SUPREME COURT OF QUEENSLAND

CITATION:	*Mallonland Pty Ltd & Anor v Advanta Seeds Pty Ltd* [2019] QSC 250
PARTIES:	**MALLONLAND PTY LTD** ACN 051 136 291 **(AS TRUSTEE FOR THE ANDREW JENNER FAMILY TRUST)** (first plaintiff) **ME & JL NITSCHKE PTY LTD** ACN 074 520 228 **(AS TRUSTEE FOR THE NITSCHKE FAMILY TRUST)** (second plaintiff) **v** **ADVANTA SEEDS PTY LTD** ACN 010 933 061 **(FORMERLY KNOWN AS PACIFIC SEEDS PTY LTD)** (defendant)
FILE NO:	BS4103 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application for disclosure
DELIVERED ON:	9 October 2019
DELIVERED AT:	Brisbane
HEARING DATE:	18 and 26 September and 8 October 2019
JUDGE:	Mullins J
ORDER:	**1. The application for disclosure of the defendant's insurance policy and related documents dealing with the defendant's assertion it is not indemnified in respect of the plaintiffs' claims is dismissed.** **2. The plaintiffs must pay the defendant's costs of the application.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – CLASS ACTIONS OR GROUP PROCEEDINGS – where the plaintiffs brought a representative proceeding against the defendant which produced sorghum seed that is alleged by the plaintiffs to have been contaminated and to have caused loss to the plaintiffs and other group members – where the proceeding had advanced to the stage of being set down for a mediation and then a trial – where the defendant advised it was not insured in respect of the plaintiffs' claims in the proceeding, other than the claim of one group member – where the plaintiffs apply for disclosure of the defendant's insurance

policy and related documents dealing with the defendant's assertion that it was not indemnified in respect of the plaintiffs' claims – where the plaintiffs rely on s 103ZA of the *Civil Proceedings Act* 2011 (Qld) to obtain disclosure – whether it is appropriate or necessary to ensure justice is done in the proceeding to order the requested disclosure

Civil Proceedings Act 2011 (Qld), s 103ZA

Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 2) [2019] FCA 838, cited
Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 4) [2019] FCA 1229, considered

COUNSEL: D J Campbell QC and B A Hall for the plaintiffs
K F Holyoak and M Brooks for the defendant

SOLICITORS: Creevey Russell Lawyers for the plaintiffs
Clifford Gouldson Lawyers for the defendant

[1] In April 2017 the plaintiffs commenced a representative proceeding against the defendant which produced and supplied MR43 Elite sorghum seed for sale by third parties that is alleged by the plaintiffs (as purchasers of the seed) to have been contaminated and caused loss to the plaintiffs and other group members. The proceeding is set down for trial in March 2020 and a mediation is arranged for 17 and 18 December 2019. The plaintiffs provided the expert reports on which they rely to the defendant in late August 2019. The defendant's expert reports are due to be provided to the plaintiffs on 31 October 2019.

[2] Information came to the attention of the plaintiffs suggesting the defendant was not insured which resulted in the application filed on 5 September 2019 for disclosure of the defendant's insurance policy and related documents dealing with the defendant's assertion that it is not indemnified in respect of the plaintiffs' claims in this proceeding. The plaintiffs' application relies on the general power conferred on the court pursuant to s 103ZA of the *Civil Proceedings Act* 2011 (Qld) (CPA) to make any order that it considers appropriate or necessary to ensure justice is done in the proceeding. The defendant opposes the making of the order.

The information available about the defendant's insurance

[3] As a result of documents disclosed by the defendant in this proceeding, the plaintiffs were aware the defendant had been in communication with its insurer Vero Liability Insurance Limited (Vero) about claims made arising out of the contaminated seed. The investigations the plaintiffs' solicitors had undertaken in the initial stage of the proceeding about the defendant's financial position had disclosed that insurance costs were paid by the parent company of the defendant in the relevant years. As a result of the defendant's solicitors asserting in their letter dated 29 July 2019 to the plaintiffs'

solicitors that they knew the defendant was not insured against this claim which the plaintiffs' solicitors denied, further correspondence ensued between the parties' solicitors that resulted in confirmation by the defendant that it was not insured against the claim.

[4] For the purpose of the hearing on 26 September 2019 Mr Croker, the managing director of the defendant, swore an affidavit that was filed by leave on that day in which he dealt with the lack of insurance cover:

> "3. The Defendant held insurance cover with Vero Liability Insurance Limited (**Vero**).
>
> 4. Two growers, Griffiths and Cook, had made, or had indicated to the Defendant they would make, claims arising from the use of MR43 seed the subject of this proceeding against the Defendant.
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> 5. In or about early 2013, I attended a meeting with Ian Thompson from Vero and the Defendant's insurance broker, Ken Macgregor from Austcover at which Vero asserts it was orally agreed that Vero would only indemnify the Defendant against claims made by two growers of the MR43 seed the subject of this proceedings: the Griffiths and the Cooks, and no other claims relating to MR43 seed.
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> 6. Vero asserts the agreement was reached as a result of it alleging that it was not properly notified of the Griffith and Cook claims by the Defendant and alleged prejudice.
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> 7. Insurance against other claims relating to MR43 seed was not denied on the basis of fraud, dishonesty or any exclusion.
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> 8. Vero indemnified the Defendant and conducted the defence of the proceeding against the Defendant by the Griffiths.
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> 9. I notified the Defendant's insurance broker that Mr Cook is a group member in this action on 30 July 2019.
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> 10. The Defendant's insurance broker passed on that notification to Vero.
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> 11. Vero then instructed Hopgood Ganim in respect of the Defendant's request for indemnity under its insurance policy with Vero for that portion of this action which pertains to Mr Cook.
>
> 12. The Defendant does not waive privilege in its communications with the Defendant's insurance broker or Vero."

[5] On 26 September 2019, I directed the defendant file and serve on or before 3 October 2019 a further affidavit of Mr Croker that responded to the following questions:

> "(a) Does the defendant accept the assertion of Vero Insurance that is referred to in paragraph 6 of Mr Croker's affidavit filed by leave today?

(b) Can the defendant confirm that as presently advised it has no recourse against Vero Insurance in respect of the claims the subject of this proceeding other than the claim by Mr Cook?"

[6] As a result, a further affidavit of Mr Croker was filed on 3 October 2019 which exhibited the letter dated 22 December 2017 from the defendant to Vero that stated:

> "Advanta Seeds Pty Limited (Advanta) hereby agrees that it is not entitled to indemnity, save for any claim against it by Cook, from Vero Liability Insurance Limited (VL) under Seedsmans Policy HO-LPI-6046258 for or in respect of the claims against it by Mallonland Pty Limited & Others which are the subject of proceedings issued in Queensland in or about 2017.This acknowledgement and/or waiver does not extend to or include any claims for which Advanta has already been indemnified by VL."

[7] In addition, Mr Croker confirmed in paragraph 2 of this affidavit that the defendant accepts the assertions of Vero referred to in paragraphs 5 and 6 of his affidavit filed by leave on 26 September 2019. Mr Croker then stated in the affidavit filed on 3 October 2019:

> "4. As matters presently exist, and as presently advised, the Defendant has no recourse against Vero in respect of the claims the subject of this proceeding other than the claim by sample group member, John Cook on behalf of GT CM JT and AJ Cook.
>
> 5. Vero has not yet confirmed indemnity for the claim of Cook. Vero is taking advice, including advice regarding the period and amount of cover applicable to the claim of Cook. The Defendant has reserved all its rights in that regard against Vero in respect of the claim of Cook."

[8] The application for disclosure was therefore adjourned from 26 September 2019 to 8 October 2019 to enable the further affidavit from Mr Croker to be procured and also to give the plaintiffs the opportunity of putting on further material to deal with the financial capacity of the defendant to meet an award.

The defendant's financial position

[9] The plaintiffs relied on the affidavit of Ms Creevey sworn on 8 October 2019 that was filed by leave at the hearing on the same date which exhibited copies of documents obtained from the Australian Securities and Investments Commission relating to the financial position of the defendant, namely the 2018 and 2019 annual reports. (The defendant objected to the late filing of Ms Creevey's affidavit on the basis that the defendant did not have an opportunity to respond, but did not necessarily seek an adjournment, if leave were given to the filing of the affidavit, as the defendant opposed the application on grounds that did not depend on responding to Ms Creevey's affidavit. If the financial information in Ms Creevey's affidavit was going to be critical to the outcome of the application, the defendant then sought an adjournment of the application until after the delivery of the defendant's expert reports.)

[10] The 2018 report disclosed the defendant held as at 31 March 2018 total assets of $80,279,165 and total liabilities of $33,661,530. The current assets at that date were $46,050,063 and the current liabilities were $33,200,496. The 2019 annual report disclosed that the defendant's total assets as at 31 March 2019 were $71,510,189 and the total liabilities were $15,112,810. The net assets were $56,397,379 of which $36,046,461 were non-current assets. The net profit after tax of the defendant for the year ended 31 March 2019 was $9,347,411. The ultimate holding company of the defendant is Advanta Netherlands Holdings BB which is owned by UPL Limited. These reports show that the defendant is an operating company engaged in the development and marketing of hybrid, proprietary crop, pasture planting seeds and added value products, both domestically and internationally. It employed 87 people as of 31 March 2019.

Potential damages awards

[11] The plaintiffs rely on the estimated assessment of the loss of the class set out in the consolidated findings report prepared by accountant Mr Lytras dated 26 August 2019. Mr Lytras prepared his report when it was anticipated the total class comprised 124 members. Since the potential group members have been notified of this proceeding, a number have opted out and it is estimated that the current extent of the class is 92 members. The loss is calculated by extrapolating the loss estimated for the seven sample group members who have provided to Mr Lytras detailed information about the circumstances of their planting of the contaminated seed and consequences for their production of sorghum. The shortest period for which the loss is calculated is 10 years on the basis the plaintiffs will prove that is the minimum period required to eradicate the contamination. Mr Lytras has calculated the loss for the total class of 124 members at $97m on the basis of the number of hectares affected. Mr Lytras did a second calculation by reference to bags purchased and assessed the loss for 10 years at $105m. As the class has reduced in size, the bottom figure on Mr Lytras' method of assessment in respect of hectares affected is about $70m.

The plaintiffs' submissions

[12] The plaintiffs are now concerned to ensure before the mediation is held that they are fully informed about the extent of funds available to the defendant to meet any damages award, including whether there is a possibility of pursuing Vero for indemnification under the defendant's insurance policy. It is "bizarre" that the defendant accepts Vero's position that it would extend indemnity only in respect of the Griffiths and Cook claims. The plaintiffs therefore remain uncertain whether any rights the defendant had under the Vero insurance policy have been lawfully and finally compromised. The prospects of settlement at the mediation will be reduced, if the plaintiffs' lawyers are required to advise on the reasonableness of the settlement offer "without conclusive information about the insurance position and whether the position of the insurer might be challenged". The plaintiffs also need to be satisfied about the defendant's position, in order to submit to the court that any settlement reached at the mediation is reasonable and ought to be sanctioned.

[13] Provisions such as s 103ZA of the CPA confer on the court "the widest possible power that extends to all procedures appropriate or necessary to deal with the matter on a just basis": *Westpac Banking Corporation v Lenthall* (2019) 366 ALR 136 at [86].

[14] The plaintiffs rely on the production of insurance documents ordered by Gleeson J in a class action *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 4)* [2019] FCA 1229 (*Radio Rentals No 4*) for similar purposes to assist the applicant in assessing the reasonableness of any offer of settlement (at [13] and [23]-[24]).

[15] The plaintiffs note that the insurer was already a party in *Radio Rentals No 4*, but submit that was not relevant to Gleeson J's decision to order disclosure of the insurance documents which were not relevant to an issue in the proceeding. Another reason the applicant in *Radio Rentals No 4* had advanced for seeking the insurance policies was "to review the excess layer policies to ensure that any issues surrounding the activation of those policies is addressed at the final hearing, to the intent that the policies are properly enlivened if the applicant is successful in her claims". The plaintiffs seek to rely on an analogous reason in this proceeding to access the defendant's insurance policy that, if indemnification is available under the policy, or may be available, it will enable the plaintiffs to advance their case in a manner that is consistent with triggering the right to indemnity.

[16] The plaintiffs foreshadow that, if necessary and applicable, they will consider taking action to enforce the defendant's indemnity against Vero pursuant to s 48(1) of the *Insurance Contracts Act* 1984 (Cth) or declaratory relief against Vero.

[17] The plaintiffs' conservative estimate of loss of the group members of $70m exceeds the defendant's net assets. The defendant has not proffered any evidence that its foreign parent company will guarantee the defendant's liabilities or otherwise stand behind it.

The defendant's submissions

[18] The defendant submits the application should be refused on the basis it seeks to serve a collateral purpose of challenging the absence of insurance cover which is its real or dominant purpose in the circumstances or there is no identifiable basis serving the interest of justice for the exercise of the discretion to order disclosure of the insurance policy.

[19] The plaintiffs are engaging in a fishing expedition which is vexatious. The sworn evidence of Mr Croker with correspondence evidencing the existence of the oral agreement between the defendant and Vero is the end of any legitimate course of inquiry in respect of the lack of insurance in respect of the claims made by the plaintiffs. The plaintiffs are at no disadvantage about the defendant's insurance coverage, as they know they are dealing with the defendant and not an insurer, except possibly in relation to Mr Cook's claim. This is not a matter where the defendant is seeking joinder of the insurer. If the plaintiffs are intent on pursuing Vero, it should have been served with this application, as its interests are involved.

[20] The defendant notes that the publicly available financial capacity of the defendant is most substantial. The defendant disputes the description of Mr Lytras' assessment of loss for the group members on the 10 year basis as conservative. The defendant strongly defends the proceeding on the basis of limitation issues and its case, as pleaded, is that the contaminated seed could reasonably be treated and removed within two years and losses would be limited to the loss of one summer crop and one winter crop following emergence and eradication expenses. The defendant expects to be able to demonstrate, when its expert reports are available, that the plaintiffs' assessment of loss is "very significantly overstated".

[21] The circumstances in which disclosure of the insurance documents relating to the director of Thorn who had already been joined as a respondent together with the insurer of Thorn in *Radio Rentals No 4* can be contrasted to the circumstances in which the plaintiffs' application is brought.

Should the insurance policy and related documents be disclosed?

[22] Weighing up all the relevant factors applicable to whether the plaintiffs should succeed on their application must be done within the framework of the breadth of the discretion conferred by s 103ZA of the CPA and the test that the court may make any order it thinks appropriate or necessary to ensure that justice is done in the proceeding.

[23] The timing of this application is relevant. It is not brought for the purpose of determining whether the plaintiffs should bring or pursue the representative proceeding, but for the purpose of the plaintiffs having a better understanding of the sources of funds available to the defendant which the plaintiffs assert is relevant to making a decision on any offer at the mediation, but also to enable the plaintiff to decide whether it can or should take any action as a result of the defendant's assertion that it is not insured.

[24] As both parties rely on *Radio Rentals No 4*, it is necessary to consider the background to the making of the disclosure order in that class action in which the applicant on her own behalf and in a representative capacity pursuant to the *Australian Securities and Investments Commission Act* 2001 (Cth) sued Thorn from whom she obtained financial products as a consumer for misleading or deceptive conduct, unfair contract terms and unconscionable conduct. The claim exceeded $100m. In *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 2)* [2019] FCA 838 (*Radio Rentals No 2*), Gleeson J joined Mr Marshall (a director of Thorn) and AIG Australia Limited (the insurer of Thorn which had declined to indemnify both Thorn and Mr Marshall under a particular insurance policy) as the second and third respondents in the class action brought by the applicant. The applicant was also given leave to bring the proceeding against AIG pursuant to s 5 of the *Civil Liability (Third Party Claims Insurers) Act* 2017 (NSW). Section 4 of that Act confers the right in a claimant to whom the insured person has an insured liability to recover the amount of the insured liability from the insurer in proceedings before a court, provided the leave of the court is obtained under s 5 of the Act. AIG accepted (*Radio Rentals No 2* at [60]) the pre-conditions for giving the leave were satisfied, because the applicant had an arguable case against the insured (Thorn and Mr Marshall), there was an arguable case the policy applies, and there was a real possibility that if judgment were obtained, the insured would not be able to meet it. Mr

Marshall had foreshadowed filing a cross-claim against AIG for indemnity under the relevant policy. At the time the joinder was ordered in *Radio Rentals No 2*, there was also evidence that the financial position of Thorn was deteriorating.

[25] It was in these circumstances that the applicant in *Radio Rentals No 4* sought documents relating to the directors and officers liability, civil liability and professional indemnity insurance policies issued to Thorn and its subsidiaries. They were described as policies not currently in issue in the proceeding. Gleeson J allowed the production of the documents pursuant to an equivalent provision to s 103ZA of the CPA, because of the utility anticipated by the applicant (at [22]-[25]). AIG, as a party to the proceeding made submissions in response to the application.

[26] There are significant differences in the circumstances in which the plaintiffs make their application for the defendant's insurance policy and that in which the applicant sought additional insurance documents applying to Thorn and Mr Marshall in *Radio Rentals No 4*. First, it had been conceded by AIG that there was an arguable case against it for indemnity and AIG made submissions on the disclosure application. The question of insurance coverage whether under the policy that was the subject of AIG's refusal to indemnify or other available policies was therefore a legitimate area for inquiry by the applicant.

[27] The problem for the plaintiffs' application is they are seeking the court to go behind the stated position of the defendant about its lack of insurance in respect of the plaintiffs' claims in this proceeding (other than the claim of Mr Cook), when it is merely speculation on the plaintiffs' part that there is something for them to pursue. The plaintiffs may have been proceeding on the mistaken understanding the defendant was insured until receipt of the defendant's solicitors' letter of 29 July 2019, but that mistake is no reason for the plaintiffs to be given disclosure of the defendant's insurance policy with Vero and the documents relevant to the defendant's assertion that it is not insured, when there is no dispute between the defendant and Vero about that position. The plaintiffs' concern that without that information they will be impeded in the mediation makes an assumption that the mediation will be conducted on the basis of what is known to the plaintiffs at the present time. The mediation will take place in the context of the provision of the expert reports from the defendant, so the framework of the mediation will not be limited to the loss assessments of Mr Lytras and the plaintiffs' expert reports. It is also premature in the circumstances of this proceeding for the plaintiffs to be concerned, as to how they will satisfy the court on the reasonableness of any settlement offer accepted at a mediation, when the material that will be relevant to any such application will have developed from the state of the material for this application.

[28] It is a relevant factor that the defendant has substantial assets and is continuing to operate a profitable business.

[29] On balance, I do not consider the plaintiffs have persuaded me that it either appropriate or necessary at this stage to ensure that justice is done in the proceeding to accede to the disclosure application in respect of the defendant's insurance policy and related documents.

Orders

[30] At the conclusion of the hearing on 8 October 2019 neither party demurred from the suggestion that costs should follow the event.

[31] I therefore make the following orders:

1. The application for disclosure of the defendant's insurance policy and related documents dealing with the defendant's assertion it is not indemnified in respect of the plaintiffs' claims is dismissed.

2. The plaintiffs must pay the defendant's costs of the application.