PARTIES:	RICHARD WHITE
	v
	PINK BATTS INSULATION PTY LTD formerly known as DIVIC PTY LTD formerly known as DIMET CORROSION PREVENTION PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT of the NORTHERN TERRITORY Exericising Territory Jurisdiction
FILE NO:	138/93 (9315534)
DELIVERED:	13 March 1997
HEARING DATES:	13, 14 and 15 November 1996
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Plaintiff:	J.B. Waters
Defendant:	S. Tilmouth QC
Commercial Union	D. Quick QC

Solicitors:

Plaintiff:	Cridlands
Defendant:	De Silva Hebron
Commercial Union	Elston & Gilchrist

Judgment category classification:	C
Judgment ID Number:	tho96016
Number of pages:	31

(tho96016)

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No 138/93 (9315534)

BETWEEN:

RICHARD WHITE
Plaintiff

AND:

PINK BATTS INSULATION P/L
formerly known as DIVIC P/L
formerly known as DIMET
CORROSION PREVENTION P/L
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 13 March 1997)

These interlocutory proceedings involved the following two applications:

1) An application by the plaintiff to join Commercial Union Assurance Company of Australia Ltd as a second defendant.

2) An application by the defendant for summary judgment against the plaintiff in this matter on the basis that the plaintiff has proceeded against the wrong defendant.

Mr Waters appeared for the plaintiff, Mr Tilmouth QC for the defendant and Mr Quick for Commercial Union Assurance Company of Australia Ltd (hereinafter referred to as "CU")..

The plaintiff, Richard White, was employed in the Northern Territory between 1972 to 1974. He was engaged principally in sand blasting and painting ships and other steelwork. One of the principal issues at trial will be by whom was he employed.

In 1987 the plaintiff was diagnosed with lung problems, the consensus of medical opinion being that he suffers a form of silicosis. At the time of trial the other principal issue will be whether there is a causal connection between his employment during the period 1972 to 1974 and his present lung condition.

On this interlocutory application, the defendant will be seeking to establish that the plaintiff was not employed by Pink Batts Insulation Pty Ltd, at that time known as Dimet Corrosion Pty Ltd, but rather by Dimet Contracting Pty Ltd. Dimet Contracting Pty Ltd was voluntarily wound up in 1985 and the company's assets dispersed. The plaintiff seeks to utilise the provisions of ss26 and 27 of the *Law Reform (Miscellaneous Provisions) Act* to pursue an action against Commercial Union Assurance Company of Australia Ltd as the likely insurer of Dimet Contracting Pty Ltd. The plaintiff asserts he is entitled to maintain an action against Dimet Corrosion Pty Ltd.

Mr Waters, on behalf of the plaintiff, seeks to rely on the following affidavit material:

1. Affidavit of Richard White sworn 7 June 1995.
2. Affidavit of Victor John Fishwick sworn 28 October 1996.
3. Affidavit of Barry Thomas Medley sworn 29 October 1996.
4. Affidavit of Colin Ferguson sworn 6 March 1996.
5. Affidavit of Richard Martin Bonython sworn 30 July 1996.
6. Affidavit of David Sydney Farquhar sworn 25 September 1996.
7. Affidavit of Helen Camp sworn 4 November 1996.

Mr Tilmouth QC for the defendant, sought to rely on the affidavit material already referred to and the plaintiff's answers to interrogatories filed on 13 May 1996.

Mr Quick QC, counsel for Commercial Union Assurance Company of Australia Ltd, sought to rely on the affidavit material already referred to by the plaintiff and the following affidavit evidence.

1. Affidavit of Dominic Donato sworn 4 November 1996.
2. Affidavit of Roy Joseph William Botterell sworn 7 November 1996.
3. Affidavit of Trevor J. Sinclair sworn 8 November 1996.
4. Affidavit of Frank Strazdins sworn 8 November 1996.
5. Affidavit of Dennis Cross sworn 11 November 1996.
6. Affidavit of Denis James sworn 11 November 1996.

The defendant does not dispute the matters set out in paragraph 2 of the plaintiff's statement of claim dated 19 May 1994, which states as follows:

> "2. At all material times the Defendant carried on its business in the Northern Territory, variously under the names of:-
>
> (a) DIMET CORROSION PREVENTION PTY. LIMITED from 13th January 1964 to the 3rd of July 1972;
>
> (b) DIMET CORROSION PTY. LIMITED from the 4th of July 1972 to the 16th of March 1977;
>
> (c) DIVIC PTY. LIMITED from the 16th of March 1977 to the 29th of October 1991; and
>
> (d) PINK BATTS INSULATION PTY. LIMITED from the 30th of October 1991 to present."

Neither does the defendant dispute, for the purpose of these applications, the assertions contained in paragraphs 3, 4, 5, 6 and 7 of the proposed further amended Statement of Claim which is annexure "A" to the affidavit of David Sydney Farquhar sworn 4 November 1996. These paragraphs provide as follows:

> "3. At all material times, Dimet Contracting Pty Ltd, formerly known as Dimet (S.A.) Pty Ltd; formerly known as Zinceron Holdings Pty Ltd and originally incorporated in South Australia on 23 April 1954 as Zinceron Holding Ltd; was carrying on business in the Northern Territory of Australia and capable of suing and being sued in its corporate name and style. (This entity is hereinafter referred to as "Dimet Contracting Pty Ltd".)
>
> 4. On 1 March 1972 Dimet (S.A.) Pty Ltd changed its name to Dimet Contracting Pty Ltd.
>
> 5. At all material times Dimet Contracting Pty Ltd was a wholly owned subsidiary of the First Defendant.

6. On 7 June 1976 Dimet Contracting Pty Ltd resolved to be wound up.

7. On 24 January 1985 Dimet Contracting Pty Ltd was dissolved after the liquidator had repaid surplus assets to the First Defendant."

The change in the plaintiff's claim appears in paragraph 8 and 9 of the proposed Further Amended Statement of Claim which asserts:

"8. The Plaintiff commenced employment with the First Defendant, or in the alternative with Dimet Contracting Pty Ltd in about May 1971.

9. The Plaintiff was employed as a labourer's assistant and sandblaster on a part-time basis until December 1972, thereafter working in the same capacity but on a full-time basis until approximately August 1974."

In addition the plaintiff asserts in the proposed Further Amended Statement of Claim:

"15. At all material times the Second Defendant provided employer's indemnity insurance cover to the First Defendant and to Dimet Contracting Pty Ltd in relation to workmen's compensation claims brought by employees of the First Defendant or Dimet Contracting Pty Ltd, in both South Australia and the Northern Territory.

16. At all material times the First Defendant and Dimet Contracting Pty Ltd were entitled to indemnity in the Northern Territory pursuant to the Workmen's Compensation Ordinance policy, or in the alternative pursuant to the policy entered into pursuant to and collateral with the South Australian Workmen's Compensation Act."

The essential difference between the first Statement of Claim issued on behalf of the plaintiff and the proposed Further Amended Statement of Claim is the allegation of employment by an alternative employer and the consequential prayer for relief in respect of alternative employers.

The evidence for consideration on these applications is contained in the affidavits referred to above. A summary of the relevant evidence is as follows:-

RICHARD MARTIN BONYTHON

Mr Richard Martin Bonython was cross examined by way of video conference on his affidavit sworn 30 July 1996 and tendered in evidence. I have summarised the evidence given by him in the course of cross examination.

Mr Bonython gave evidence that since 20 December 1974 he has had no association with the Dimet Group of Companies. He had previously been a director of Dimet Contracting Pty Ltd which was a hands on involvement. In Whyalla South Australia the main occupation was in the ship building yards. Dimet Contracting was the contractor who blasted and applied the coatings. Dimet Corrosion quoted for the supply of those coatings and gave technical assistance to the ship yard. Any contract obtained would be in the name of Dimet Contracting. Dimet S.A. Pty Ltd was the former name of Dimet Contracting Pty Ltd. Dimet Corrosion Pty Ltd was not operating in South Australia. Dimet Contracting Pty Ltd operated in Darwin for some years and a local manager was sent to Darwin from Whyalla. Mr Bonython was shown a print out of claims recovered from the record of Commercial Union for the period between 1972-1974. Mr Bonython agreed it was possible Commercial Union Assurance Company of Australia Ltd had a blanket cover across Dimet Corrosion and all its subsidiaries including Dimet Contracting Pty Ltd. When

asked as to why some 30-40 claims were made against Dimet Corrosion in Whyalla during the early 1970's and admitted by the insurers, Mr Bonython replied that the insurance company wrongly put Dimet Corrosion Pty Ltd when it was in fact Dimet Contracting Pty Ltd.

Mr Bonython agreed that workers compensation is compulsory. It is Mr Bonython's evidence that the Dimet Group of companies operated in a number of other states as well as South Australia and he had no doubt that the appropriate insurance was put in place in each jurisdiction, although he did not recollect specifically that it was done. Mr Bonython stated he was not aware that a claim was made by Mr Morris Wilson and Mr Jim Taccori against Dimet Contracting Pty Ltd and paid by Commercial Union Assurance Company of Australia Ltd. He was aware that a Mr Trevor Jones was employed by Dimet Contracting Pty Ltd but was not aware that Mr Jones made a claim against Dimet Corrosion Pty Ltd which was paid by Commercial Union Assurance on the basis of a claim made by Dimet Corrosion Pty Ltd.

The only explanation Mr Bonython could make as to why 30 employees in South Australia between 1973-1974 had claims admitted by Dimet Corrosion Pty Ltd was that Commercial Union Assurance made a mistake in their records of the name of the company. The company that was carrying on work in the Northern Territory was Dimet Contracting Pty Ltd. Employees transferred to the Northern Territory from South Australia were not transferred into another company. There was no change of status as regards their employer. Mr Bonython stated that Commercial Union Assurance was at the relevant time

the only insurance company of both Dimet Corrosion Pty Ltd and Dimet Contracting Pty Ltd in South Australia.

In re-examination Mr Bonython confirmed he was managing director of Dimet Contracting Pty Ltd during the early 1970's. Dimet Corrosion Pty Ltd quoted for supply and gave technical assistance whereas Dimet Contracting Pty Ltd applied the coatings and did the "gritty work". In the early 1970's a technical officer employed by Dimet Corrosion Pty Ltd lived and worked full time in Whyalla and from time to time other employees of Dimet Corrosion Pty Ltd who were responsible for selling the coatings would go to Whyalla.

In his affidavit sworn 30 July 1996, Mr Bonython has deposed to the fact that he was a director of Dimet Contracting Pty Ltd between 1970 and 1975. He was also a director of Dimet Corrosion Prevention Pty Ltd, subsequently Dimet Corrosion Pty Ltd for approximately the same time. A return giving particulars in the Register of Directors, Managers and Secretaries and change of particulars of Dimet Corrosion Pty Ltd dated 20 December 1994 noted that Mr Bonython had resigned.

Throughout the period of Mr Bonython's directorship of both companies, Dimet Corrosion Pty Ltd (previously Dimet Corrosion Prevention Pty Ltd) was a manufacturer of coatings in Victoria. Dimet Corrosion Pty Ltd never carried out a sand blasting operation either in Darwin or elsewhere.

The business of Dimet Contracting Pty Ltd involved blasting of steel and other surfaces as a preparation for the application of coatings.

Dimet Contracting Pty Ltd was based in South Australia but operated from time to time elsewhere, including Darwin. The operation in Darwin was permanent for several years.

It is Mr Bonython's evidence in his affidavit that Dimet Corrosion Pty Ltd was not the employer of the plaintiff.

COLIN FERGUSON

Colin Ferguson in his affidavit sworn 6 March 1996 has deposed to the fact that in the mid to late 1960's he commenced working for an employer known as Dimet Corrosion Pty Ltd. He continued working with them in Whyalla until approximately 1974/1975. It is his evidence that in the early 1970's some of the workers employed by Dimet Corrosion in Whyalla were sent to work in Darwin on a job sand blasting a boat. He states he believes that Dimet Corrosion may have secured other sand blasting work in Darwin after the initial job, which caused some of the workers to be sent from Whyalla to Darwin. Mr Ferguson declined an invitation by the supervisor of Dimet Corrosion Pty Ltd in Whyalla to travel from Whyalla to Darwin to work.

BARRY THOMAS MEDLEY

In an affidavit sworn 29 October 1996, Barry Thomas Medley has deposed to the fact that he worked with Richard White during the years 1971-1974 Richard White worked for "Dimet Sandblasting Company". When Mr Medley first came to the Northern Territory he was working for "Dimet". Mr Medley states he knew Dimet Corrosion Prevention Pty Ltd, Dimet Corrosion Pty Ltd and Dimet Contracting Pty Ltd as a group of companies that were all called "Dimet".

VICTOR JOHN FISHWICK

Victor John Fishwick in his affidavit sworn 28 October 1996 deposed to the fact that he worked in Darwin in 1974 for a company called Dimet. Richard White was working with him at this time for the same company in Darwin. Mr Fishwick was aware the Dimet group of companies were in a lot of different locations around Australia.

DENNIS CROSS

The affidavit of Dennis Cross sworn 11 November 1996 deposes to the fact that he is the claims controller for the Adelaide Branch of Commercial Union Assurance Company of Australia Limited. Between 1989-1991 he was employed by CU in its office in Darwin in the position of "Manager, Northern Territory". During that time Mr Cross arranged for the disposal of all CU files, important documents excepted, spanning the period from the late 1960's to 1985.

DENIS JAMES

Denis James, who is the liability claims controller for CU in Adelaide, deposes in his affidavit sworn 4 November 1996 to the fact that all underwriting records, in relation to the proposals of insurance and policies issued to the Dimet group of companies that relate to the South Australian and Northern Territory offices, have been destroyed. Copies of the micro-filmed claim files were forwarded to Messrs Elston and Gilchrist for inspection by the solicitors for the parties in the action.

In his affidavit sworn on 11 November 1996, Denis James deposes as follows:

> "2. I have read through all the claims files referred to in my affidavit that were retrieved and photocopied. Only three of the claims related to a claim from the Northern Territory.
>
> 3. In respect of those three claims I wish to say"-
>
> (i) **Dimet and Jones:**
> The file identifies Mr Jones as a worker transferred from Whyalla to Darwin. The claim was paid under the South Australian Policy on the basis that Mr Jones, having been employed in Whyalla, was thereby entitled to claim under the South Australian Workers Compensation Act.
>
> (ii) **Dimet and Wilson:**
> The file does not disclose whether the worker was a transferee from S.A. The practice of Dimet was to send a batch of claims at one time and in my opinion the claim would have been admitted and the benefit paid either because the small amount of the file claim would not warrant any investigation or because the officer of CU who handled the claim did not realise the claim was from the Northern Territory or both.
>
> (iii) **Dimet and Taccori:**

My comment in respect of this claim are the same as (ii) above.

5. I am able to say that all claims were paid under the S.A. Policy because I recognise the policy numbers as being those applicable to S.A. The first 4 positions indicate the company (i.e. C for CU), the type of policy (i.e. 03 is workers compensation) and the last designating the branch from which the policy was issued (i.e. A is S.A.)."

RICHARD WHITE

In his affidavit sworn 7 June 1995, Richard White deposes to the fact that he was employed by "Dimet" on a part-time basis from May/June 1971 until late 1972 and from late 1972 until November 1974 on a full-time basis. On 24 December 1974 Mr White's home in Darwin was severely damaged in Cyclone Tracy and any documents he had relating to his employment with "Dimet" were destroyed.

Mr White states in his affidavit that when he first consulted a solicitor in relation to his disease on 13 November 1991, he was not able to recall the correct name of his employer for the period 1971 to 1974. The affidavit then relates the further searches and inquiries Mr White made to establish the identity of his employers and the reasons for issuing proceedings against the defendant.

DOMINIC DONATO

An affidavit of Dominic Donato sworn 4 November 1996 has also been tendered. Paragraph 4, 5 and 6 of this affidavit states as follows:

"4. In the period 1971 to 1974 there was a CU office in the Northern Territory and CU were an authorised insurer for the purpose of

issuing workers compensation policies in the Northern Territory. CU has a policy that each of the State or Territory offices are autonomous, and each is responsible for issuing policies in their own area, so that, for instance, a Northern Territory policy would not be issued by the South Australian Office.

5. I am able to say that to the best of my recollection and as a result of making enquires of people involved in underwriting at the time, particularly a Mr G Lewis, no workers compensation/common law policy in respect of injuries to workers was issued to any of the Dimet Group of Companies in respect of their liability under the Northern Territory Workers Compensation Act.

6. I am now aware that some of the work force employed by Dimet in Whyalla were transferred temporarily to the Northern Territory in the period 1971 to 1974 and because those workers were still covered by the South Australian policy issued to Dimet, I understand that Dimet was indemnified for three (3) claims made by those workers."

DAVID SYDNEY FARQUHAR

In an affidavit sworn 25 September 1996 David Sydney Farquhar deposes to the fact that Mr Farquhar has attended at the offices of Messrs Elston and Gilchrist, solicitors for CU to inspect documents delivered to their office pursuant to a subpoena issued on 12 July 1996.

Mr Farquhar has attached to his affidavit a copy of a summary of notes from that inspection. He states that:

"5. The files apparently disclose that Commercial Union provided workers compensation cover to a number of different entities within the Dimet group and that such entities were sometimes involved in the same claim."

ROY JOSEPH BOTTRELL

Roy Joseph Bottrell in an affidavit sworn 7 November 1996 stated he was the Manager for the Commercial Union Assurance Company (Australia) Pty Ltd in Darwin between September 1972 and December 1977. His evidence is that to the best of his recollection, no workers compensation/common law policy in respect of injuries to workers was issued to any of the Dimet Group in respect of their liability under the Northern Territory *Workers Compensation Act*.

Summary of submission for the defendant on the defendant's application for summary judgment

Mr Tilmouth QC argues on behalf of the defendant that the cross examination of Mr Bonython takes the matter no further than his affidavit. It is his submission there is no probative evidence that Dimet Corrosion Pty Ltd was employing people in the Northern Territory at the relevant times.

Mr White, in his affidavit and answers to interrogatories, states he has no knowledge of the name of the company who employed him at the relevant time. Mr White's present belief based on information received from Barry Medley and Victor Fishwick, is that the name of the company was Dimet Corrosion. Mr Medley in the interview, a copy of which is attached to his affidavit, is only able to talk about the Dimet group which would include Dimet Contracting. There is also a reference to Dimet Sandblasting company but no evidence to support the belief the employer was Dimet Corrosion. Mr Fishwick in his affidavit also only makes reference to the Dimet group of

companies and does not provide evidence to support Mr White's belief the employer was Dimet Corrosion.

Mr Ferguson's affidavit of 6 March 1996 makes reference to the fact that he worked for Dimet Corrosion as a leading hand in Whyalla. This conflicts with the evidence of Mr Bonython that the only people on the ground in Whyalla with Dimet Corrosion were the technical support people. Similarly his evidence that some of his co-workers employed by Dimet Corrosion in Whyalla were sent to work on a job in Darwin conflicts with other evidence that if any persons did go from Whyalla to Darwin they were persons employed by Dimet Contracting.

It is Mr Tilmouth's submission that none of the evidence in the affidavit of Mr Medley or Mr Fisher is probative because they have no direct knowledge of people employed by Dimet Corrosion. The inference that Dimet Corrosion was the employer is based on unsubstantiated belief rather than direct fact.

Conclusion on the defendant's application for summary judgment

I do not agree the submissions made by Mr Tilmouth justify dismissing the plaintiff's action against Dimet Corrosion.

There is no conclusive evidence before the Court at this time as to which company employed Mr White; there is conflicting evidence as to whether it was Dimet Corrosion Prevention Pty Ltd, Dimet Contracting Pty Ltd or one of the other Dimet group of companies. Ultimately this Court will be required to

make a decision as to which company employed the plaintiff. I consider the conflicting evidence is a matter to be determined at trial. The defendant has not satisfied me that I should accede to their application to dismiss the plaintiff's claim against them. In addition to the conflicting evidence referred to there is evidence from Mr Farquhar's summary of his detailed research that a number of claims are from Dimet Corrosion. There is no evidence the claims were only from persons employed to give technical assistance. It may be the insurance company made a mistake but there may be another explanation.

The defendant bears the onus of satisfying this Court on the balance of probabilities the application should be granted. This Court has a power to make the order the defendant seeks pursuant to Order 23.03 which reads:

> "On application by a defendant who has filed an appearance, the Court at any time may give judgment for the defendant against the plaintiff if the defendant has a good defence on the merits."

This power should be exercised with great care and applied only where there is no question to be tried (*Wilson v Union Insurance* (1992) 112 FLR 166 at 180; *Fancourt v Mercantile Credits Ltd* (1982) 154 CLR 87; *ANZ Banking Group Ltd v David* (1991) 105 FLR 403 at 407-8).

I consider there is a question to be tried. For the reasons stated the defendant's application for summary judgment is dismissed.

I turn now to deal with the plaintiff's application to join Commercial Union Assurance Company Pty Ltd, the insurer of Dimet Contracting Pty Ltd

as a second defendant in these provisions pursuant to the provisions of the *Law Reform (Miscellaneous Provisions) Act*.

The limitation period for a claim under s27 of the *Law Reform (Miscellaneous Provisions) Act* runs from the date leave is granted pursuant to s27(3) of the *Law Reform (Miscellaneous Provisions Act* to join CU as a defendant (*Ceric v C.E. Heath Underwriting* (1994) 122 FLR 123).

When assessing the appropriateness of joinder the criteria to be applied is whether there is an argument in the applicant's favour which could seriously be put. Leave should then be granted. I apply with respect the principle as stated by the Court of Appeal in the Federal Court in *AFG Insurances Ltd v Andjelkovic* (1981) 54 FLR 398 at 400:

> "Counsel for the respondent argued that the respondent was entitled to leave pursuant to s.26(3) of the Ordinance if she could show a prima facie case of liability which he equated to a seriously arguable case, but he conceded that, if the incident took place outside the terms of the policy, the respondent was not entitled to leave. For the purpose of the appeal he said that the only real issue was 'Was there an arguable case?'
>
> Section 26 (3) commands the court not to grant leave in certain circumstances. It is not easy to decide precisely what is embraced in the words which describe the circumstances where the court is not to grant leave. In our opinion the court has a general power to grant leave in all cases which do not fall within the provision that it shall not grant leave and in which it is made to appear by evidence available in the application that there is an arguable case of liability against the insured, being a liability against which the insured is indemnified by a contract of insurance in force at the time of the happening of the event said to give rise to the claim. We accept the relevant test proposed by the respondent which is really the test formulated by the primary judge, namely, has the respondent presented a case which is at least arguable?"

In the matter of *Oswald v Bailey* the decision of the Court of Appeal in New South Wales (1987) 11 NSWLR 715 Kirby J at 716 sets out the background to the legislation:

> "These appeals concern the meaning of an unusual statutory provision, derived from a New Zealand Act of 1936. The provision in question is designed to permit direct access by a claimant for damages or compensation to a fund of insurance moneys provided in consequence of a contract of insurance into which the insured has entered with an insurer. Normally the law of privity of contract would preclude the claimant's direct access to such moneys. The claimant's only claim would lie against the alleged tortfeasor. In a legislative stroke, more bold because of its departure from the normal rule that insurance is an extraneous and separate matter between the insured and its insurer, the *Law Reform (Miscellaneous Provisions) Act* 1946, s6 (the Act) provides a scheme for the attachment of insurance moneys for the benefit of those having certain claims upon the insured. To prevent unnecessary or inappropriate claims, the Act provides that the leave of the Court is necessary before any such direct action against the insurer may be commenced. But once commenced, the fictions of indemnity are replaced by s 6(4) of the Act. The parties are then declared to have the same rights and liabilities, and the court the same powers, as if the action were against the insured.
>
> The very uniqueness of this statutory provision speaks against a narrow construction of it. So too does the beneficial object which lies behind it. The insured may disappear, die or, if a company, be wound up. Such events could, in the past, stultify the claimant's prospects of practical recovery. Out of recognition of the modern reality of insurance, the need to protect those with claims for damages or compensation, and the ready ability, normally, to trace insurers entering into contracts of insurance, provision has been made for a direct action against the insurer. The claimant must bring himself within the terms of s 6 of the Act. But if the claimant does, the benefit is secured of a charge on all insurance moneys that are or may become payable in respect of the insured's liability."

On the evidence of Mr Richard Bonython, Dimet Contracting Pty Ltd operated in the Northern Territory and during this period employed Commercial Union Assurance Company Pty Ltd exclusively as their insurers.

In the document titled "Summary of Commercial Union Claims", which is attached to the affidavit of David Sydney Farquhar sworn 25 September 1996, there are numerous claims against Commercial Union from Dimet Corrosion Pty Ltd, Dimet Contracting Pty Ltd, Dimet (S.A.) Pty Ltd and Dimet (W.A.) Pty Ltd. Claims were made by a number of different Dimet entities, all to Commercial Union most of them relating to the workers compensation jurisdiction. On p7 of this summary Mr Farquhar has summarised a claim by Mr Morris Wilson. The insured is stated to be Dimet Contracting Pty Ltd. The worker sustained aggravation to his eyes and it is noted that he received an invoice from Darwin Hospital providing a medical certificate dated 30 September 1974. The accident occurred whilst the worker was sandblasting, he reported it to T. Jones. The name of the insured was given as Dimet Contracting of PO Box 3779 Darwin, at Dimet at 13 Mile. The summary then states "C.U. only paid $1.35 on this claim being invoiced from hospital for medical certificate."

The following entry on this page of the summary relates to a claim made by Mr Jim Taccori and states as follows:

"Jim Taccori

Insured: Dimet Contracting Pty Ltd.
Date of incident: **25.9.74**
Place: Stokes Hill Wharf, Darwin.
Worker was a sandblaster who sustained a dislocated knee and bruised ribs.
Accident was at Stokes Hill Wharf with the witness noted as Bruce Henders?

The report of the injury is by the employer in the name of Dimet Contracting.
The medical certificate from Darwin Hospital dated 1/10/74 renders an account for $1.35 to Dimet Const. of PO Box 3779, Darwin.
Further invoice of $1.25 to Dimet Contracting Pty Ltd of 3 Marjorie Street, Berrimah for ambulance.
Note in this claim the worker had been employed for 2 months only and gave a Darwin address."

The inference from this information is that Dimet Contracting Pty Ltd was insured for the claims.

On p14 there is a summary of a claim made by T. Jones:

"T. Jones

Insured: Dimet Corrosion Pty Ltd
Date: 11.5.74
Place: Accident occurred at 12 Mile, Stuart Highway.

Subpoena to produce documents is in name of Dimet Contracting Pty Ltd.

Letter from Von Doussa, McGregor and Co. Barristers & Solicitors refers to Dimet contracting Pty Ltd as employer and also mentions treatment of Jones at Royal Darwin Hospital.

. Dimet Contracting Pty Ltd and Dimet Construction are used regularly in correspondence, although Dimet Corrosion is noted as the insured.

. Dimet Corrosion Control letterhead appears with Darwin branch phone number listed.

. Writ made out to Dimet contracting Pty Ltd.

. Commercial Union Australia Group memo dated 19 December 1974 mentions 'Darwin office of Dimet'."

There is no indication this claim was rejected by Commercial Union. I agree with the submission made by Mr Waters that the proper inference to be drawn is that all these claims were properly lodged and admitted at least so far as the liability of Commercial Union to the Dimet Company was concerned. I also agree with Mr Waters submission that there is an inference to be drawn that there was an arrangement whereby Commercial Union would meet claims by whichever Dimet entity made those claims.

It is not in dispute that on 7 June 1976 Dimet Contracting Pty Ltd resolved to be wound up. On 24 January 1985, Dimet Contracting Pty Ltd was dissolved after the liquidator had repaid surplus assets to the first defendant.

There is evidence that Commercial Union accepted claims from a number of the Dimet entities during the relevant period including Dimet Contracting Pty Ltd. There is evidence of claims made by Messrs Morris Wilson and Jim Taccori naming Dimet Contracting Pty Ltd as the insured. The nominated insured in respect of the claim by Mr T Jones is Dimet Corrosion Pty Ltd.

Exhibit I in these proceedings is a copy of a consent judgment in suit number 444 of 1974 dated 17 May 1976. The parties are Trevor Norman Jones, plaintiff, and Dimet Contracting Pty Ltd, defendant.

The terms of the consent judgment are as follows:

"1. That the defendant pay to the plaintiff the sum of TWENTY SEVEN THOUSAND DOLLARS ($27,000.00) inclusive of the costs in this action.

2. That none of the sums received by the plaintiff under the Workmen's Compensation Ordinance 1949 (as amended) shall be deducted from the amount of the judgment herein."

This is the Mr T Jones referred to in the summary of Commercial Union Claim files annexed to the affidavit of Mr Farquhar sworn 25 September 1996.

The matters deposed to in the affidavits of Trevor Sinclair sworn 8 November 1996, Frank Strazdins sworn 11 November 1996, Roy Joseph William Bottrell and Dennis Stephen Cross sworn 11 November 1996, Dominic Donato sworn 4 November 1996 and Denis James sworn 11 November 1996, do not completely refute the plaintiff's submission that Commercial Union accepted claims from Dimet Contracting Pty Ltd during the relevant period.

I agree with the submissions made by Mr Waters, counsel for the plaintiff, that based on the aforementioned evidence there is an arguable case against Commercial Union Assurance Company Pty Ltd.

In the affidavit of Helen Camp sworn 4 November 1996, Ms Camp has annexed a document annexure "A" which is a list of "Claims for Dimet - Claims Finalised and Outstanding". On p6 of the annexure a claim has been identified by counsel for the plaintiff as being a claim made by Mr White whom it is conceded is the plaintiff in these proceedings. The claim is against Dimet Corrosion Pty Ltd. The branch code is "A" which designates the branch from which the policy was issued in South Australia. In the affidavit of Mr James sworn 11 November 1996, he states that all claims were paid under the

South Australian policy. Counsel for the plaintiff argues that one can draw no particular significance from the internal policy classification arrangement that Commercial Union has adopted in this case. Mr Bonython in his evidence had stated that nobody in Whyalla apart from the technical assistants were employed by Dimet Corrosion.

Summary of submissions by counsel for Commercial Union Assurance Company Pty Ltd

Mr Quick QC, counsel for Commercial Union, referred to the provisions of the *Law Reform (Miscellaneous Provisions) Act* and the scheme created by ss26 and 27 of that legislation. He referred to the affidavit of Mr White sworn 7 June 1995 which places the happening of the injury, being the event which gives rise to the statutory cause of action, as occurring in the late 1970's or early 1980's. Dimet Contracting Pty Ltd commenced winding up proceedings in June 1976, that is before the happening of the event identified as giving rise to the claim against the insured. Because it did not go into liquidation until 1985, the provisions of s26(2) apply, and pursuant to s27(3) the leave of the Court is not required to commence the action. Mr Quick argues that if that be the case no leave is required. The cause of action against the insurer pursuant to s26 is a cause of action which vested on the happening of the event itself, that is, the event giving rise to liability between the third party and the insured. The cause of action against Commercial Union became vested back in the late 1970's - or the early 1980's. This means that the claim has been out of time for not less than about 12 years, which is a point fundamentally adverse to an application for joinder simpliciter. On the proposed Amended

Statement of Claim no jurisdictional facts are alleged which give the Court power to extend time under s44 of the *Limitation Act*.

If I am against this argument, then counsel for Commercial Union argues that leave should not be granted to commence an action against Commercial Union because:

a) It has not been established that a policy of insurance is in existence or was in existence at the relevant time which covered the insured Dimet Contracting in respect of an injury to Mr White. At all times Mr White was an employee working in the Northern Territory having been engaged whilst he was resident in the Northern Territory. Until such time as it is established that there is in existence a policy of insurance or was in existence at the relevant time, either by concession or by some form of judicial proceedings, leave should not be granted. The legislation requires that all issues, as to the liability to indemnify as between insurer and insured, have to be clarified before leave should be given.

It has not been demonstrated that a policy of insurance exists.

b) There is a discretion in s27(3) of the *Law Reform (Miscellaneous Provisions) Act* to refuse joinder where there has been a substantial delay in seeking leave to join and in particular where that delay causes prejudice to an insurer which is the situation here. Mr Quick referred to the extensive affidavit evidence that the relevant documents have been destroyed or lost and

this is a substantial prejudice to Commercial union Insurance. Section 26(2) of the *Law Reform (Miscellaneous Provisions) Act* provides as follows:

> "If, on the happening of the event giving rise to the claim for damages or compensation, the insured (being a corporation) is being wound up, or if any subsequent winding-up of the insured (being a corporation) is deemed to have commenced not later than the happening of that event, the provisions of subsection (1) apply notwithstanding the winding-up."

Section 27(3) provides as follows:

> "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."

Mr Quick QC argues that the matter of indemnity must be resolved in some other proceedings and leave cannot be granted until those proceedings have been taken. On the affidavit material there is an issue of indemnity. There is an issue as to whether or not there was a policy and if so what were its terms and do these cover the circumstances of contracting in respect of the injuries sustained by Mr White. Until such time as issues of indemnity between insurer and insured have been clarified, it is inappropriate to give leave. There is no policy and there is no basis for indemnity. Commercial Union is only here because the plaintiffs brought them to Court.

The next matter argued by Mr Quick QC is that if the time of sustaining damage was sometime after 6 June 1976 and before the company went out of

existence on 24 January 1985 then no leave would be required under ss26 and 27. By reason of the provisions of ss27(3) and 26(2) the claim would clearly be out of time by a very long way. It would be out of time in 1988 and there is no capacity for an extension of time and that would be fatal to the joinder. The limitation of time is fatal to the joinder of another party (Williams Civil Procedure Victoria paragraph 9.06.20).

Counsel for Commercial Union submits that if the Court does not know what to do with the time position by reason of lack of particularity in the statement of claim then the appropriate action is not to allow the application but to either dismiss it or adjourn it to enable another statement of claim to be brought into Court.

The alternative argument is whether or not there is a policy of insurance in place at all.

The argument put by Mr Quick for CU is that the onus of proof clearly rests on the applicant for joinder to demonstrate that there was such a policy. There is evidence that three payments have been made. The plaintiff says those payments amount to an admission of the existence of a policy. The response of CU to this proposition is that the making of a payment does not amount to an admission. The making of those payments does not evidence a policy of insurance and, in particular, a policy of insurance which covers the situation of Mr White. The payments may have been made negligently, or they may be ex gratia payment or payment under workers compensation legislation.

In respect of the three payments that were made, the plaintiff has to demonstrate that the terms of the policies under which those payments were made were such that the employer of Mr White would also be insured under those same terms, and there is no evidence of that at all. Mr Quick QC then referred to the provisions of the South Australian Workers Compensation Act to demonstrate why in law there may have been good reason to make the three payments and that the circumstances would not entitle the employer of Mr White to indemnity.

Mr Quick QC relies on the evidence in the affidavit of Mr Donato sworn 4 November 1996 and in particular to paragraph 5 which states:

> "5. I am able to say that to the best of my recollection and as a result of making enquiries of people involved in underwriting at the time, particularly a Mr G Lewis, no workers compensation/common law policy in respect of injuries to workers was issued to any of the Dimet Group of Companies in respect of their liability under the Northern Territory Workers Compensation Act."

Mr Quick QC refers to the evidence of Mr James in his affidavit sworn 11 November 1996 that in respect of the three workers identified by the plaintiff where there was a payment made the claims were paid under the South Australian policy. The making of a payment under the South Australian policy does not evidence the existence of a liability of indemnity in the Northern Territory because of the provision of s11 of the *South Australian Workers Compensation Act*.

Mr Quick QC points out that Commercial Union have been able to locate two people who were actually in the Darwin office during the relevant time, Mr Strazdins and Mr Botterell, both of whom were able to state that to the best of their recollection no workers compensation/common law policy in respect of injuries to workers was issued to any of the Dimet Group in respect of their liability under the Northern Territory *Workers Compensation Act*.

Counsel for Commercial Union submits that the plaintiff may well have an arguable case of liability against Dimet Contracting but more than an arguable case has to be demonstrated in relation to indemnity. There is no reliable evidence to suggest that there could even be an arguable case of indemnity of a policy of insurance.

With respect to the issue of the Court's discretion, counsel for Commercial Union has referred to a decision of the Court of Appeal in the Northern Territory *Ceric v C.E. Heath Underwriting & Insurance (Australia) Pty Ltd* (1994) 122 FLR 123, Gallop ACJ and Morely J at 130:

> "We recognise, as did Mahoney JA, that this construction of the legislation leads to the result that there is no restriction on a plaintiff seeking leave at any time and that, accordingly, he may by his own act prevent time running against himself. But, by delaying making an application for leave, a plaintiff exposes himself to the risk that leave will not be granted if his delay is shown to be unreasonable.

Mr Quick QC then outlined the prejudice to Commercial Union in this case because of the difficulties of now tracing people who could give evidence and the effect that the length of time would have on people's memories. The

prejudice suffered by Commercial Union is that it cannot now determine whether there was a policy and if there was a policy, what were its terms.

I have come to the conclusion that the plaintiff is required to obtain the leave of the court pursuant to s27(3) before commencing an action against CU.

Section 26(2) of the *Law Reform (Miscellaneous Provisions) Act* does not apply in this situation. The event giving rise to the claim for damages or compensation occurred at the time the plaintiff was employed by the defendant or in the alternative, with Dimet Contracting Pty Ltd whether or not the plaintiff was aware at that time that damage was occurring and whether or not he showed symptoms of damage at that time. The plaintiff was so employed by the defendant or in the alternative Dimet Contracting Pty Ltd between approximately May 1971 and August 1974. The event giving rise to the claim for damages or compensation occurred prior to the winding up of Dimet Contracting Pty Ltd.

Under the provisions of the *Limitation Act*, time does not commence to run unless and until the plaintiff is entitled to commence proceedings for the enforcement of the cause of action. In the present circumstances the cause of action is one created by statute and time does not commence to run until leave is granted by the Court.

I do not consider there is evidence before the court sufficient to satisfy me that CU is entitled to disclaim liability.

I agree with the submission of counsel for the plaintiff that the plaintiff has at least an arguable case that he was employed at the relevant time by Dimet contracting Pty Ltd. With the company having now been dissolved the appropriate course is for the plaintiffs to join the insurer, Commercial Union Assurance Pty Ltd, as a defendant in these proceedings.

I do not agree that I should exercise a discretion to refuse the plaintiff's application because of prejudice to CU brought about by the delay in making such a claim. The reasons for the delay are explained by Mr White in his affidavit sworn 7 June 1995 and are essentially attributable to the slow onset of Mr White's physical condition which gives rise to the claim. It is a delay which affects both the plaintiff and the defendant in this claim in the preparation of their case.

For these reasons I propose to grant the plaintiff's application that the plaintiff have leave to join Commercial Union Assurance Company of Australia Ltd as second defendant in these proceedings.

I summarise the orders as follows:

1. The defendant's application that the proceedings be dismissed and judgment be entered in favour of the defendant is refused.
2. The plaintiff is granted leave to join Commercial Union Assurance Company of Australia Ltd as second defendant in these proceedings.

3. The parties are at liberty to apply on the question of costs.

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