FEDERAL COURT OF AUSTRALIA

SMD Drainage Pty Ltd v Berkley Insurance Company [2018] FCA 380

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| File number: |  |
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| Judge: | **ALLSOP CJ** |
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| Date of judgment: | 20 March 2018 |
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| Catchwords: | **INSURANCE** – joinder of additional applicant and respondent – referee for quantum issues |
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| Cases cited: | *Sheehan v Lloyds Names Munich Re Syndicate Ltd* [2017] FCA 1340 |
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| Date of hearing: | 20 March 2018 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: | Insurance List  |
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| Category: | Catchwords  |
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| Number of paragraphs: | 10 |
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| Counsel for the Applicants: | Mr J Richardson |
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| Solicitor for the Applicants: | Ligeti Partners Lawyers |
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| Solicitor for the Respondent: | Ms S Fountain of DLA Piper |

ORDERS

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|  | VID 1130 of 2017 |
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| BETWEEN: | SMD DRAINAGE PTY LTDFirst ApplicantDUVALL PTY LTD ACN 075 806 996Second Applicant |
| AND: | BERKLEY INSURANCE COMPANY ACN 115 005 788Respondent |

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| JUDGE: | ALLSOP CJ |
| DATE OF ORDER: | 20 MARCH 2018 |

THE COURT ORDERS THAT:

1. Pursuant to rule 9.05 of the *Federal Court Rules 2011* (Cth), Peatling Group Vic Pty Ltd be joined to the proceeding as an applicant;
2. Pursuant to rule 9.05 of the *Federal Court Rules 2011* (Cth), CGU Insurance Limited be joined to the proceeding as a respondent;
3. Costs of the application be costs in the cause of the first and second applicants and first respondent;
4. The applicant serve the originating process and current defence-relevant papers in these proceedings upon CGU as soon as possible, including the terms of this judgment when it is settled and provided to the current applicants; and
5. The parties, including the newly joined parties, be granted leave to apply on three days' notice by contacting my associate if they need to approach the Court for any matter prior the case management hearing of 1 May 2018.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

(Revised from the transcript)

ALLSOP CJ:

1. This is an application to amend proceedings to join an applicant and a respondent. The matter is in the Insurance List. It arises out of a fire at a business of the current applicants, being a drainage business. The current respondent, Berkley Insurance Company (**Berkley**), is the material-damaged insurer of the applicants. The matter came into the Insurance List in late last year. There was a certain urgency in the application because the business of the applicants had been critically affected by the fire and the associated destruction of equipment. At that time, the respondent had not paid any monies, and it was investigating the claim. There was a usual exclusion in the policy of any claim for any fire or damage that had been caused by employees of the company.
2. Investigations have continued, and early this year, an interim payment was made by Berkley of a significant sum of money under the policy which reflected the conclusion of its investigations in the respects just identified and its acceptance of liability to the proper level dictated by the policy. Therefore, the continuing debates between the current applicants and Berkley turn on questions of fact and quantum.
3. In the meantime, the applicants, and in particular, a third company related to the applicants, have been dealing with another insurer, CGU Insurance Limited (**CGU**). CGU is the industrial special risk insurer, or loss of profits insurer; such insurance sitting on top of Berkley’s material damage policy. It was anticipated by the applicants that CGU and the applicants would resolve their differences satisfactorily without litigation. However, the applicants have come to the view that they will need to bring CGU to Court.
4. CGU is, of course, not present today, not being party to the proceedings. On the evidence filed before me, that is the affidavit of Heath Walter Peatling sworn 16 March 2018 which I will take as read, it is appropriate to join Peatling Group Vic Pty Ltd as an applicant to the proceedings and it is also appropriate and convenient to order the joinder of CGU to the proceedings as a second respondent.
5. There is a mediation scheduled between the current applicants and Berkley in April 2018. It is anticipated and hoped that CGU will participate in that mediation. If it be the case that CGU is not willing to participate in that mediation, the parties have general liberty to apply to bring the matter back for discussion as to the appropriate way forward with any mediation that does involve CGU. Likewise, I will not make orders for the filing of a concise statement or statement of claim or the filing of any concise statement in answer or defence by CGU. The parties have been in discussion with each other for some time and probably know what divides them already.
6. The matter is listed for a case management hearing on 1 May 2018. In the event that the mediation fails, I would expect the applicants, including the new applicant, to have provided to CGU a draft concise statement, at the very least such that CGU is in a position on 1 May to discuss the issues in the case and the way to resolve this case in the most cost-efficient and effective way. I’m informed by Mr Richardson, who appears for the applicants, that there will be or may well be construction issues in the CGU policy and also, perhaps, issues of fact as to which policy applies which may affect the nature of this construction issue.
7. If the matter does not settle at mediation, I’ve indicated to the current parties my view that any quantum issue will be sent to an appropriate referee. If there are construction issues, it may well be that appropriate declarations as to the meaning of the policy should be made prior to that reference. I would urge the parties to consult and confer with each other as to an appropriate person to undertake the reference should mediation fail. There are a number of recent judgments of the Court in relation to referees: see e.g. *Sheehan v Lloyds Names Munich Re Syndicate Ltd* [2017] FCA 1340. One of the particular advantages of the use of that process is that the parties can minimise heavy expenditure in competing expert evidence if they can agree upon a referee whose qualifications and standing they all agree upon and are willing to rely upon. Such use of a referee does not meant that there can never be any challenge to the conclusions of the referee. The bases for challenges of referees’ conclusions are well known. Certainly, questions of law are heard de novo, and questions of fact have a certain hurdle.
8. However, the parties can contest findings by the referee at the adoption hearing without necessarily having to spend extremely large amounts of money that are often required to fund, if I may use the expression, duelling experts. With these comments, I would urge the parties in their mediation to, even if they cannot resolve the matter, at least light upon the name of someone that they are content to investigate the matter and report to the Court as to quantum.
9. There may also be issues between the parties as to payment for amounts of money that must nevertheless be owing. There may also be issues that concern CGU that need to be dealt with prior to the mediation, or at least prior to the case management hearing on 1 May. Therefore, I will grant the parties, including the newly joined parties, liberty to apply on three days’ notice should they need to approach the Court for any matter.
10. With those comments and those reasons, I make orders in accordance with the interlocutory application dated March 2018 and filed by the applicants to the effect that:
11. Pursuant to rule 9.05 of the *Federal Court Rules 2011* (Cth), Peatling Group Vic Pty Ltd be joined to the proceeding as an applicant;
12. Pursuant to rule 9.05 of the *Federal Court Rules 2011* (Cth), CGU Insurance Limited be joined to the proceeding as a respondent;
13. Costs of the application be costs in the cause of the first and second applicants and first respondent;
14. The applicant serve the originating process and current defence-relevant papers in these proceedings upon CGU as soon as possible, including the terms of this judgment when it is settled and provided to the current applicants; and
15. The parties, including the newly joined parties, have liberty to apply on three days’ notice by contacting my associate if they need to approach the Court for any matter prior the case management hearing of 1 May 2018.

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| I certify that the preceding ten (10) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop. |

Associate:

Dated: 21 March 2018