CATCHWORDS: PROCEDURE – SUPREME COURT PROCEDURE –
QUEENSLAND – PROCEDURE UNDER RULES OF
COURT – OTHER MATTERS BEFORE TRIAL – where the
plaintiff applied for orders that certain questions be tried
separately and in advance of other issues – where the plaintiff
submitted that a separate preliminary trial may lead to a
settlement of the case or at least to a compromise of parts of the
remainder and would result in an overall saving in time and
expense – where there is a strong likelihood that the judge
conducting the preliminary trial could not hear the remainder of
the case as a result of findings which would be made about
witnesses – whether a separate trial of preliminary questions
should be ordered

Uniform Civil Procedure Rules 1999 (Qld), r 483

Evans Deakin Industries Ltd v The Commonwealth [1983] 1 Qd
R 40, cited

COUNSEL: A W Duffy for the plaintiff
G Thomson for the defendant

SOLICITORS: Schweikert Lawyers for the plaintiff
Results Legal Solutions for the defendant

- [1] The plaintiff applies for orders pursuant to *UCPR* r 483 that certain questions be tried separately and in advance of the other issues. In broad terms, the plaintiff's proposal is for a separate trial of the issues of whether the contracts alleged by the plaintiff were made and upon what terms and of whether representations were made to the plaintiff by the defendant as alleged.
- [2] The plaintiff does not contend that the resolution of these questions, either way, would dispose of the litigation. Rather, the suggested utility of the proposal is that it may lead to a settlement of the case, or at least a compromise of parts of the remainder, with an overall saving in time and expense.
- [3] The case concerns the supply by the defendant to the plaintiff of a fleet of trucks and an excavator which the plaintiff was to use in mining for coal at the BHP Billiton-Mitsubishi Alliance ("BMA") mine at Blackwater. The plaintiff was performing that work, it alleges, under a contract with BMA. That contract is put in issue but its formation, terms and subsequent termination are unlikely to be controversial. They are some of the questions proposed for a preliminary determination. Considered by themselves, there would be no utility in a separate trial of those questions. But if other issues are tried in this proposed preliminary hearing then those questions should be included.
- [4] The plaintiff's case relies upon two contracts between it and the defendant. The first is for the supply of these vehicles and the second is a maintenance contract. There are substantial issues as to the ambit of the contracts in the sense of what constituted their terms, as well as issues as to the proper interpretation of those contracts. Importantly, there is an issue as to what was the defendant's obligation, if any, as to the "commissioning" of these vehicles at the BMA mine. The defendant pleads that its obligation in that respect was limited in certain respects necessarily as a matter of business efficacy. It does not plead some oral term as affecting the content or meaning of the written terms. But it is likely that the issue in respect of the meaning of "commissioning" will involve a consideration of what the parties said to each other prior to the contract for the supply of the equipment, at least because the defendant will wish to say that the meaning of the contract was affected by facts and circumstances which it made known to the plaintiff during those discussions. So this is not a case where the issues as to what constituted the contracts between the parties and the proper interpretation of those contracts could be neatly separated from a consideration of factual questions which go to other issues, and most importantly, the plaintiff's case as to pre-contractual representations.
- [5] The representations case concerns what happened at a meeting or meetings attended, on the defendant's side, by Mr Harrington, Mr Pisani and Mr Mares. The issues of what was said at these meetings are likely to require findings as to the reliability, if not the credibility, of these witnesses. They are also likely to be relevant witnesses in the defendant's case for issues not proposed for the preliminary trial, more specifically issues involving the alleged breach or breaches of contract and issues of causation of loss. Some of the plaintiff's representations case is admitted, in that, for example, there is an admission that the defendant represented to the plaintiff that if the parties were able to agree on the terms of the

proposed sale of the equipment, the defendant would be able to have the sale equipment delivered to the mine site and commissioned by a certain time. The defendant pleads that it had reasonable grounds for making that representation and Mr Mares will be a relevant witness in that respect. The same applies to Mr Pesani. Mr Mares would give evidence in the proposed second hearing as to what occurred on site, relating to questions of causation. Then there are issues concerning the maintenance contract and whether, as the plaintiff alleges, it was an implied term of that contract that the defendant would maintain the equipment so as to achieve what were described as “availability targets”. Mr Mares would be a relevant witness on this question.

- [6] In summary it appears to be inevitable that if the parties did not settle the litigation at the completion of the proposed preliminary hearing, several witnesses, at least from the defendant’s side, would have to be recalled for the trial of the remainder of the case. There is a strong likelihood that the judge conducting the preliminary hearing could not hear the remainder of the case as a result of findings which would be made about those witnesses. In turn that gives rise to the prospect of inconsistent findings between the two stages of the case. Of themselves, these need not be fatal to any application for the trial of some questions in advance of others. It is a matter of considering those factors in the circumstances overall. But in this case they are substantial reasons for rejecting the plaintiff’s proposal.
- [7] In favour of the proposal is the prospect that the settlement of this litigation might be enhanced by the determination of these questions in advance of the others, and where that preliminary hearing is estimated to take three days against a hearing of the entire litigation, which would take more than 10 days.
- [8] The discretion here is a broad one and I accept, as the plaintiff submits, that the approach more recently in this court, particularly in cases on this List, is more receptive to applications such as this than might be suggested by earlier authorities such as *Evans Deakin Industries Ltd v The Commonwealth*.¹ On balance, however, I am not persuaded to make the orders which are sought. Against the possible utility of the proposal, the major considerations are these. The first is that in relation to witnesses being recalled. The second is the prospect that the overall disposition of this litigation could be delayed by an appeal from the judgment in the preliminary trial. That is a consideration which usually arises in applications such as the present, but nevertheless it is relevant. Thirdly, I have the impression that the estimate of three days for the trial of these preliminary questions is an underestimate. There is at least the potential for the trial of these preliminary questions to take five days or more. Fourthly, the preparation for this preliminary trial would be extensive. Put another way, this is not a case where the preliminary question or questions are ones which could be litigated immediately and without significant further expense.
- [9] Accordingly the application filed on 31 August 2009 must be dismissed. I will hear the parties as to costs and other orders.

¹ [1983] 1 Qd R 40 at 45.