SUPREME COURT OF QUEENSLAND

CITATION: *Australia Pacific LNG Pty Limited & Ors v Sooner Insurance Company & Ors* [2021] QSC 43

PARTIES:
AUSTRALIA PACIFIC LNG PTY LIMITED (ACN 001 646 331)
(First Plaintiff)
AUSTRALIA PACIFIC LNG CSG PROCESSING PTY LIMITED (ACN 109 043 487)
(Second Plaintiff)
AUSTRALIA PACIFIC LNG GLADSTONE PIPELINE PTY LIMITED (ACN 144 653 921)
(Third Plaintiff)
AUSTRALIA PACIFIC LNG CSG TRANSMISSIONS PTY LIMITED (ACN 138 156 466)
(Fourth Plaintiff)
AUSTRALIA PACIFIC LNG CSG MARKETING PTY LIMITED (ACN 008 750 945)
(Fifth Plaintiff)
AUSTRALIA PACIFIC LNG (CSG) PTY LIMITED (ACN 099 577 769)
(Sixth Plaintiff)
v
SOONER INSURANCE COMPANY (BUSINESS ID 0100869)
(First Defendant)
CHUBB INSURANCE AUSTRALIA LTD (ACN 001 642 020) T/AS ACE INSURANCE LIMITED
(Second Defendant)
AAI LIMITED (ACN 005 297 807) T/AS VERO INSURANCE LIMITED
(Third Defendant)
ZURICH AUSTRALIAN INSURANCE LIMITED (ACN 000 296 640)
(Fourth Defendant)
XL INSURANCE COMPANY SE (ARBN 083 570 441) T/AS XL INSURANCE COMPANY LIMITED
(Fifth Defendant)
INSURANCE AUSTRALIA LIMITED (ACN 000 016 722)
(Sixth Defendant)
ALLIANZ AUSTRALIA INSURANCE LIMITED (ACN 000 122 850)
(Seventh Defendant)
AIG AUSTRALIA LIMITED (ACN 004 727 753) T/AS CHARTIS AUSTRALIA INSURANCE LIMITED
(Eighth Defendant)
SWISS RE INTERNATIONAL SE (ARBN 138 873 211)
(Ninth Defendant)

FILE NO/S:	BS No 5151 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	8 March 2021
DELIVERED AT:	Brisbane
HEARING DATE:	4 March 2021
JUDGE:	Bowskill J
ORDERS:	**The application filed 26 February 2021 is dismissed. I will hear the parties as to costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PARTIES AND REPRESENTATION – LEGAL REPRESENTATION – SEPARATE LEGAL REPRESENTATION – where the plaintiffs have brought proceedings in relation to claims relating to electrical works and pipeline works under two policies of insurance – where, prior to the proceedings being commenced, the insurers had engaged separate legal representation to deal with the claims relating to the electrical works and pipleline works claims – where the first to sixth defendants apply for orders which would permit them to maintain this separate legal representation on the record in the proceedings *Uniform Civil Procedure Rules* 1999 (Qld), r 5, 17, 68, 140, 367
COUNSEL:	P Dunning QC and B Kabel for the plaintiffs S Couper QC and J B Sweeney for the first to sixth defendants, instructed by Carter Newell M Trim for the first to ninth defendants, instructed by Wotton & Kearney
SOLICITORS:	Clayton Utz for the plaintiffs Carter Newell for the first to sixth defendants Wotton & Kearney for the first to ninth defendants

[1] This proceeding concerns claims against nine insurance companies under two policies of insurance. In the period 2011-2015 the plaintiffs entered into various contract works insurance policies, referred to by the plaintiffs as the "Upstream" and "MPS" policies, in respect of LNG contract works in central Queensland. The defendants were the insurers. During 2019, the plaintiffs made four separate claims under those policies: the "cables" claim, the "busbar" claim, the "main pipeline" claim and the "HPGN" claim. The cables and busbar claims (together referred to as the electrical claims) are made under the Upstream policies and total approximately $167 million. The main

pipeline and HPGN claims (together referred to as the pipeline claims) total approximately $142 million, and are made under the Upstream and MPS policies.

[2] The proceedings were commenced in May 2020, amended in November 2020 and served in December 2020. No defences have yet been filed. The applicant/defendants therefore required, and were given, leave under r 135 UCPR to bring the present application.

[3] From about November 2018, Wotton & Kearney has been retained by the insurers in relation to the main pipeline claim and, from December 2019, the HPGN claims, and has retained and briefed counsel and experts in relation to those claims. From August 2019, Carter Newell has been retained by the insurers in relation to the cables and busbar claims, and has retained and briefed counsel and experts in relation to those claims. Both firms have been dealing with the plaintiffs' solicitors, Clayton Utz, in those capacities, in relation to those claims, since they were retained, including for the purposes of accepting service of the proceedings.

[4] The defendants wish to continue with their existing legal representation arrangements in relation to the claims the subject of this proceeding.

[5] To that end, the first to sixth defendants have applied for leave, pursuant to r 68(2)(d) or r 367 UCPR or in the inherent jurisdiction of the court, for the first to sixth defendants to be represented in the proceedings by Carter Newell in respect of the claims set out in paragraphs 1 to 12 of the Amended Claim (the electrical claims) and by Wotton & Kearney in respect of the claims set out in paragraphs 13 to 30 of the Amended Claim (the pipeline claims).

[6] As described in the first to sixth defendants' submissions, the proposed dual representation is "insurance claims based". Wotton & Kearney would represent the first to sixth defendants in relation to the (approximately) $99 million pipeline works claims under the Upstream policies. Wotton & Kearney would also represent the first to fifth defendants and the seventh to ninth defendants in relation to the approximately $43 million pipeline works claims under the MPS policies. Carter Newell would represent the first to sixth defendants in relation to the approximately $167 million electrical works claims under the Upstream policies.

[7] Whilst the plaintiffs contended r 68(2)(d) UCPR is not relevant as a source of power to make the orders sought, they accepted that the court has power to make the order sought either under r 367 UCPR or as an exercise of power in the inherent jurisdiction of the court.

[8] Relevantly, r 367(1) empowers the court to make any order about the conduct of a proceeding it considers appropriate, even though the order may be inconsistent with another provision of the rules; and r 367(2) provides that in deciding whether to make an order, the interests of justice are paramount.

[9] In those circumstances it is not necessary to dwell on the question of power; but as it was a matter addressed in the submissions I record that I am satisfied that r 68(2)(d) UCPR is a source of power to make the orders sought. Rule 68 is found in division 3 of part 1 (several causes of action and parties in a proceeding), chapter 3 (parties and proceedings) of the UCPR. It provides as follows:

> "**68 Inconvenient inclusion of cause of action or party**
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> (1) This rule applies to a proceeding, despite division 2, if including a cause of action or party may delay the trial of the proceeding, prejudice another party or is otherwise inconvenient.
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> (2) The court may, at any time –
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> (a) order separate trials; or
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> (b) award costs to a party for attending, or relieve a party from attending, a part of a trial in which the party has no interest; or
>
> (c) stay the proceeding against a defendant or respondent until the trial between the other parties is decided, on condition that the defendant or respondent against whom the proceeding is stayed is bound by the findings of fact in the trial against the other defendant; or
>
> (d) make another order appropriate in the circumstances.
>
> (3) In this rule –
>
> ***trial*** incudes hearing."

[10] As the opening words of r 68(1) make plain, r 68 assumes the joinder of causes of action in or parties to a proceeding is authorised by the rules, but operates where that may delay the trial, prejudice another party or is otherwise convenient.

[11] The defendants do not seek to separate the claims the subject of the proceeding; but do contend that, if the first to sixth defendants are not permitted to maintain their separate representation in respect of the two sets of claims (electrical and pipelines) there will be delay whilst one set of solicitors duplicates what has already been done by the other set of solicitors in preparation of a defence, there will be prejudice to the first to sixth defendants in that additional unnecessary costs will be incurred and for that reason the joinder of the separate causes of action, in respect of each of the claims, is otherwise inconvenient.

[12] The power conferred on the court by r 68(2)(d) is broad, both in terms of the circumstances in which it may be exercised (at its broadest, when the inclusion of a cause of action or party "is otherwise inconvenient") and in terms of what the court is empowered to do ("make another order appropriate in the circumstances"). Read with r 5 of the UCPR – in particular, r 5(2), which obliges the court to apply the rules with the objective of avoiding undue delay, expense and technicality and facilitating the purpose of the rules – I am satisfied that an order such as is sought on the present application is one the court could, as a matter of power, make under r 68(2)(d).[1]

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[1] See also the observations in *Tindle v Ansett Transport Industries (Operations) Pty Ltd* (1990) 21 NSWLR 492 at 498.

[13] Being satisfied the court has power to make the order sought, the real question is whether I should do so.

[14] Having regard to the rules, and the authorities, the considerations which are relevant to the exercise of the court's power to make an order permitting a party to have dual representation include:

(a) the general rule of practice[2] is that each party to proceedings is entitled only to be represented by one set of legal representatives – one firm of solicitors on the record,[3] and counsel instructed by that firm;[4]

(b) the circumstances in which a party may be permitted to have dual representation are rare, in some cases described as exceptional, and ought only be permitted when the interests of justice require it;[5]

(c) the reason for the rule is, essentially, fairness to the opposing party(ies): as observed in *Buses + 4WD Hire Pty Ltd v Oz Snow Adventures Pty Ltd* [2016] NSWSC 1017 at [28]:

> "Where there are two counsel appearing for a party, who are separately instructed, there is the potential for the party to be putting propositions which are inconsistent. This, in turn, has a substantial potential to create confusion, increased cost and prejudice to the administration of justice and, accordingly, is only warranted when the interests of justice require it. The authorities cited are redolent with references to the deleterious consequences of allowing separate representation such that the present application must be approached with a high degree of caution."

(d) circumstances in which it may be appropriate, in the interests of justice, to permit a party to have dual representation include where a party has separate interests which cannot be reconciled,[6] or where there is a conflict of interest (for example between an insurer and an insured);[7]

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2 *Cart Provider Pty Ltd v Park* [2016] QSC 277 at [18], referring to *MDA National Limited v Medical Defence Australia Ltd* [2014] FCA 954 at [55]; *Ghose v CX Reinsurance Company Ltd* [2010] NSWSC 110 at [33].

3 *Elphick v Westfield Shopping Centre Management Co Pty Ltd* [2011] NSWCA 356 at [3], [5] and [9]; *Konneh v State of New South Wales (No 2)* [2013] NSWSC 390 at [79]. See also r 140, read with r 17(1)(b) UCPR.

4 *Buses + 4WD Hire Pty Ltd v Oz Snow Adventures Pty Ltd* [2016] NSWSC 1017 at [28].

5 *Lewis v Daily Telegraph Ltd (No. 2)* [1964] 2 QB 601 at 623; *Hinchcliffe v Carroll* [1969] VR 164 at 166; *Elphick v Westfield Shopping Centre Management Co Pty Ltd* [2011] NSWCA 356 at [10]; *Cart Provider Pty Ltd v Park* [2016] QSC 277 at [24]; *Buses + 4WD Hire Pty Ltd v Oz Snow Adventures Pty Ltd* [2016] NSWSC 1017 at [28]; *Spotlight Pty Ltd v Maintek Roofing Pty Ltd* [2017] NSWSC 165 at [28]. See also r 367(2) UCPR.

6 See, for example, *AMP Capital Investors Ltd v Parsons Brinckerhoff Australia Pty Ltd* [2013] NSWSC 1633 at [19].

7 See, for example, *Buses + 4WD Hire Pty Ltd v Oz Snow Adventures Pty Ltd* [2016] NSWSC 1017 at [33] and *Spotlight Pty Ltd v Maintek Roofing Pty Ltd* [2017] NSWSC 165. See also *Wilkins v Kingsley-*

(e) considerations of cost and delay are relevant;[8]

(f) it is also relevant to have regard to the prejudice to the defendants of not making the order sought, and the prejudice to the plaintiffs if the order is made;[9]

(g) but the onus is on the party(ies) applying for the order to demonstrate, on the evidence, why it is in the interests of justice to make what is to be regarded as an exceptional order.[10]

[15] Notably, in cases in which a party has been permitted to have two solicitors on the record, that has been in circumstances where those solicitors jointly engage one set of counsel and nominate one address for service.[11] That is not what is proposed here. If the order were made, there would be two solicitors on the record for the first to sixth defendants and two sets of counsel separately briefed to represent the first to sixth defendants.

[16] The defendants submit that the electrical and pipeline claims are discrete, treated as such by the plaintiffs at the time the claims were originally made and in the claim and statement of claim which has now been filed. They seek to maintain the separate representation which was initiated by them, in response to the claims as they were made, having regard to the familiarity of the respective firms with the discrete issues which will arise in the proceedings, as a result of the investigatory, analytical and advisory work they have respectively undertaken, including by engaging different experts and counsel.

[17] The plaintiffs submit that the electrical and pipeline claims are not to be regarded as separate or discrete – because they are claims made, in some respects, under the same policy of insurance. The plaintiffs submit the factual basis of the claims will affect the positions taken by the first to sixth defendants in relation to the meaning and effect of relevant parts of the policy. This leaves open the possibility of the separate legal representatives taking competing positions, on behalf of the first to sixth defendants, for example in relation to matters of construction of the policy.

[18] Each of Carter Newell and Wotton & Kearney say the costs and disbursements paid or payable by the defendants they have been retained to act for, for the work undertaken to date in relation to the electrical claims and the pipeline claims, respectively, totals about $600,000 (as to Wotton & Kearney, that relates to the first to ninth defendants, not only the first to sixth).

Strack (BC9606018, Giles CJ Comm D, 12 December 1996, unreported), referred to in *Elphic* at [9] and *Buses* at [47]-[48].

8 Rule 5(2) UCPR.

9 *Buses + 4WD Hire Pty Ltd v Oz Snow Adventures Pty Ltd* [2016] NSWSC 1017 at [51]; *Stewart v Nestle Australia Limited* [2018] NSWSC 870 at [22].

10 *Elphick v Westfield Shopping Centre Management Co Pty Ltd* [2011] NSWCA 356 at [10].

11 For example, *Johnson Tiles Pty Ltd v Esso Australia Ltd* (1999) ATPR 41-679; [1999] FCA 56 at [70] and [71]; and *Parbery & Anor v QNI Metals Pty Ltd & Ors* [2018] QSC 83 at [8] and [18].

[19] Ms Horvat of Carter Newell contends that, if the defendants are required to be represented by a single law firm in this proceeding, the costs and effort incurred to date would be largely duplicated, causing the first to sixth defendants to suffer significant financial prejudice; and that there will be further wasted costs and wasted time if one firm, now, has to come to grips with the detail in relation to all claims. Ms Vale of Wotton & Kearney, says that the work done to date by the separate solicitors would be, in part, wasted and additional costs would be incurred if one firm were required to act for the first to sixth defendants.

[20] As against that, the solicitor for the plaintiffs, Mr Sammut of Clayton Utz, says it is not apparent why the work undertaken to date would be "wasted", since whichever firm becomes the representative firm on the record can adopt and make use of the work already undertaken. Further, in relation to the potential for duplication, the plaintiffs' solicitor emphasises the early stage of the proceeding (no defences yet having been filed). In any event, Mr Sammut says that the quantum of any duplicated costs incurred in the short term will be far exceeded by the future additional costs which will be incurred by all parties if two sets of legal representatives are permitted to act for the first to sixth defendants: beginning with the preparation of two defences but extending to all future steps in the proceeding. Mr Sammut also notes that it is not unusual in large and complex litigation for parties to engage two law firms, one to represent the party on the record in the proceeding and the other to provide independent or additional advice, and if the first to sixth defendants were to adopt this course there would be no, or minimal, risk of wasted or duplicated costs.

[21] In short, for the first to sixth defendants, the order for dual representation is sought because of a wish to maintain the separate legal representation arrangements that have been put in place; to avoid wasted time and costs; and on the basis that they consider the litigation will be more efficiently managed with dual representation.

[22] The plaintiffs oppose the application, submitting that:

(a) there are no exceptional circumstances that warrant the grant of leave for dual representation;

(b) the primary justification for the application for leave seems to be convenience;

(c) it is not apparent why the work undertaken to date should be "lost" if the two sets of solicitors are not permitted to be on the record for the first to sixth defendants (including, for example, in relation to the work of counsel and the experts retained);

(d) the plaintiffs would face significant procedural difficulty and disadvantage if dual representation is allowed, including incurring additional costs (not only of responding to duplicate steps for the same parties, beginning with two defences, but also of the additional case management measures required to address practical complexities) and also the potential prejudice and difficulty in the event competing positions are taken by the different firms acting for the first to sixth defendants (for example, in relation to matters of construction of the policy).

[23] The defendants submit the plaintiffs have not provided evidence to support any of the contended prejudice or disadvantage; submit that any practical difficulties are capable of being managed by directions; and that the plaintiffs' extra costs argument is

"illusory". As to this, I reiterate the point made at paragraph [14](g) above – the onus on this application is on the first to sixth defendants. And I am not persuaded that the arguments on behalf of the plaintiffs, as to the potential risks, problems and prejudice to them in the management of this litigation, can be so readily dismissed.

[24] Having carefully considered the principles, rules and authorities, and the submissions of the parties, I am not persuaded that the interests of justice require the order for dual representation to be made; nor that it is in the interests of justice to make it. The circumstances of this case are not rare or exceptional; there is no conflict of interest which arises, or separate interest, which would warrant separate representation of the same party, in the case of any of the first to sixth defendants. I am not persuaded that there will be such considerable wastage, of time, money, effort or work (viewed in light of the size and complexity of the claims in this proceeding) as to justify the order sought. The court proceeding is at an early stage. Refusing to make the order for dual representation will not prevent the first to sixth defendants from engaging such lawyers as they wish to assist, including a second firm of solicitors, and multiple barristers who may perform the work in teams which are split by reference to the differing claims.[12]

[25] I note the point made by Bond J in *Parbery & Anor v QNI Metals Pty Ltd & Ors* [2018] QSC 83 at [16] as to why, if solicitors are to be involved in advancing a party's case, there are good reasons of public policy to impose on them the accountability of being solicitors on the record. But significantly in *Parbery*, the parties who were permitted to have separate representation were the company's general purpose liquidators and its special purpose liquidators; who were then also both named as the solicitors on the record for the company, albeit with a common address for service; in circumstances where all three plaintiffs were also, separately, defendants to a $1.8 billion counterclaim, in respect of which the separate solicitors had been acting for the two sets of liquidators; the solicitors had already had extensive involvement in the proceedings; and, importantly, the same group of counsel was to be instructed jointly by the two sets of solicitors, such that the conduct of the trial would be able to be managed to ensure no prejudice to the defendants. *Parbery* is a very different case.

[26] Mr Trim for the first to ninth defendants also submitted that as a matter of discretion it was relevant to take into account that the plaintiffs' conduct, in making separate claims, and then not objecting to the separate representation until February this year, contributed to the representation and the work which has been done separately to date. I do not regard this as a matter of any weight in the circumstances. Mr Sammut's evidence is that it was not until 3 February 2021 that he became aware that the first to sixth defendants intended to have two sets of legal representatives on the record for them in the proceeding. He responded on 12 February 2021 outlining the plaintiffs' objection to that course and the need for the first to sixth defendants to make an application seeking the court's leave.

[27] Finally, Mr Trim submitted that it would be open for the seventh to ninth defendants to retain separate representation, in which case the plaintiffs would have to deal with two defences in any event. That may be the case, but that would be the consequence of the

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[12] As discussed in *Parbery & Anor v QNI Metals Pty Ltd & Ors* [2018] QSC 83 at [18] by reference to *Canberra Residential Developments Pty Ltd v Brendas* [2010] FCAFC 125 at [45].

ordinary rule of practice operating. That does not support the making of the order for dual representation for the first to sixth defendants.

[28] The application filed 26 February 2021 is dismissed. I will hear the parties as to costs.