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| CITATION: | *WILLIAM SERGEANT V MPJ ENTERPRISES [2021] NTLC 017* |
| PARTIES: | WILLIAM SERGEANT<br>V<br>MPJ ENTERPRISES<br>AND<br>QBE INSURANCE (AUSTRALIA) LTD |
| TITLE OF COURT: | WORK HEALTH COURT |
| JURISDICTION: | WORK HEALTH |
| FILE NO(S): | 21823756 |
| DELIVERED ON: | 8 JULY 2021 |
| DELIVERED AT: | DARWIN |
| HEARING DATE(S): | 25 MAY 2021, 22 JUNE 2021 AND 6 JULY 2021 |
| DECISION OF: | JUDGE JOHN NEILL |

**CATCHWORDS:**

*Joinder of approved insurer; jurisdiction of Work Health Court to entertain an application pursuant to section 132 of the* Return To Work Act*; jurisdiction of Work Health Court to entertain an action pursuant to subsection 27(1) of the* Law Reform (Miscellaneous Provisions) Act*; exercise of Court's discretion to grant leave pursuant to subsection 27(3) of the* Law Reform (Miscellaneous Provisions) Act.

*Return To Work Act sections 132, 133*

*Work Health Court Rules rule 11*

*Work Health Administration Act section 14*

*Law Reform (Miscellaneous Provisions) Act sections 26 and 27*

*Johannsen v Buslink Vivo Pty Ltd [2018] NTLC 23*

*Hopkins v QBE Insurance (Australia) Ltd [1991] NTSC 33*

**REPRESENTATION:**

*Counsel:*

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| Worker: | Mr Ben O'Loughlin |
| Employer: | Mr Bill Piper |
| Insurer: | Ms Peggy Cheong |

*Solicitors:*

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| Worker: | Halfpennys |
| Employer: | Piper Ellis Lawyers |
| Insurer: | Hunt and Hunt Lawyers |

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| Judgment category classification: | B |
| Judgment ID number: | 017 |
| Number of paragraphs: | 38 |

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21823756

BETWEEN

WILLIAM SERGEANT

Worker

AND

MPJ ENTERPRISES

Employer

AND

QBE Insurance (Australia) LTD

Insurer

REASONS FOR DECISION

(Delivered 8 July 2021)

JUDGE: JOHN NEILL

## The First Application

1. By interlocutory application filed on 9 April 2021 the Worker represented by Mr O'Loughlin of counsel instructed by Halfpenny's sought leave to join QBE Insurance (Australia) Ltd ("QBE") as a party to this proceeding on the basis that QBE was the approved insurer of the Employer at all material times.

2. The Employer has appeared in response to this application represented by Mr Piper of Piper Ellis. The Employer has taken a neutral position in response to the application.

3. QBE has appeared represented by Ms Cheong of Hunt & Hunt Lawyers, to oppose the application. It is QBE's position that the Worker was not at any material time a worker for the purposes of the *Return To Work Act* ("the Act"). It is QBE's position that there is no jurisdiction in the Work Health Court to join it in the proceeding in the circumstances.

4. There is a relevant history to this application. By a previous interlocutory application filed in this proceeding dated 19 December 2019, the Worker sought a preliminary determination of the question whether the Employer was entitled to be indemnified by QBE under a policy of Work Health insurance for the Worker's claim for payment of medical expenses arising out of a work injury in the course of his employment with the Employer. Any such preliminary determination would necessarily require a finding that the Worker at any relevant time was a worker for the purposes of the Act.

*5.* By Orders made on 5 May 2020 Deputy Chief Judge Fong Lim ruled that the Worker had failed to satisfy the Work Health Court for the purposes of his application that he was a worker for the purposes of the Act. In so finding, Judge Fong Lim did not purport to make a final ruling or finding whether the Worker was in fact a worker for the purposes of the Act. Her ruling was limited to the Worker's failure to discharge the onus on him to prove that issue at that interlocutory stage. Deputy Chief Judge Fong Lim specifically ordered in Order 2.c. that "*The question of whether the Worker is a worker for the purpose of the Act has not otherwise been conclusively decided*".

*6.* In the application filed 9 April 2021 Mr O'Loughlin on behalf of the Worker argued that it would be very convenient and involve a great saving in time and expense if all issues between the Worker and the Employer, and between both those parties and QBE, could be heard and determined at the same time at the same hearing of the proceeding. This may be correct, but convenience alone cannot create jurisdiction or power where no such jurisdiction or power otherwise exist.

7. In seeking to join QBE as a party to this proceeding, the Worker in his interlocutory application filed 9 April 2021 identified and relied on rule 11.01 of the *Work Health Court Rules*. That application document did not identify any other jurisdiction, power or legal basis generally in support of that joinder.

*8.* Rule 11 of the *Work Health Court Rules* bears the heading "*Joinder of party*". Subrule 11(2) requires "*a person proposing to join another person as a party to a proceeding*" to apply to the Court for orders in respect of the proposed joinder. That subrule as well as subrules (3) and (4) of Rule 11 set out the procedure required when making any such application. Subrule 11(1) defines "*a person proposing to join another person as a party to a proceeding*" . The definitions in subrules 11(1)(a) and (b) are not relevant to this case. The definition in subrule 11(1)(c) is a catch-all, in the terms "*a party proposing to join another person as a party*".

9. Whatever the definitions in rule 11, nowhere does that rule purport to establish a power of joinder in Work Health Court proceedings. Rather, rule 11 is limited by its own terms to the procedure involved in applying to the Court to join another party to a proceeding. Even if it purported to do otherwise, a rule of Court cannot create a power or jurisdiction which does not otherwise exist in the Act or in the *Work Health*

*Administration Act* – see *Johannsen v Buslink Vivo Pty Ltd* [2018] NTLC 23 in paragraphs 40 and 41. I am satisfied and I rule that rule 11 of the *Work Health Court Rules* does not purport to create and nor does it create any jurisdiction or power to join any person as a party to proceedings before the Work Health Court. I am satisfied that rule 11 alone cannot assist the Worker in this application.

10. There is no specific provision in the Act or in the *Work Health Administration Act* to join an approved insurer in the circumstances of this matter. At the hearing of this interlocutory application on 25 May 2021, the Worker raised and relied on section 132 of the Act**.** Section 132 is limited on its face to circumstances where a worker has already established an entitlement to payment of compensation under the Act by an employer or the employer has agreed to pay compensation, and the employer then defaults in payment of an amount of such compensation for a period exceeding one month. In those circumstances, but not otherwise, a worker may make a claim directly against the approved insurer of an employer to recover payment of the compensation. It is purely an enforcement provision, although one which cuts out a recalcitrant employer and allows direct access to the relevant insurer.

11. In the present case, the Worker has not established that prerequisite entitlement to payment of compensation under the Act by the Employer. The Employer has not agreed to pay any compensation to the Worker, and the Worker has not as yet established any liability of the Employer to pay compensation in accordance with the Act. Necessarily, there cannot have been a default in making any such payment for a period exceeding one month, or any period.

12. Mr O'Loughlin for the Worker argues that the provisions of section 14 of the *Work Health Administration Act* establish the jurisdiction of the Work Health Court to entertain an enforcement application pursuant to section 132 of the Act, and that those provisions are in broad enough terms to permit this even before the preconditions to the operation of section 132 have been established. Section 14 provides:

> *"The Court has the following jurisdiction:*
>
> (a) under the Return To Work Act, to hear and determine:
>
> (i) claims for compensation under Part 5 of that Act; and
>
> (ii) all other matters required or permitted by that Act to be referred to the Court for determination;
>
> *(b)* under *the* Work Health and Safety (National Uniform Legislation) Act, *to hear and determine:*
>
> (i) all applications made to the Court under that Act; and

(ii) all other matters required or permitted by that Act to be dealt with by the Court;

(c) to *determine* all matters and questions incidental to, or arising out of, matters before the Court;

(d) any other jurisdiction confirmed on it under any other Act".

13. In the NT Supreme Court Decision of *Hopkins v QBE Insurance Ltd* [1991] NTSC 33, Martin J (as he then was) (BF) held that the Work Health Court did not have jurisdiction under the relevant Work Health legislation as it stood in 1991 to entertain an enforcement application pursuant to section 132 of the *Work Health Act*, as *the Return To Work Act* was then known. He said at page 15.5:

> *"The question here is whether or not the legislature has conferred jurisdiction on the Work Health Court. There is a clear distinction between compensation payable by an employer to a worker under Part V of the Act and the right of the worker to seek recovery from an authorised insurer of a debt due and payable by the insurer to the worker by the operation of sections 132 and 133. In that latter situation the worker is not pursuing the rights to compensation under Part V or any matter incidental to or arising out of a claim for compensation under Part V. The worker is, to the contrary, seeking to recover from another party, the authorised insurer, a debt created by Part VII of the statute. The jurisdiction of the Work Health Court is limited to claims for compensation under Part V and matters and questions incidental to or arising out of claims for compensation under Part V, not claims for compensation and debts under the Act and matters and questions incidental to or arising out of such claims. The phrase "incidental to" can add something liable to happen or naturally appertaining to the claim for compensation (the Concise Macquarie Dictionary) to the Court's jurisdiction. The nexus between a claim for compensation under Part V and a claim against the authorised insurer for a debt arising from the operation of Part VIII does not have sufficient nexus such that the latter is incidental to the former".*

14. Martin J at page 16.8 held that the Supreme Court, and to the limit of its monetary jurisdiction the Local Court, had jurisdiction to entertain an enforcement application pursuant to section 132 of the *Work Health Act*.

15. The provisions establishing the jurisdiction of the Work Health Court at the time of that Decision in 1991 were to be found in section 94 of the *Work Health Act*, as the *Work Health Administration Act* did not yet exist. The jurisdiction provisions of section 94 of the *Work Health Act* in 1991 were relevantly in the same terms as section 14 of

the *Work Health Administration Act* as it presently stands. Section 94 relevantly provided the Court's jurisdiction as follows:

> *"(a) claims for compensation under Part V and all matters and questions incidental to or arising out of such claims;*
>
> and
>
> *(b) all other matters required or permitted by the Act to be referred to the Court for determination, and such other powers as are conferred on it by or under this or any other Act".*

16. I note that the provisions of section 132 of the *Work Health Act* were in identical terms in 1991 to the provisions of section 132 of the present *Return To Work Act*.

17. I am satisfied that the Decision of the Supreme Court in *Hopkins v QBE Insurance Ltd* is still binding on the Work Health Court in respect of the lack of jurisdiction of the Work Health Court to entertain an application pursuant to section 132 of the Act. I am satisfied and I rule that neither subsection 14(a)(ii) nor subsection 14(c) of the *Work Health Administration Act* creates a jurisdiction in the Work Health Court which did not exist pursuant to the repealed section 94 of the previous *Work Health Act*, namely to entertain an enforcement application pursuant to section 132 of the Act even where the preconditions to that section have been established. I am satisfied and I rule that there is necessarily no jurisdiction to entertain an enforcement application pursuant to section 132 of the Act where those preconditions have not yet been established. I am satisfied that section 132 of the Act cannot assist the Worker in this application.

18. Finally, it was submitted that the Work Health Court has the implied power to join an approved insurer in the circumstances of this matter. It is correct that the Work Health Court is a creature of statute and that therefore while it has no inherent power, it does have implied power. Implied power however cannot create a jurisdiction where none otherwise exists.

## The Second Application

19. By interlocutory application filed on 28 June 2021 the Worker made a further application to join QBE as a party to this proceeding, this time pursuant to sections 26 and 27 of the *Law Reform (Miscellaneous Provisions) Act*. Once again, Mr O'Loughlin appeared for the Worker, Mr Piper appeared for the Employer and Ms Cheong appeared for QBE. Once again, the Employer took a neutral position with respect to the application.

20. Sections 26 and 27 of the *Law Reform (Miscellaneous Provisions) Act* relevantly provide as follows:

> *"26(1) If a person (in this Part referred to as the insured) has, whether before or after the commencement of this Ordinance, entered into a contract of insurance by which he is indemnified against liability to pay any damages or compensation, the amount of his liability is, on the happening of the event giving rise to the claim for damages or compensation, and notwithstanding that the amount of the liability may not then have been determined, a charge on all insurance monies that are or may become payable in respect of that liability.*
>
> *"26(2) and (3) - not relevant.*
>
> *"27(1) Subject to subsection (2), a charge created by this Part is enforceable by way of an action against the insurer in the same way and in the same court as if the action were an action to recover damages or compensation from the insured.*
>
> *"(2) In respect of any such action and of the judgement given in any such action the parties have, to the extent of the charge, the same rights and liabilities, and the court has the same powers, as if the action were against the insured.*
>
> *"(3) Except where the provisions of subsection (2) of section 26 apply, no such action shall be commenced in any Court except with the leave of that court, and leave shall not be granted where the court is satisfied that the insurer is entitled under the terms of the contract of insurance to disclaim liability, and that any proceedings, including arbitration proceedings, necessary to establish that the insurer is so entitled to disclaim have been taken".*

21. The Worker alleges he suffered an injury in the course of his employment with the Employer on or about 26 February 2018. It is common ground that QBE was the Employer's approved insurer pursuant to the Act at around that time.

22. I am satisfied and I find that the Employer had entered into a contract of insurance with QBE by which he was indemnified against liability to pay any compensation pursuant to the Act to a worker who suffered an injury in the course of employment with the Employer on or about 26 February 2018.

23. I am satisfied and I find that pursuant to subsection 26(1) of the *Law Reform (Miscellaneous Provisions) Act*, on the happening of the injury which the Worker alleges he sustained on or about 26 February 2018 and which he alleges occurred in the

course of his employment with the Employer, the amount of the Employer's liability, if any, to pay compensation to the Worker pursuant to the Act became a charge on all insurance monies that were or may become payable by QBE in respect of that liability.

24. Subsection 14(d) of the *Work Health Administration Act* provides that the Work Health Court additionally has the following jurisdiction:

> "(d) any *other* jurisdiction conferred on it under any Act".

25. I am satisfied that pursuant to subsection 27(1) of the *Law Reform (Miscellaneous Provisions) Act* the charge I have found in paragraph 24 above is enforceable by way of an action against QBE in the same way and in the same court as if the action were an action to recover damages or compensation by the Worker from QBE. I am satisfied and I rule that subsection 27(1) of the *Law Reform (Miscellaneous Provisions) Act* together with subsection 14(d) of the *Work Health Administration Act* establish the jurisdiction of the Work Health Court to entertain such an action by the Worker against QBE in the circumstances of this proceeding. That being so, rule 11 of the *Work Health Court Rules* provides the procedure necessary to apply to the Court to join QBE as a party to the proceeding.

*26.* However, subsection 27(3) of the *Law Reform (Miscellaneous Provisions) Act* establishes a precondition to any such action by the Worker against QBE in the Work Health Court or indeed any other Court which might have jurisdiction to entertain it. That precondition is the leave of the Court. The subsection goes on to establish that the Court may not grant that leave "*…where the Court is satisfied the insurer is entitled under the terms of the contract of insurance to disclaim liability, and that any proceedings, including arbitration proceedings, necessary to establish that the insurer is so entitled to disclaim have been taken".*

27. Here, the Court must be satisfied of two matters. It must be satisfied first that the insurer is entitled under the terms of the contract of insurance to disclaim liability and second, that any proceedings including arbitration proceedings, necessary to establish that the insurer is so entitled to disclaim have been taken.

28. QBE has filed affidavits of Ms Peggy Cheong promised 6 July 2021 and 7 July 2021 in respect of QBE's entitlement to disclaim liability. The Employer has filed an affidavit of William Francis Piper promised 7 July 2021 in respect of the same issue. The affidavits of Ms Cheong set out matters which, if proven to the requisite standard, could establish QBE's entitlement to disclaim liability as a matter of general contract and insurance law. The affidavit of Mr Piper puts some of those matters in contest. The contested matters cannot be finally determined at this interlocutory stage. Additionally, all of the affidavits are silent as to the existence of any requirement for any proceedings, including arbitration proceedings, necessary to be taken to establish

that the insurer is entitled to disclaim liability. They are all silent as to whether any such proceedings, if they exist and are necessary, have been taken.

29. The requirement in subsection 27(3) of the *Law Reform (Miscellaneous Provisions) Act* that the Court be satisfied as to an insurer's entitlement to disclaim liability places the onus on QBE in the present matter. QBE has failed to discharge that onus.

30. I now turn to the general question of the leave of the Court. In view of my finding in the preceding paragraph, the Court's discretion as to that leave is unfettered, however it must be exercised judicially.

31. A major policy reason for the introduction of provisions in State and Territory legislation around Australia in the same or very similar terms to sections 26 and 27 of the *NT Law Reform (Miscellaneous Provisions) Act* was to protect the interests of claimants against insured persons where those insured persons were or were likely to be unable to pay such claims once liability was established. It was seen as appropriate to enable claimants in such circumstances to recover directly from insurers.

*32.* In the present case the only evidence relevant to the financial position of the Employer appears in paragraph 5. of the affidavit of William Francis Piper promised 7 July 2021. There, Mr Piper deposes as follows: "*Whilst my client is not contactable at the time of preparing this affidavit, based on my previous instructions the employer may not have the means to cover the cost of any liability, if found, at the conclusion of this proceeding*".

33. I am not satisfied that this evidence is sufficiently cogent in the circumstances of this case to satisfy me that the Employer is or may be unable to pay compensation to the Worker in the event the Worker eventually establishes any liability on the part of the Employer.

34. However, there is another circumstances relevant to the exercise of my discretion whether to grant leave to the Worker pursuant to subsection 27(3) of the *Law Reform (Miscellaneous Provisions) Act* to commence proceedings against QBE by allowing QBE to be joined as a party to this proceeding. That circumstance appears in a letter dated 24 October 2019 from Hunt & Hunt Lawyers who represented and continue to represent QBE in this matter. That letter is attached to the affidavit of William Francis Piper promised 7 July 2021 as item c. referred to in paragraph 2. of that affidavit. That letter is addressed to Mr Piper of Piper Ellis Lawyers.

35. At the end of the second paragraph and continuing in the third paragraph on page 2 of that letter, the author warned Mr Piper that even if the Worker were to establish the Employer's liability under the Act in proceedings before the Work Health Court, QBE would be entitled to reopen and re-agitate the same issues in the course of

defending any enforcement application pursuant to section 132 of the Act. In the third paragraph, the author stated: "*The long and short of the foregoing is that your client may ultimately fall between two stools if he is proved to be the Employer in the case against the Worker and the Court holds otherwise in any action under section 132 against the Insurer*".

36. Whatever the likelihood of QBE's being able to reopen and re-agitate such issues in any defence against enforcement action by the Worker pursuant to section 132 of the Act, and whatever its present intention to proceed in that manner, the prospect was plainly raised on behalf of QBE in 2019. In my view, it would be most undesirable for that prospect to occur or even to be a possibility as an additional hurdle to be cleared in any subsequent enforcement litigation.

37. Accordingly, I am satisfied it is desirable in order to achieve the fair, effective, complete, prompt and economical determination of all present and foreseeable future issues between the parties and between each of them and QBE that the Worker should have leave pursuant to subsection 27(3) of the *Law Reform (Miscellaneous Provisions) Act* to commence proceedings against QBE by joining QBE as a party to this proceeding.

38. I make the following orders:

    1. Pursuant to subsection 27(3) of the *Law Reform (Miscellaneous Provisions) Act* the Worker has leave to commence an action against QBE Insurance (Australia) Ltd pursuant to subsection 27(1) of that Act.

    2. Pursuant to subsection 27(1) of the *Law Reform (Miscellaneous Provisions) Act* and rule 11.03 of the *Work Health Court Rules*, the Worker may commence that action in the Work Health Court by joining QBE Insurance (Australia) Ltd in this proceeding in its capacity as the Employer's approved insurer pursuant to the *Return To Work Act*, and it is so joined, to be referred to as the "Insurer".

    3. The Worker's interlocutory application filed 9 April 2021 is dismissed and the costs of and incidental to that application are to be the Insurer's costs in the proceeding, and the Worker and the Employer are to pay their own costs.

    4. The costs of and incidental to the Worker's interlocutory application filed 28 June 2021 are to be costs in the cause, that cause being the Employer's liability to pay compensation to the Worker.

    5. The Worker within 21 days file and serve on each of the Employer and the Insurer his Amended Statement of Claim pleading his claim against the Insurer pursuant to subsection 27(1) of the *Law Reform (Miscellaneous Provisions) Act*, in addition to his claim against the Employer.

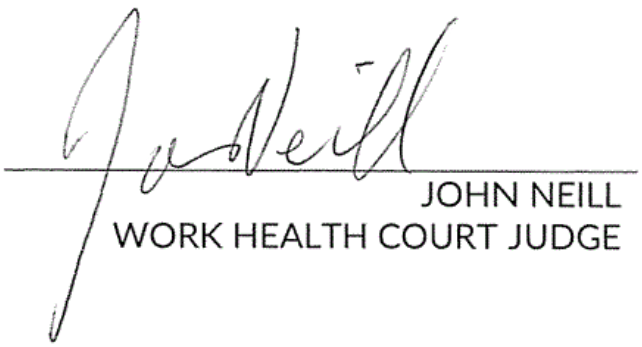
6. The Employer within 14 days of service on him of the Worker's Amended Statement of Claim file and serve on each of the Worker and the Insurer any Amended Notice of Employer's Defence in the proceeding.

7. The Insurer within 21 days of service on it of the Worker's Amended Statement of Claim file and serve its Notice of Insurer's Defence on each of the Worker and the Employer.

8. All parties within 14 days of the filing of the Notice of Insurer's Defence file and serve on each other party an up to date and consolidated List of Documents relevant to all issues arising in the proceeding, including all issues raised in respect of the action identified in Order 1 above.

9. The proceeding is adjourned before the Judicial Registrar for a Listing Conference at a time and on a date to be advised to all three parties, not earlier than 21 September 2021.

Dated this 8th day of July 2021



JOHN NEILL
WORK HEALTH COURT JUDGE